THE

COMMON LAW PROCEDURE ACT;

AND OTHER ACTS

RELATING TO THE PRACTICE

OF

THE SUPERIOR COURTS OF COMMON LAW;

AND

THE RULES OF COURT;

WITH NOTES.

BY

ROBERT A. HARRISON, ESQ., D.C.L.,

ONE OF HER MAJESTY'S COUNSEL.

SECOND EDITION.

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TO THE HONORABLE

JOHN SANDFIELD MACDONALD, Q. C.

ATTORNEY GENERAL

OF

THE PROVINCE OF ONTARIO,

IN THE DOMINION OF CANADA,

THIS EDITION

IS

RESPECTFULLY INSCRIBED.

PREFACE

TO THE SECOND EDITION.

Encouraged by the success of the first edition of the "Common Law Procedure Act," the Editor ventures to submit a second edition for the acceptance of the legal profession.

The edition now presented is, like the former one, the result of much labour, and is, it is believed, much more complete than any annotated edition of the Common Law Procedure Acts hitherto published.

In the preparation of this as well as the former edition, it has been the aim of the Editor not only to collect and arrange in convenient form the decided cases bearing on the construction of the acts and rules annnotated, but to expound the principles which govern the decisions by the light of the decisions themselves.

Considering however that the decided cases are now so numerous (not less than 8,571 having been referred to in this edition), and so widely scattered, the Editor claims indulgence if any have been inadvertently omitted.

For the benefit of English subscribers, a table precedes the work in which is given each section of the English Common Law Procedure Acts and the corresponding section of the Canadian Act. This will enable English subscribers at once to turn to such decisions as have been collected under the different sections of the Canadian Act, corresponding with sections of the English Common Law Procedure Acts.

The Editor begs to acknowledge the assistance which he has received from Mr. F. J. Joseph, Barrister-at-law, who verified all the cases to which reference is made in the notes; and to Mr. H. C.W. Wethey, Barrister-at-law, who prepared the list of cases and general index. Mr. Joseph also superintended the passing of the work through the press. Both gentlemen have done much towards making the work as accurate, useful, and reliable, as possible.

The Common Law Procedure Act has not so far suffered much from the restless disposition of law makers. The reason no doubt is that the act is a complete code of practice, was well considered before it was passed, since its passing has become well understood and appreciated by the legal profession, and has proved itself of great public utility.

The desire for changing laws is more noticeable in new than in old countries. In whatever country it unduly manifests itself, it is an unmixed evil and a sore discouragement to law authors. All men are supposed to understand the law. Ignorance of it is sometimes punished as a crime, and often followed by serious pecuniary losses. But with two legislatures annually at work, and the annual product a multitude of statutes, some amending, some repealing, some explaining, and some consolidating existing statutes on all conceivable subjects, there is necessarily so much confusion as to render it very difficult even for men trained to the law as a profession so to follow the law through all its changes as to understand it in all its bearings.

Englefield, Toronto,
December, 1870.

PREFACE

TO THE FIRST EDITION.

THE law, and the administration of the law, are two things essentially different. By the former we understand the great body of legal rights and liabilities which teach that justice should render to every man his due. By the latter we understand the practice of the Courts, or the machinery used for dispensing justice. All laws are designed either to prevent a mischief, to remedy it if committed, or to compensate the sufferer if no other remedy can be applied. The proper application of the remedy is thus of vital importance to the due dispensation of justice. The spirit of modern legislation is to make the remedy coëxtensive with the mischief intended to be prevented or redressed. For this the Courts have at all times struggled; for this the Legislature has laboured; and for this has the Common Law Procedure Act, 1856, been passed.

I propose, *first*, briefly to consider the nature of the Act; and, *secondly*, the manner in which I have endeavoured to expound it.

First.—Mr. Whiteside, a leading law reformer of Great Britain, in one of his masterly speeches, said, he objected to the triumph of form over substance—of technicality over truth. He objected also to a suitor being driven like a shuttlecock from a Court of Law to a Court of Equity, and being sent to Chancery to be enabled to go to Common Law. He hoped that a remedy would be applied to these abuses, and thought that to be satisfactory, the remedy should be searching, cheap and comprehensive. The remedy so forcibly invoked has been partially applied in England, in Ireland, and in Upper Canada: in England by the Acts of 30th June, 1852, and 12th August, 1854; in Ireland by the Acts of 28th August, 1853, and 29th July, 1856; and in Upper Canada by the Acts of 19th June, 1856, and 10th June, 1857. Here and at home the like remedy has been applied to like abuses. The triumph of form over substance is carefully guarded against by the enactment of general rules of pleading, extensive powers of reference, and liberal powers of amendment. The cruelty of driving a suitor from Court to Court in the manner described by Mr. Whiteside is also, to a great extent, prevented by the enlargement of the jurisdiction of the Courts of Common Law. The remedy is searching, because of the powers given to examine parties to a cause and their witnesses, under

certain circumstances, by interrogatories. It is cheap, because needless steps in a cause have been abolished, and the remaining steps made easy and simple. It is comprehensive, because the whole course of a suit, from summons to execution, is made the subject of legislation in a single Statute.

As to *Pleading:* Special demurrers are abolished, and forms are provided for almost every case which can occur in practice. These forms are simple, concise and intelligible. The work is done to the hand of the practitioner in a manner convenient and complete.

As to *References:* Submissions of all conceivable forms are provided for, and references of all kinds are much facilitated. There is a strong desire evinced to encourage references to arbitration: indeed in matters of account there is more than encouragement, for there is compulsion. As to cases wherein there is no compulsion, there is strict and anxious surveillance. Where the parties to any contract, anticipating the possibility of differences arising, have stipulated that they shall be referred to arbitration, there is provision made for staying any action that may be brought in disregard of such stipulation. If the referee named by the parties be dead, the Court may appoint a substitute. If there be no provision for the appointment of an umpire when one is necessary, the Court may appoint one of its own choosing. If there be several arbitrators, one of whom dies or becomes incapacitated, a successor may be appointed.

As to *Amendments:* There is almost unlimited discretion. The Judges have at all times the power of amending all defects and errors in any proceeding in any stage of the cause, whether there be anything in writing to amend by or not. All amendments necessary to the determining of the real question in controversy in the existing suit may be made.

As to the *Enlargement of jurisdiction:* The Courts of Common Law have conferred upon them, to some extent, powers to give the redress necessary to protect and to vindicate common law rights, and to prevent wrongs, whether existing or likely to happen unless prevented. With these objects the strong arm of injunction is added, and the arm of mandamus is strengthened. The power to entertain equitable defences, in consequence of the unsuited machinery of the Courts, is however, very limited; but, so far as bestowed upon the Courts of Common Law, is an enlargement of their jurisdiction. This enlargement does not at all oust the Court of Chancery of any portion of its jurisdiction; in truth, a great portion of the latter still remains exclusive.

As to the *Comprehensiveness* of the Act, a glance at the repealing clause will convey some idea of the change made in our statute law. Little is left either of the Old King's Bench Act of 1822, or of the Common Pleas Act of 1849, or of the Act of 1853, regulating and amending the practice in these Courts. The Legislature, while engaged in the work of improve-

ment, have gone far towards removing obscurities and abuses. The Acts respecting Absconding Debtors, Absent Defendants and Insolvent Debtors have been, in general, wiped from the Statute book, and restored in a simple and consolidated form. The Absconding Debtors' law, from session to session of the Legislature, became obscure, owing to the accumulation of amending Statutes. The Absent Defendants' Act, nearly allied to the Absconding Debtors' Act, served to make confusion more confounded. The Insolvent Debtors' Acts were nearly effete from sheer non-user of many of their provisions. There was a widely scattered heap of law, of which a great part was felt to be rubbish, and therefore removed.

It would be too tedious here to notice the changes in detail made in the steps of a cause from process to execution. Suffice it to say, that forms of action have been in a measure abolished; that with regard to the service and renewal of writs of mesne process, very decided improvements are enacted; that the appearance of defendants is placed upon a rational and intelligible basis; that unusual facilities are held out for the speedy trial of causes, and after trial equal facilities, for speedy execution; that the description of property made subject to execution is much extended; and that for the revival of judgments when obtained wise and beneficial provision is made.

Second.—A new Act is not always a new law. The Common Law Procedure Act is not so much a new law as a re-enactment, with amendments, of the old. For the sake of convenience, the provisions are brought together in a compact and logical form; but the provisions themselves are for the most part old and familiar. They carry with them a long train of decisions. To classify these decisions, and to bring them under the eye in a convenient form, has been one of my great objects. The less a new statute unsettles old and established practice, so far as consistent with the object of its enactment, the better. The Courts, in a long series of decisions, have given to particular words and expressions a definite meaning. The Legislature, in Acts subsequently passed, have used these words and expressions over and over again. Thus the language becomes familiar and well known to Judges and lawyers under the epithet of legal phraseology. Hence, when necessary to bring together Acts or legislative enactments upon a particular branch of law or of practice, the collection ought to be made as far as possible in the very words of the original text. Stability is more to be desired than novelty. To attain stability there must be certainty, and to attain certainty there must be the preservation of well-understood words and expressions. When we reflect upon the cost, the trouble, and the vexation of working out an entirely new legislative provision, we are forced to acknowledge the value of old phraseology.

One important characteristic of our Common Law Procedure Act is that in it words are used as lawyers have at all times used them. We are

enabled to fall back upon the old, for the construction of the new law. Impressed with the value of decided cases, I have not failed to open up to the consideration of my professional brethren decisions apparently consigned to oblivion, but in truth as necessary for use as when first delivered from the Bench. Fairly to understand a new law, which is in nine cases out of ten a remedial law, we must not spurn that which is by the alteration thrown aside.

We speak of a Statute such as the Common Law Procedure Act being remedial—remedial of what? Of some law existing when it passed. Is it not then necessary, in order to apply the remedy, to have a knowledge of the mischief intended to be remedied? Before a lawyer can use a remedial statute correctly and satisfactorily, he must generally have some knowledge of the pre-existing law. Actuated by thoughts such as these, in stating the changes effected by the Common Law Procedure Act, I have done so by briefly showing what the practice was antecedently, and so presented the law as modified or otherwise altered. A new code of practice is enacted. Why? Because the old code was defective. Then in what was it defective? The attempt mentally to answer this question opens up a true idea of the work to be done. The real principle of expounding a remedial statute is, I conceive, such as I have described. While acting up to this standard, my main object has been, by exhibiting what the law was, concisely to show what the law is, and in such a manner that it will impress itself upon the memory of the reader or practitioner. This I have done particularly in noting a preamble introducing a number of sections on a given branch of practice. One example may be noticed. It is on page 94, being note *g** to the preamble beginning, "And as regards proceedings against absconding debtors," &c. In carrying out this plan, I have upon all occasions, when convenient, introduced the views of the English Common Law Commissioners, usually in their own words. The result is, that both reports of the Commissioners are embodied in my notes, instead of being published, as originally intended, in a separate form.

I may be allowed to observe, that I have had a great advantage over my fellow labourers in England, and have endeavored to avail myself of it so as to render my book more complete and reliable than any similar work hitherto published either in England or Ireland. I am the latest commentator on the Common Law Procedure Acts, and have not only the benefit of the experience of my predecessors, but the benefit of decisions pronounced by the Courts since the publication of their works. It is only by degrees that a new or even a modified practice "settles down." Many questions of construction are sure to arise and to require practical exposition. As the practice is studied and familiarised, and as doubtful points receive adjudication, its application becomes simple and easy to the prac-

* See note *a* page 476.

titioner. It is, however, a work of gradual development, and it is only as point after point of doubtful construction is decided, that misapprehension is obviated and certainty secured.

In considering each section annotated, I have endeavoured to get at the reason of the section and the principles involved in it. The meaning of an Act of Parliament, as well as a single section, can only be ascertained by reference to the principle which governs it. The Common Law Procedure Act is passed with a view "to simplify and expedite" proceedings in the Superior Courts of Common Law. The County Courts Procedure Act has a similar declared object. Two cognate principles, as applied to the whole Act, are thus enunciated: the one, to simplify; the other, to expedite. This much predicated, it is for the Court to advance the objects proposed, and so carry out the principles involved. The known aptness of the Court to respect precedents is a source whence there flows much good. But owing to human frailty former decisions are sometimes reluctantly doubted or overruled; and from this arises a desire for the very latest decisions on a doubtful point. When an old case is cited, the question is often put by the Court—"Is there no later authority than that?" The necessity for the latest cases, when solving a doubt, is sufficiently known to all practitioners to render any further reference to it here unnecessary. It only remains for me to say, that I have been most careful in noting the late decisions, sheet by sheet, as this work went to press. Those since decided will be found mentioned in the Addenda. More than *nine hundred cases*, decided since the passing of the English Acts and of our Acts upon the construction of one or other of them, have been noted in the work. No case, however, whether early or late, should, if possible, be viewed otherwise than as controlled by some governing principle. In matters of practice certain principles may be discovered which are of intrinsic value as the key notes of a great variety of cases. When it is laid down in general terms that he who endeavours to upset an opponent upon some ground of irregularity must be strictly regular himself, we have before us a principle applicable to every case of irregularity. When we are informed that the law favours the liberty of the subject, we reasonably conclude that in a proceeding to restrain the subject of that liberty there must be no irregularity. When the Court sets aside an arrest because the affidavit to hold to bail does not state that the debt is "due," we know that it is set aside not merely because there is an authority in point, but because that authority is consistent with reason and accords with the general principle that the liberty of the subject is to be favoured. The Court in effect decides that the affidavit omits to make out a good case for depriving the subject of his liberty.

My only ambition in compiling this work was to produce a useful, complete and reliable vade mecum for the legal profession in Upper Canada.

The only merit to which I lay claim is industry, and if that have not been misapplied I am satisfied. I lay no claim to any display of originality of conception, but have contented myself with treading the beaten but sometimes uncertain paths of the law. I have striven in my progress to prepare the way for those who may have occasion to travel one or all of the paths through which I have travelled. In some places, perhaps, I have overstepped the limits of authority. In some instances I may have assumed that to be law for which there is no authority; but where such has been done it has not been done without a due sense of responsibility. Though law is said to be a science, it is in truth a most perplexing science. Though Reports and reported cases outstrip numerical calculation, yet cases do arise for which there is no express authority. Cases will arise which the most astute never could foresee; and still the law is for all cases, and must be applied to all cases so far as reason and anology can suggest the mode of application. In the absence of decided cases I have frequently felt myself bound to state my impression by way of suggestion. That such impressions are free from error is more than I can expect. My only object in suggesting a construction unsupported by authority, was the desire of pointing the reader's attention towards what *might* be the right direction. In palliation of any errors that may be discovered, I have only to draw attention to the circumstances under which my impressions were formed Before me there was a new Act, with scarcely a decision of our Courts My task was to explain and expound it. I had not the advantage upon every point of doubt of an able argument from contending counsel; but even Judges, notwithstanding these advantages, are failable. Those who are accustomed to speculate on the construction of new laws will, I am confident, be the first to appreciate my difficulties, and the readiest to bestow indulgence when needed. Many friends, upon whose knowledge and standing I have been too glad to rely, have kindly read the proof sheets, and so fortified my positions. Among these, I may mention the names of The Honourable Chief Justice Macaulay and His Honour Judge Gowan. Every page of the book, before it was worked off, was submitted to their perusal, and it is to me as much a duty as a pleasure thus publicly to acknowledge the advice and assistance with which I have been honoured. To Adam Wilson, Esq., Q. C., and Henry Eccles, Esq., Q. C., I have to express my thanks for similar services. The note, as to equitable defences have also been submitted to and approved by a leading member of the Equity Bar. To many others, whose names need not be given, I am greatly obliged for advice and assistance.

It is unnecessary to mention to any one who may open this volume, that it has been a work of great labour, not at all lightened by the responsibility under which I wrote. The immense number of cases consulted with a view to the extraction of guiding principles, being no less than

six thousand, and the placing of these cases, when approved, in proper order, has been a task requiring no ordinary perseverance and patience. This, too, was done with the prospect of pecuniary loss, consequent upon the size of the work and the low price at which it was promised. Bearing all these things in mind, I submit the work to those for whose benefit it is designed, and only ask of them a candid consideration and a fair judgment—more I do not ask, less I cannot expect. For the completeness of the Index of Subjects I am indebted to W. C. KEELE, ESQ., and of the Index of Cases to MR. DAVID ALEXANDER, Student at Law.

I have, as promised, added the General Rules of Practice and Pleading, with copious notes upon the same plan as the Statutes. They add to the completeness of the volume, so as to make it, as intended, a ready, complete and reliable book of practice for the Common Law Practitioner. The Common Law Procedure Acts of 1857 are also added, but without notes. It was found that the work had grown to such dimensions under my hands, that to annotate them would make the volume much too bulky, and add much to the delay which has already taken place in its issue from the press. As I believe a very general impression was entertained that this volume would have appeared at a much earlier period than it does, I can only say in excuse that it was not possible to furnish the book in less time, while making it as complete as my anxiety to serve the profession led me to believe was necessary. A contrary course might have, as it is well known, saved me much trouble and no little expense. It is now, however, in my power to assert, with those kind friends who at much personal inconvenience to themselves lent me the aid of ripe experience, that the book is of its kind the most complete published. It contains *twice* the number of cases cited in the elaborate work of FINLASON, and *four* times the number of cases cited in KERR, THOMPSON, MARKHAM, or any other work in general use. This statement I make in no boastful spirit, but for the simple purpose of conveying to those inexperienced in the writing of books some idea of my protracted labour, and as an apology for what otherwise might be thought inexcusable delay.

R. A. H.

QUEEN STREET WEST,
February, 1858.

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THE

COMMON LAW PROCEDURE ACT.

CON. STAT. U. C.—CAP. 22.

An Act to regulate the procedure of the Superior Courts of Common Law and of the County Courts. (*a*)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Process and proceeding in the Courts.

1. In the Superior Courts of Common Law and in the County Courts respectively, the process and proceeding shall be as follows: (*b*)

(*a*) The modern plan of naming a statute, found so convenient in practice, has been followed in this act. In citing the act, it will be sufficient to use the expression "The Common Law Procedure Act:" see section 346.

(*b*) This act, the origin of which in this Province is the Common Law Procedure Act 1856, 19 Vic. cap. 43, is for the most part copied from the Imperial Statutes 15 & 16 Vic. cap. 76, and 17 & 18 Vic. cap. 125. These statutes were prepared upon the suggestions of the Common Law Commissioners, appointed by the Queen on the 13th May, 1850, "to inquire into the Process, Practice and System of Pleading of the Superior Courts of Law at Westminster, &c." On 30th June, 1851, their first report was made, upon which the Statute 15 & 16 Vic. cap. 76, was framed. On 30th April, 1853, their second report was made, which lead to the passing of the Stat. 17 & 18 Vic. cap. 125. The act invests the courts with a large discretion to do what justice requires: *Messiter* v. *Rose*, 13 C. B. 165, *per* Jarvis, C. J. Since the legislature has abolished special demurrers, the courts are bound to follow out that spirit and not give effect to mere technicalities: *per* Pollock, C. B., in *Flowers* v. *Welsh*, 9 Ex. 272. *Semble*, the English Statute of 1852 is confined to civil proceedings: *Regina* v. *Seale*, 24 L. J. Q. B. 221, *per* Campbell, C. J. It has been held to apply to personal actions commenced in inferior courts, but removed into the superior courts by *certiorari*: *Messiter* v. *Rose*, 13 C. B. 162.

ORIGINAL PROCESS.

1.—NON-BAILABLE.

All actions not bailable to be commenced by Summons.

2. (*c*) [Except in cases where it is intended to hold the Defendant to special bail,] (*d*) all personal actions (*e*), including actions by or against Members of both Houses of the Provincial Parliament, and Attorneys-at-Law, brought in the said Courts, when the Defendant is residing or supposed to reside within the jurisdiction thereof (*f*) shall be commenced by Writ of Summons, according to the Form A. No. 1, and, in every such Writ and copy thereof, the place and county (*g*)

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 2.

(*d*) The words in brackets are not in the English Act. Defendants in the Province of Ontario may be held to special bail by a writ of *capias*, which writ is for all purposes the commencement of the action.

(*e*) *Personal Actions* (one of the three classes—real, personal and mixed—into which actions have been divided) may be taken to mean those actions which are brought for the specific recovery of debts, damages, money, goods and chattels, or wrongs done to the person or property. The Statute U. C. 4 Wm. IV. cap. 1, s. 39 (Con. Stat. U. C. cap. 27. s. 78), abolished all real and mixed actions, except three, writ of dower, writ of dower *unde nihil habet*, and ejectment. The distinction between the two former has since been practically removed. Our enactment of 4 Wm. IV. cap. 1, s. 39, was adopted from Eng. Stat. 3 & 4 Wm. IV. cap. 27, s. 36. The English act saves a fourth action which has never been in use in this Province, *quare impedit*. This section clearly does not apply to dower: *Fisher* v. *Grace*, U. C. Q. B. Hilary Term, 1869.

(*f*) The territorial jurisdiction of the common law courts, both of superior and inferior jurisdiction, may not be inaptly mentioned here. The common law courts of superior jurisdiction are two, the Queen's Bench and the Common Pleas. The former was the first court established in Upper Canada, now Ontario, with power to hold plea "in all and all manner of actions, causes or suits, as well criminal as civil, real, personal and mixed, *arising, happening or being in the Province*" (*Upper Canada*): Stat. 34 Geo. III. cap. 2, s. 1. Therefore, territorially considered, this court received jurisdiction extending over the whole of Upper Canada. The jurisdiction exercised or enjoyed by the court of Queen's Bench is exercised and enjoyed by the Common Pleas. Both courts in this respect at least have clearly a co-ordinate jurisdiction.

(*g*) The word "place" is of doubtful meaning, as applied this Province. Stat. 12 Vic. cap. 63, s. 22, required "the city, town or township *and* county," to be mentioned. The question is, whether "place" is to be construed to mean city, town or township, or a more specific description, as street and number of house. In England, the descriptions are usually very precise. But it may be mentioned that the words "place and county" were used in Eng. Stat. 2 Wm. IV. cap. 39, s. 1, and that our Prov. Stat. 12 Vic. cap. 63, s. 22, was copied from the latter act: but the legislature omitted the words "place and county," substituting "city, town or township, and county." Even in the C. L. P. A. there seems to be a legislative exposition of the word "place." It is provided by section 13, that if the plaintiff sue out a summons in person, the name of the *city, town, incorporated* or *other village*, or *township*, within which he resides, shall be indorsed

of the residence or abode or supposed residence or abode of the party Defendant shall be mentioned. (*h*) 19 Vic. c. 43, s. 16; 19 Vic. c. 90, s. 2; 12 Vic. c. 66, s. 5.

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on the writ. Referring to English authorities, as regards "place and county," we meet with the following: "Tufton street, in the county of Middlesex," sufficient without naming the parish: *Cooper* v. *Wheale*, 4 Dowl. P. C. 281. "Kent Street, in the county of Surrey," sufficient: *Webb* v. *Lawrence*, 1 C. & M. 806; s.c. 3 Tyr. 906; 2 Dowl. P. C. 81. "A. B. of the city of London," without specifying any place or street therein, insufficient: *Cotton* v. *Sawyer*, 2 Dowl. N. S. 310. In this case it was observed by the court, that "*it would be sufficient to describe a person as of an ordinary town in a particular county, but London is an exception.*" It is presumed therefore, that in Canada, where all our cities and towns, compared with London, are "ordinary towns," a description as of a township, town, city, &c., would be a sufficient compliance with the Act. "Parliament Street, in the city of Westminster," not naming the county, insufficient: *Ross* v. *Gandell*, 7 C. B. 766. The place stated must be within the county mentioned in the writ: *King* v. *Hopkins*, 13 M. & W. 685; *Balman et al* v. *Sharp*, 16 M. & W. 93. "Township of Toronto, *in the county of York*," insufficient, that township being in Peel: *Hutchinson* v. *Street et al*, 1 Prac. R. 367. Where an objection is made to the writ, that defendant's residence is improperly described as being in one county instead of another, which adjoins the affidavit, it ought to be positive as to the fact, and ought to aver that there is no dispute about boundaries: *Lewis* v. *Newton*, 4 Dowl. P. C. 355; see *Jelks* v. *Fry*, 3 Dowl. P. C. 37. Judicial notice cannot be taken that a particular place is situate in a known county: *Rippon* v. *Dawson*, 7 Dowl. P. C. 247; *sed qu.*, see remarks of Robinson, C. J., in *Hutchinson* v. *Street et al*, 1 Prac. R. 367. The omission to insert the county of the defendant's residence is a mere irregularity that should be taken advantage of within a reasonable time: *Ross* v. *Gandell*, 7 C. B. 766.

(*h*) This applies to two states of facts: *First*, where the defendant's residence, or supposed residence, is known, and he is known or supposed to be residing there. *Second*, where he has left his place of residence, and is known or supposed to be in some other place: *Downes* v. *Garbett*, 2 D. & L. 944, *per* Coleridge, J. It would seem useless for defendant to deny that he resides at the place mentioned in the writ, so long as plaintiff is prepared to assert that his supposition was that he did reside there: see *Windham* v. *Fenwick*, 2 Dowl. N. S. 783; *Balman et al* v. *Sharp*, 16 M. & W. 93; *Jelkes* v. *Fry*, 3 Dowl. P. C. 37; *Rippon* v. *Dawson*, 5 Bing. N. C. 206. Meaning of the words "supposed to be:" see *Hesketh* v. *Fleming*, 24 L. J. Q. B. 255. Defendant may be supposed to reside anywhere, if there be a reason for the supposition, but his supposed residence must be described correctly: see *King* v. *Hopkins*, 2 Dowl. P. C. 639, *per* Alderson, B. Although a *correct* description of a *supposed* residence will satisfy the statute, yet it is clear an *incorrect* description of an *actual* residence is open to objection: see *Ib.* 638, *per* Pollock, C. B. A writ was directed to "A. B., of the township of Nottawasaga, in the county of Simcoe," and defendant obtained a summons to set aside the writ on the ground that "the place and county of his residence were wrongly described, he having for eighteen months previous to the service of said writ resided, and being at the time of such service resident, at the city of Toronto." In answer to this, plaintiff produced and verified a letter from defendant, dated at Collingwood, November 13th, 1855, written by defendant to plaintiff, and enclosing the note on which this action was brought; *held* that plaintiff had "sufficient grounds for his supposition that the residence of defendant was as stated in the writ of summons:" *Uhlborn* v. *Chapman*, 2 U. C. L. J. 231. The defendant may be described as of his late abode: *Norman* v.

2.—BAILABLE.

Commencement of actions where it is intended to hold defendant to special bail.

3. (*i*) In case any person is to be arrested and held to special bail, the process shall be by a Writ of *Capias* according to the Form A. No, 2, which Writ shall bear date, be tested and (in addition to other indorsements) be endorsed in the same manner as Writs of Summons, and may be directed to the Sheriff of any County in Upper Canada. (*j*) 19 Vic. c. 43, s. 22.

Winter, 5 Bing. N. C. 279, s. c. 7 Dowl. P. C. 304; *Bettyes* v. *Thompson*, 7 Dowl. P. C. 822; also see *Cotton* v. *Sawyer*, 2 Dowl. N. S. 310; *Simpson* v. *Ramsay*, 5 Q. B. 371. But he should not be described as "now or late of, &c.:" *Pilbrow* v. *Pilbrow's Atmospheric Railway Co.*, 3 C. B. 730. It will be sufficient to describe a corporation or public company, as of the place where their functions are exercised; see *Norman* v. *Winter*, 5 Bing. N. C. 279; *Launceston & Victoria Railway Co.* v. *Brennan*, 3 Jur. 196; *Cotton* v. *Sawyer*, 2 Dowl. N. S. 310. The defendant's addition need not be inserted: *Morris* v. *Smith*, 2 C. M. & R. 120. The residence of plaintiff need not be stated: see Form No. 1, in Schedule. Neither is it necessary to state whether the parties are suing or being sued in a representative capacity: 1 Dowl. P.C. 98, note *a*. Nor is it necessary to state whether defendant has privilege of Parliament, &c.: see *Cantwell* v. *Earl of Sterling*, 8 Bing. 174. In actions upon bills or notes, defendants may be described in the process or declaration by the initials or contraction used by them in such instruments: Con. Stat. U. C. cap. 42, s. 30. The "form" of the writ is given, but the omission to insert or endorse in or upon the writ the matters made necessary by the act, does not make it a nullity; it is only an irregularity that may be set aside or amended: C. L. P. A. sec. 48.

(*i*) This section is substantially a re-enactment of the repealed Act 12 Vic. cap. 63, s. 24. It may be well here to point out in what respect the capias in this Province differs from the capias in England. The summons in England is the only writ wherewith to commence personal actions: Eng. Stat. 1 & 2 Vic. cap. 110, s. 2. A capias may be issued, but only as collateral to the main proceedings: *Ib.* s. 3. The summons must first issue, and then, if necessary and allowable, the capias. Whereas in this Province, the capias so far from being an auxiliary writ may, in cases where it is intended to hold the defendant to bail, be the first and only process: see *Tyson* v. *McLean*, 1 Prac. R. 339. After special bail has been put in, plaintiff may proceed with his action "in like manner as if the action had been commenced by writ of summons, and the defendant had appeared thereto:" C. L. P. A., sec. 34. This will explain why our legislature, in adopting many of the English provisions, have, after the word "summons," generally added "or writ of capias." Both writs in this Province, as regards the commencement of action, being upon an equal footing, the one to be used in non-bailable, the other in bailable actions.

(*j*) The form in the Schedule (which see) follows very closely the form given in No. 3 Schedule to 12 Vic. cap. 63. It is worthy of notice that even the form of action ("in an action on promises, or debt, &c.") though unnecessary in a summons (section 9) is retained in the capias: see Schedule A. No. 2. But it must be recollected that these forms are given as much for illustration as any other purpose. The retention of the words "on promises," &c., shows that as a general rule a capias now can only be sued as out as of right for a money demand or "debt," in the popular sense of that word.

WHO TO ISSUE.

4. 1. In the Superior Courts, the Clerk of the Process shall issue to the parties or their Attorneys all original, and other Writs of Summons and of *Capias*, and all Writs of Replevin issued respectively from the principal office at Toronto, and shall renew such Writs except Writs of *Capias* as hereinafter authorized. (*k*) 19 Vic. c. 43, s. 4. Process Clerk to issue Writs, &c., to parties and their Attorneys in Toronto.

2. And the Clerk of the Process and each Deputy Clerk of the Crown shall issue Writs for the commencement of actions, and the Clerks of the County Courts shall issue all similar writs in such Courts respectively. 19 Vic. c. 43, s. 4. Deputy Clerk and County Court Clerk in the outer Counties.

3. In the Superior Courts, such writs shall be issued alternately one from each of such Courts, and not otherwise, (*kk*) Writs to issue alter-

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(*k*) Before the year 1853, process in the courts of Queen's Bench and Common Pleas were issued by the respective clerks of these courts. Statute 16 Vic. cap. 175, was then passed. It recited that "it is desirable that the offices for issuing writs of summons and capias and other writs of mesne or first process in the courts of Queen's Bench and Common Pleas, in Upper Canada, in the county of York, be united." It enacted that the clerks of the two courts should, from time to time, "select one of their clerks, whose duty it shall be to issue all writs of summons, &c." The officer contemplated by the section under consideration has different duties to perform, and is differently appointed. The clerk of process, though appointed by the executive, is subject to the control of the judges. As an officer appointed by government, he will be responsible to government for the proper discharge of his duties. But like other officers of a court of justice, he will also be responsible to the courts, and be liable to be dealt with for improper conduct. For his guidance in the performance of his duties, he must look to the courts. As an officer of both courts, he must obey all regulations of the courts not inconsistent with the provisions of this statute: see R. G. pr. *et seq.* It was held under the Common Law Procedure Act, 1856, that the clerk of the process was empowered to issue writs of mandamus: *Burdett* v. *Sawyer*, 2 Prac. R. 398. A writ issued by the officer at his own house, and before office hours, was decided not to be illegal: *Rolker et al* v. *Fuller*, 10 U. C. Q. B. 477. The court, though refusing to set aside the writ, animadverted upon the inconvenience of the practice, both as regards the profession and the officer himself: *Ib.* It is irregular for a deputy clerk of the crown to file papers at his private residence apart from his office, and out of office hours: *Fralick* v. *Huffman*, 1 Cham. R. 80. The delivery of a paper to him in the street, is not "filing or entering it:" *Ib.* When the defendant's attorney is present at the opening of the office in the morning, to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the former is entitled to precedence: *Ib.* An attachment was granted against a deputy clerk of the crown, for having issued process without authority: *Rex* v. *Fraser*, 3 O. S. 247. Afterwards on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings: *Ib.*

(*kk*) In the superior courts the writs are to be issued alternately, one from each of the courts. The system of issuing writs in dozens for each court was first authorised by Stat. 16 Vic. cap. 175, s. 2. The recital to that section explained

nately from each Court.

but this shall not affect the issue of concurrent Writs. 19 Vic. c. 43, s. 4.

All writs to be under the Seal of the Courts, and tested, &c.

5. All writs issued by any of the said Courts shall be under the seal thereof, and in the Superior Courts shall be tested in the name of the Chief Justice, and in the County Courts in the name of the Judge thereof, or in case of the death of such Chief Justice or Judge, then in the name of the Senior Judge in the Superior Courts and of the Junior or acting Judge in the County Courts for the time being. (*l*) 19 Vic. c. 43, s. 4; 19 Vic. c. 90, s. 4.

Office from which issued to be noted in the margin.

6. The Process Clerk and each Deputy Clerk of the Crown, and the Clerk of each County Court, shall note in the margin of every Writ issued by him, from what office and in what County the Writ issued, and shall subscribe his name thereto. (*m*) 19 Vic. c. 43, s. 20; 19 Vic. c. 90, s. 4.

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the reason of the system. It recited that much public inconvenience arose from the unequal distribution of the business between the two superior courts of common law, they having a common jurisdiction (12 Vic. cap. 63, s. 8), whereby one court was often insufficiently employed, while the other was unduly pressed, to the great delay and injury of suitors and detriment of justice. With a view to equalize the business of said courts, it was enacted that first process should be issued in rotation by twelves. The alternate issue of writs, "one from each court," is much preferable to "rotation by twelves." Increased facilities are afforded to such suitors as may desire to make a choice of courts, and yet the business of the two courts as regards the number of writs issued is not in consequence made unequal. *Semble*, a writ is irregular if not sealed: *Smith* v. *Russell*, 1 Cham. R. 193. Under the old practice a writ was held to be sufficiently signed when signed by the deputy who issued it, though not signed by the clerk of the crown: *Ib.* The clerk of process must, under section 4, *seal* and *sign* all process whatsoever.

(*l*) At common law a court of record has the power of appointing a seal as a necessary incident to give effect to the authority delegated to it. The principle as to corporate seals applies to courts. See 1 Bl. Com. 475, Bac. Abr. "Corporations, D." A writ would be irregular if not sealed: *Smith* v. *Russell*, 1 Cham. R. 193; see also *Gallogly* v. *Ormsby*, 1 Ir. C. L. R. 545. Unless there is a *vacancy* in the office, the writ must be tested in the name of the chief justice. His absence from the Province does not make it improper to test writs in his name: *Brett* v. *Smith*, 1 Prac. R. 309, *per* Richards, J. A writ tested in the name of a retired chief justice is an irregularity only: *Nelson* v. *Roy*, 9 U. C. L. J. 265. A judge in chambers refused to set aside a writ for mere error in the christian name of the chief justice: *Folkard* v. *Fitzstubbs*, 1 F. & F. 376.

(*m*) This is a re-enactment of our old practice. See form of summons and capias schedule to 12 Vic. cap. 63; also see old Rule, 1 H. T. 13 Vic.: "Every writ of summons or capias shall state in the margin the 'city, town or place,' at which the same was issued." As to the words, "city, town or place," see remarks of Draper, J., *in Chamberlain et al* v. *Wood et al*, 1 Prac. R. 199; see also note *g* to section 2. The city, town, or place of issue is now unnecessary, if the

Proper office for taking out Writs in transitory actions.

7. In cases in the Superior Courts in which the cause of action is transitory, the Plaintiff may sue out the Writ for the commencement of the action from the office of the Clerk of either of the said Superior Courts, or from the office of any of the Deputy Clerks of the Crown, and in like cases in a County Court the Writ may be sued out from any County Court having jurisdiction over the cause of action. (*n*) 19 Vic. c. 43, s. 6, *and* c. 90, s. 5.

When *venue* local.

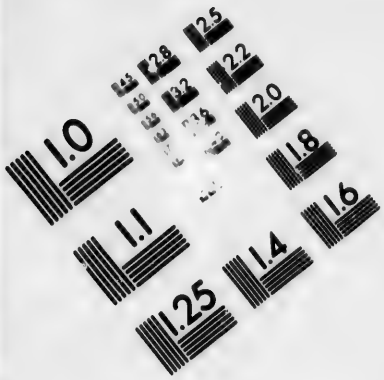
8. When the cause of action is local, the Writ for the commencement of the action must be sued out from the office within the proper County, and all proceedings to final judgment in actions whether transitory or local, shall be carried on in the office from which the first process issues. (*nn*) 19 Vic. c. 43, s. 7, *and* c. 90, s. 5.

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office and county be stated. It was held under Stat. 12 Vic. c. 63, that the writ was sufficiently signed, if signed in the margin by the officer who issued it: *Smith* v. *Russell*, *Smith* v. *Reid*, 1 Cham. R. 193; *Leach* v. *Jarvis*, *Ib.* 264.

(*n*) Actions are, *transitory*, where the cause of action might be supposed to have accrued or happened anywhere, such as debt, contracts, detinue, slander, assault, false-imprisonment, and usually, all matters relating to the person or personal property, even though all the facts arose abroad. *Local*, where the cause of action could have accrued or happened in one county only. Thus if the action be trespass for breaking the plaintiff's close, the action must be commenced and the venue laid where the close is situated. Generally, it may be stated that actions may be considered local when the cause of action could by possibility and in its nature have reference to a particular locality only. It should be noticed that some actions are made local by statute. For example, actions brought against persons for something done by them in the performance of a public duty, or when acting under the express provisions of certain acts of parliament. The statute for the protection of justices of the peace, Con. Stat. U. C. cap. 126, may be referred to as an instance. Section 11 of that act enacts, that in actions brought against a justice of the peace, for any thing done by him in the execution of his office, "the venue shall be laid in the county where the act complained of was committed &c.:" see *Atkinson* v. *Hornby*, 2 C. & K. 335. An arrest by a justice of the peace, if illegal, may under this section, be deemed a local cause of action; whereas, if the same act were committed by a private individual, the venue would be transitory: see *Moran* v. *Palmer*, 13 U. C. C. P. 450. No action should be commenced against any person who could reasonably suppose that he was acting under the authority of an act of parliament, until it has been ascertained by reference to the act, whether any and what provision is made with respect to venue. It has been held that in replevin, where the goods to be replevied have not been distrained, the writ of replevin may be sued out in any county, and that a writ of replevin may be issued in one outer county to replevy goods in another outer county: *Buffalo and L. H. R. Co.* v. *Gordon*, 3 U. C. L. J. 28.

(*nn*) In an action on a recognizance the venue should be laid in the county in which the recognizance remains of record: *McFarlane* v. *Allen et al*, 4 U. C. C. P. 438; *Smith* v. *Russell*, 8 U. C. Q. B. 387. But the crown has the right to lay the venue in any county: *The Queen* v. *Shipman*, 6 U. C. L. J. 19. Where the crown



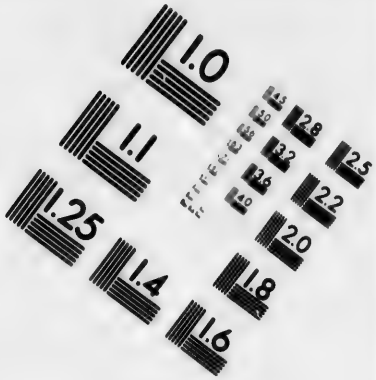
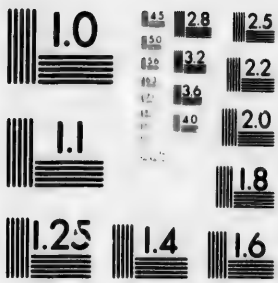
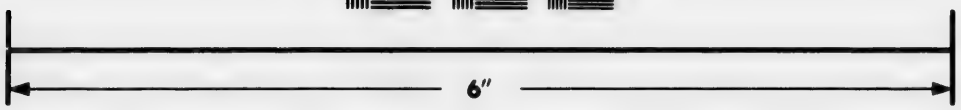
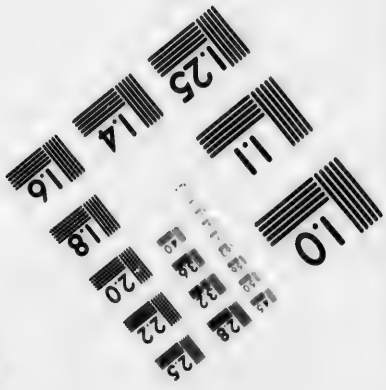


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WRIT OF SUMMONS.

Form of action need not be stated in.

9. It shall not be necessary to mention any form or cause of action in any Writ of Summons or in any notice thereof. (*o*) 19 Vic. c. 43, s. 17.

To contain the names of all the parties.

10. Every such Writ shall contain the names of all the Defendants in the action, and of no other Defendant. (*p*) 19 Vic. c. 43, s. 18.

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proceeding is on a recognizance to keep the peace removed into one of the superior courts at Toronto, the venue may be laid in the county of York: *Ib.* In local actions laying the venue in the wrong county has been held to be a ground of nonsuit: *Boyes et al* v. *Hewetson*, 7 C. & P. 327; 1 Saund. 241 f. In some local actions (ejectment, for example), if the writ be issued from any county "other than the proper county," the error will appear on the face of the writ itself. It is apprehended that in such a case the writ would be irregular, if not void, and might at once be taken advantage of upon motion. In other local actions (trespass, for example), the error might appear till declaration or other proceeding subsequent to the writ. The omission made known to the opposite party might in this case too, it is apprehended, be moved against. In some actions, local by statute (actions against magistrates, for example), the error might not disclose itself until the trial. A nonsuit in this case, it is apprehended, would not be improper: see *Moran* v. *Palmer*, 13 U. C. C. P. 450. In the case of a local action brought in a wrong county, it was held under the old practice that a judge in chambers had no power to amend the proceedings: *Vaughan* v. *Hubbs et al*, 1 Cham. R. 76, *per* Macaulay, J. But see *Ward et al* v. *Sexmith*, 1 Prac. R. 382. A summons was sued out before the separation of Ontario from York and Peel, directing the defendant to appear in the office of the three united counties. It was not served until after the separation. The venue in the declaration was laid in the three united counties. Demurrer, *held* not to be frivolous: *Plaxton* v. *Smith at al*, 1 Prac. R. 228. Under the old practice besides being a ground of nonsuit, it has been said that defendant might demur or otherwise specially plead to the error: *Tremeere* v. *Morrison*, 4 M. & Scott, 609; *Richards* v. *Easto*, 15 M. & W. 244. See further section 89, and notes thereto.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 3. Founded on first report of the Common Law Commissioners, s. 2. The commissioners reported that the statement of the form or cause of action "was utterly useless and lead to captious objections, and to much fruitless delay and expense." They recommended one general form of writ for every action. This recommendation has been followed by the legislature. It is no longer necessary "to mention any form or cause of action in any writ of summons, &c." But if mentioned, the writ will neither be a nullity, nor be liable to be set aside. Notwithstanding the enactment contained in the section under consideration, it cannot be well said that forms of action have been abolished. True it is that the same nicety in choosing a form of action, or in stating it when chosen, is not now as formerly required. But for many purposes, such as Statutes of Limitations, and some other statutes in which particular forms of action are mentioned, the existing forms must still be preserved. Causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same writ: see section 73, and notes thereto.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 4. This section also corresponds with our old Rule, 1 H. T. 13 Vic. (Draper's Rules 73), which appears to have been copied from Eng. Rule M. T. 3 Wm. IV. No. 1 (Jervis, N. R. 94), and

11. Every such Writ shall bear date on the day on which the same issues. (*q*) 19 Vic. c. 43, s. 9. To be dated the day of issue.

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is remedial of the old practice. It may be noticed that the English rule extends to "writs of capias and detainer." Formerly it was held that no more than four defendants could be included in one writ; and that four separate causes of action, against four separate defendants, might be joined in the same writ: see *Pepper* v. *Whalley*, 1 Bing. N. C. 71. In both respects the practice is now and for some time past has been altered. Christian and surname of defendant ought to be correctly stated: *Williams* v. *Bryant*, 5 M. & W. 447. Defendant may be addressed by the name which he bears by reputation: *Ib.* In actions "upon bills of exchange, promissory notes, or other written instruments," when defendant signs by initial letter of his christian name, designation by such initial letter in process, &c., is sufficient: Con. Stat. U. C. cap. 42, s. 30; Stat. U. C. 7 Wm. IV. cap. 3, s. 9; copied from Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 12. With reference to the latter see the following cases: *Sarjant* v. *Gordon*, 7 D. & R. 258; *Rolph* v. *Peckham*, 6 B. & C. 164; *Sumner* v. *Batson*, 11 Moore, 39; *Rust* v. *Kennedy*, 4 M. & W. 586, s. c. 7 Dowl. P. C. 199. It is sufficient to describe a defendant by the name which usage has given to him, both as regards his christian and surname: *Williams* v. *Bryant*, 5 M. & W. 447. If the action be against a corporation, they must be sued by their corporate name: see *Woolf* v. *City Steamboat Co.* 7 C. B. 103; *Attorney General* v. *The Corporation of Worcester*, 15 L. J. Ch. 398. If too many defendants are joined, some may be now struck out under section 68. If too few, after plea in abatement for non-joinder, plaintiff may amend under section 69. It was decided under the old practice, that the court could not amend the writ by adding a defendant: *Goodchild* v. *Leadham et al*, 5 D. & L. 383. A plaintiff may issue several writs of summons for the same cause of action of the same date, and upon the same *præcipe*, if all the defendants be named in each writ: *Angus* v. *Coppard et al*, 3 M. & W. 57; *Crow* v. *Crow et al*, 1 D. & L. 709. The term "you" in the writ, when there are several defendants, is taken to apply distributively: *Engleheart* v. *Eyre et al*, 2 Dowl. P. C. 145. Plaintiff can neither declare against a defendant not named in the writ, nor declare separately against defendants named in the same writ: *Pepper* v. *Whalley*, 1 Bing. N. C. 71, s.c. 2 Dowl. P.C. 821. But he may declare against some only: *Caldwell* v. *Blake*, 2 C. M. & R. 249; s.c. 5 Tyr. 618; *Knowles* v. *Johnson*, 2 Dowl. P.C. 653; *Evans* v. *Whitehead et al*, 2 M. & R. 367; *Stables et al* v. *Ashley et al*, 1 B. & P. 49. The defendants, however, who have appeared may sign judgment for their costs: *Roe* v. *Cock*, 2 T. R. 257. And a plaintiff declaring against some cannot afterwards declare against the others in a separate action: *Caldwell* v. *Blake*, 2 C. M. & R. 249; *Knowles* v. *Johnson*, 2 Dowl. P. C. 653. On a joint contract by three, all must be sued, if within the jurisdiction of the court. If one is without, the remaining two must be sued. One alone cannot be sued, if there be two remaining within the jurisdiction: *Cobbett* v. *Calvin*, 4 U. C. Q. B. 123. It was held that between bailable and non-bailable process there was a difference,—in the former it being necessary for plaintiff to declare against all the defendants named in the writ: *Carson* v. *Dowding et al*, 4 Dowl. P. C. 297; *Woodcock* v. *Kilby*, 4 Dowl. P. C. 730.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 5. Originally copied from the first part of Eng. Stat. 2 Wm. IV. cap. 39, s. 12; and as regards writs of summons and capias, substantially a re-enactment of Prov. Stat. 16 Vic. cap. 175, s. 6. The writ ought not to be issued unless cause of action complete: *Alston* v. *Underhill*, 1 C. & M. 492; *Thompson* v. *Dicas*, 1 C. & M. 768, s. c. 2 Dowl. P. C. 93; *Castrique* v. *Bernabo*, 6 Q. B. 498. The date may be either in figures or words at length: *Grojan* v. *Lee*, 5 Taunt. 651, overruled; *Eyre* v. *Walsh*, 6 Taunt. 333; *Butler* v. *Cohen*, 4 M. & S. 335; *Solomon* v. *Nainby*, 7 Dowl. P. C. 459. If writ dated on day other than that on which issued, it is irregular: *Kirk* v. *Dolby*, 8 Dowl.

And endorsed with the name and abode of the plaintiffs, Attorney and Agent.

12. (*r*) Every such Writ (*rr*) shall be indorsed with the name and place of abode of the Attorney actually suing out the same, (*s*) and when he sues out the same as agent for another Attorney, the name and place of abode of such other Attorney shall also be indorsed thereon. (*t*) 19 Vic. c. 43, s. 21.

P. C. 766, s.c. 6 M. & W. 636. If dated on a Sunday, void: *Hanson* v. *Shackelton*, 4 Dowl. P.C. 48, s.c. 1 H. & W. 342; *Kenworthy* v. *Peppiat*, 4 B. & Al. 288. If no date, irregular, not void: see *Ball* v. *Hamlet*, 3 Dowl. P. C. 188. Agreed by the judges of the Queen's Bench, Common Pleas, and Exchequer, that a writ of summons may be amended, so as to render it conformable to the precipe on which it is founded: *Kirk* v. *Dolby*, 8 Dowl. P. C. 766, *per* Parke, B. Amendment allowed by striking out, "23rd February, 1824, in the fourth year of our reign," and inserting in lieu thereof, "31st January, in the fifth year of our reign:" *Myers* v. *Rathburn*, Tay. U. C. R. 127. It will not be safe to rely too much upon this case, as the report is very unsatisfactory. For the law as to amendments generally, both as regards omissions and mistakes, see section 221 of this act. Although the act gives ample powers for amendment, still it is presumed that the judges will, in the exercise of their discretion, be governed by cases already decided, so far as applicable. If a defective writ be resealed, it ought to be dated on the day of resealing: *Knight* v. *Warren*, 7 Dowl. P. C. 663. A mistake in the year in the teste of a copy of a summons, the writ itself being right, is a mere irregularity which is waived, if the defendant does not come to the court before the time for appearance has elapsed: *Edwards* v. *Collins*, 5 Dowl P. C. 227. An offer by defendant, after having been served with the summons, to pay half the debt and costs, is a waiver of a mistake in the teste of the summons copy: *Briggs* v. *Bernard*, 6 L. J. C. P. 216. The court refused to allow the date of a writ of summons to be amended for the purpose of preventing the plaintiff's claim being barred by the Statute of Limitations: *Clark* v. *Smith*, 30 L. T. Rep. 291; s. c. 27 L. J. Ex. 155.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 6. Substantially a re-enactment of Eng. Stat. 2 Wm. IV. cap. 39, s. 12; and Eng. Rule, M. T. 3 Wm. IV. No. 9, from which the latter part of our Prov. Stat. 12 Vic. cap. 63, s. 27, was copied. The origin of the practice seems to have been Eng. Stat. 2 Geo. II. cap. 23, s. 22.

(*rr*) Applies to writs of ejectment: *Webster* v. *Gore*, 4 Prac. R. 169.

(*s*) *i. e.* The individual attorney, or the name of the firm: *Hartley* v. *Radenhurst*, 4 Dowl. P. C. 748; *Engleheart* v. *Eyre et al*, 2 Dowl. P. C. 145; *Pickman* v. *Collis*, 3 Dowl. P.C. 429. *Form* of indorsement: see Schedule A. No. 1. The name and address of the attorney is required in order to inform defendant where he may settle the action: *Dawes* v. *Solomonson*, 6 Scott, 596. The form is given for the purpose of illustration: *Hannah* v. *Wyman*, 3 Dowl. P. C. 673. In England, it has been held that if the writ be issued by an attorney in person, it is sufficient in the indorsement to describe him as residing at the place where he carries on his business: *Ablett* v. *Basham*, 5 El. & B. 1019. Place of abode means the place where a person is most likely to be found: *Allenborough* v. *Thompson*, 2 H. & N. 559; *Kerr* v. *Haynes*, 29 L. J. Q. B. 70.

(*t*) Same as old Rule 9, H. T. 13 Vic. An indorsement thus: "This writ was issued by G. F. G. & S. of No. 1, B. R. London, agents for Mr. J. T. of Exeter, in the county of D., the plaintiff within named," was held to be bad, inasmuch as it neither showed that the writ was issued by the attorney for the plaintiff, nor by

13. When the Writ is sued out by the Plaintiff in person, he shall indorse thereon a memorandum expressing that the same has been sued out by him in person, (*u*) and mentioning the City, Town, incorporated or other Village or Township within which such Plaintiff resides. (*w*) 19 Vic. c. 43, s. 21. When sued out in person to be so noted, &c.

14. (*x*) The Plaintiff's Attorney, or the Plaintiff, if he sues in person, shall endorse on every such Writ issued for the payment of a debt, (*y*) and upon every copy there- The amount of plaintiff's claim to be endorsed on Writ.

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the plaintiff in person: *Toby* v. *Hancock*, 4 D. & L. 385. Where the writ was issued out by a London agent, the description "*agent* for plaintiff in *person*," was held to be insufficient, although the plaintiff was himself an attorney: *Lloyd* v. *Jones*, 1 M. & W. 549. Any such irregularity would now be amendable either under section 48 or section 221 of this Act. Where the process was indorsed only with the name of the agent and not of the attorney immediately employed, the court held this irregular, and set aside the process: *Shephard* v. *Shum*, 2 C. & J. 632; s. c. 2 Tyr. 742. Indorsement, "M. G. & Co., agents for S.," without specifying christian names, is sufficient: *Pickman* v *Collis*, 3 Dowl. P. C. 429.

(*u*) When plaintiff in person sues out the writ, his description should be very clear, full, and precise: see *Lewis* v. *Davison*, 1 C. M. & R. 655; *Arden et al* v. *Jones*, 4 Dowl. P. C. 120; *King* v. *Monkhouse*, 2 Dowl. P. C. 221; *Yardley* v. *Jones*, 4 Dowl. P. C. 45; *Ablett* v. *Basham*, 5 El. & B. 1019. Non-professional men are not so easily found out as attorneys of the courts, whose offices are generally well known. As to place of dwelling of a corporation, see *Corbett* v. *General Steam Navigation Co.*, 4 H. & N. 482; *Brown* v. *London & N. W. R. Co.*, 4 B. & S. 326; *The Keynsham Blue Lias Lime Co.* v. *Baker*, 2 H. & C. 729; *Aberystwith Promenade Pier Co.* v. *Cooper*, 35 L. J. Q. B. 44.

(*w*) The English Act 15 & 16 Vic. cap. 76, s. 6, proceeds, "and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be." The designed omission of these words should be borne in mind when examining English authorities. The judge in chambers is to exercise his discretion in determining whether the description is sufficient or not. If he decide the question, the court will rarely review his decision: *Tadman* v. *Wood*, 4 A. & E. 1011.

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 8. The provisions of this section are such as were formerly required by rule of our courts, T. T. 3 & 4 Wm. IV. No. 3, which was rescinded by Rule of H. T. 13 Vic. No. 4. The old Rule of T. T. 3 & 4 Wm. IV. No. 3, was taken from the Eng. Rule of H. T. 2 Wm. IV. No. 2: Jervis, N. R. 90. A nominal compliance with it by plaintiffs, and inattention to it by defendants, was said to be the cause of its rescission. Indorsements of sums far exceeding the true debt and costs were commonly made in total disregard of the rule.

(*y*) This section applies only to debts, that is, to sums certain, or money demands that can be estimated: see *Perry* v. *Patchett*, 2 Dowl. P.C. 667; *Curwin* v. *Moseley*, 1 Dowl. P. C. 432. It would therefore seem unnecessary, if not improper, to put the indorsement on a writ claiming for any other cause of action: see *Edwards* v. *Dignam*, 2 Dowl. P. C. 240. The section does not apply to a *qui tam* action: see *Davies* v. *Lloyd*, 6 Dowl. P. C. 173; *Hobbs* v. *Young*, 2 D. & L. 474. Nor to an action on a bail bond: see *Smart* v. *Lovick et al*, 3 Dowl. P.C.

If paid within eight days, proceedings to stop.

of, (*z*) the amount of the Plaintiff's claim for debt, (*a*) and if there be an Attorney, the Attorney's claim for the costs of Writ, copy and service, and attendance to receive debt and costs, (*b*) and, that upon payment thereof within eight days, (*c*) to the Plaintiff or his Attorney, as the case may be, (*d*) further proceedings will be stayed, (*e*) which indorse-

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34. Nor to a replevin bond: see *Rowland* v. *Dakeyne et al*, 2 Dowl. P.C. 832; but see *Robinson* v. *Hawkins et al*, 1 Jur. 843. Nor to any case where the party claims unliquidated damages, as well as a debt: *Perry* v. *Patchett*, 2 Dowl. P. C. 667, and *Mansfield* v. *Brearey*, 1 A. & E. 347; *Jacquot* v. *Boura*, 5 M. & W. 155: see also *Rogers* v. *Hunt*, 10 Ex. 474. If defendant seeks to take advantage of the omission to indorse process as above required, he must show distinctly by affidavit, that the cause of action is a debt: *Legatt* v. *Marmontt*, E. T. 3 Vic. *MS.* R. & H. Dig. "Indorsement," I. 9, p. 236; *Curwin* v. *Moseley*, 1 Dowl. P. C. 432. Where the omission of the indorsement on a bailable writ was supplied within two hours after the arrest, before bail was put in, and before application to set aside proceedings, the old Rule 3, T. T. 3 & 4 Wm. IV. was held to be sufficiently complied with: *Smith* v. *Smith*, 4 O. S. 10; *sed. contra. Gibbs* v. *Kimble*, 1 U. C. R. 408.

(*z*) In the absence of proof to the contrary, defendant may assume that the copy served is a true copy, and that if the copy be defective, so also is the writ: *Chapman* v. *Becke*, 3 D. & L. 350. The omission of the letters "L. S.," or any mark to denote a seal to the copy of a writ, is not an irregularity: *Cameron* v. *Wheeler et al*, 6 U. C. R. 355.

(*a*) If a larger sum than is due be indorsed, proceedings will be stayed, upon payment of the real debt with costs of the writ only: *Elliston* v. *Robinson*, 2 Dowl. P.C. 241; *Young* v. *Crompton*, 2 D. & L. 557; see also *Watson* v. *Coleman*, 7 M. & G. 422. For this purpose a summons should be taken out in the usual manner.

(*b*) Plaintiff may abandon his costs if he prefer to do so. If such be his intention, he should not serve such process upon defendant as to leave him in doubt: *Truslove* v. *Whitechurch et al*, 8 Dowl. P. C. 837. For instance, "the plaintiff claims £85 8s. 6d. for debt, and £ ——— for costs," this is irregular: *Ib.*; see *Hunter* v. *Russell*, 6 Scott, 627; *Young* v. *Crompton*, 2 D. & L. 557.

(*c*) *Within eight days, &c., i. e.* from the service of the writ, both first and last days it seems inclusive: see R. G. pr. 166. "*Four* days" in English Act from which this section is taken. So it was in the old Rule of 3 & 4 Wm. IV.

(*d*) The rescinded Rule 3 & 4 Wm. IV. made express distinction in this particular, between writs issued by attorney and by plaintiff in person; "and that upon payment thereof, within four days, to the plaintiff's attorney, *or* to the plaintiff when the writ shall have been issued by the plaintiff in person:" Rule 3, T. T. 3 & 4 Wm. IV.; Cam. Rules, p. 11, "Process," 2. Probably the words "Plaintiff *or* his Attorney," as the case may be, as used in the section here annotated, mean the same thing.

(*e*) The object of the indorsement is to show the defendant, in express terms, what the plaintiff is contented to take, in order that the former may tender it, together with the costs, within eight days: *Chapman* v. *Becke*, 3 D. & L. 350, *per* Patterson, J. Indorsement held to be unnecessary on a proceeding by bill, against an attorney: *Lewellyn* v. *Norton*, 1 Dowl. P. C. 416; *Long* v. *Wordsworth*, 4 B. & Ad. 367. Since held to be necessary, as proceeding by bill is abolished:

ment shall be written or printed in the following form, or to the like effect: (*f*)

"The Plaintiff claims £ —— for debt, and £ —— for Form.
"costs; and if the amount thereof be paid to the Plaintiff or
"his Attorney within eight days from the service hereof, (*g*)
"further proceedings will be stayed;" (*h*)

Tompkins v. *Chilcote*, 2 Dowl. P. C. 187. It is apprehended that if the debt be understated, plaintiff, if tendered the amount indorsed, would be bound to accept it, and thereby lose the difference between the sum stated and the sum due, unless in the case of very special circumstances. If the plaintiff refuse the amount tendered, whether it be the sum indorsed or less, such refusal may be noted by the judge on a summons, and if after such proceeding plaintiff recover no more than the sum tendered, he will, it would seem, be liable to pay defendant's costs: see *Watson et al* v. *Coleman*, 7 M. & G. 422. The sum tendered, if refused, should be paid into court: *Clerk* v. *Dann*, 3 D. & L. 513. It has been held in England, that under the usual order on payment of the debt and costs to be taxed, the plaintiff's attorney cannot immediately after the taxation of the costs demand payment of the debt and costs, and on the clerk of defendant's attorney being unprepared with the amount, sign judgment: *Perkins* v. *The National Assurance & Investment Association*, 29 L. T. Rep. 65; see also *Anonymous*, 4 Prac. R. 242. If defendant do not within the time limited pay the debt and costs, he cannot afterwards do so as a matter of right: *Bowditch* v. *Slaney*, 4 Dowl. P. C. 140. Plaintiff may in his declaration insist upon an increased sum: *Ib.* And defendant will be liable to any additional costs which the master may allow: *Ib.* It is otherwise if plaintiff's attorney receive and retain the money after the expiration of the eight days: *Hodding* v. *Sturchfield*, 7 M. & G. 957. See also *Wyllie et al* v. *Phillips*, 3 Bing. N. C. 776; *Covington* v. *Hogarth*, 2 D. & L. 619.

(*f*) This is substantially the same indorsement as that prescribed by the old Rule of 3 & 4 Wm. IV.

(*g*) The word "execution," substituted for "service," has in England been held to be an irregularity even in bailable actions: *Shirley* v. *Jacobs*, 1 Scott, 67; *Urquhart* v. *Dick*, 3 Dowl. P. C. 17; *Boddington* v. *Woodley*, 1 Jur. 960; *Boddington* v. *Woodley*, W. W. & D. 581. An amendment of the indorsement would be allowed to plaintiff, upon payment of costs: *Urquhart* v. *Dick*, 3 Dowl. P. C. 17, *per* Littledale, J. Where the indorsement required the defendant to pay the debt within four days from the "*arrest or* service" thereof, held to be sufficient, as the words "arrest or" might be rejected as surplusage: *Sutton* v. *Burgess*, 1 C. M. & R. 770. "Defendant must know the time he was served, and that he had four days from the service of the copy, within which to pay the debt and costs, to avoid any further expense:" *Ib.* Where the indorsement was to pay the amount within four days from the "*arrest hereon*," held to be a fatal irregularity: *Cooper* v. *Waller*, *Tabram* v. *Thomas*, 3 Dowl. P. C. 167. An amendment of the indorsement, by altering the amount of the debt mentioned in it, was refused: *Trotter* v. *Bass*, 3 Dowl. P. C. 407. It might now possibly be allowed under section 221 of this Act.

(*h*) The writ must be so indorsed that an unlettered person may at once be informed what is demanded of him: *Truslove* v. *Whitechurch et al*, 8 Dowl. P. C. 837. It must state clearly what is claimed for debt and what for costs: *Ib.* If interest be claimed, the amount must be stated, or the period from which it is reckoned: *Chapman* v. *Becke*, 3 D. & L. 350; *Fryer et al* v. *Smith*, 5 M. & G. 605;

But the Defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth be disallowed, the Plaintiff's Attorney shall pay the costs of taxation. (*i*) 19 Vic. c. 43, s. 26.

Bardell v. *Miller*, 7 C. B. 753. "The plaintiff claims £20 debt, with interest from 10th March last" is sufficient: *Coppelo* v. *Brown*, 3 Dowl. P. C. 166; *Sealy* v. *Hearne*, 3 Dowl. P. C. 196. It will be intended that the interest claimed is legal interest: *Allen et al* v. *Bussey*, 4 D. & L. 430. The following additional cases may be consulted as to when this enactment is or is not sufficiently complied with: *Evans* v. *Bidgood*, 4 Bing. 63; *Patterson* v. *Habbershan*, 1 Hod. 316; *Fitzgerald* v. *Evans*, 5 M. & G. 207. The want of the indorsement would be an irregularity: *Truslove* v. *Whitechurch et al*, 8 Dowl. P. C. 837. Amendable probably under section 48 of this Act.

(*i*) Defendant may have the costs taxed, though he pay less than the sum indorsed, and though plaintiff's attorney accept the same: *Hunter* v. *Russell*, 5 M. & G. 601; but see *Young* v. *Crompton*, 2 D. & L. 557; also see *In re Woollett*, 1 D. & L. 593. If defendant desire to have costs referred to taxation, notwithstanding payment, he should take out a summons to show cause "why the bill of costs indorsed on the writ of summons paid by him, should not be referred to the master for taxation," and "why if more than a sixth be taken off, he should not refund the surplus, and pay the costs of taxation." The enactment here annotated, and Con. Stat. U. C. cap. 35, s. 31, are *in pari materia*, though the latter enactment appears to relate only to costs as between attorney and client. The material part of it is in these words: "The costs of the reference shall be paid according to the event of the taxation, except that if a sixth part be taxed off, the costs shall be paid by the party by whom or on whose behalf such bill was delivered, and if less than a sixth part be taxed off, then by the party chargeable with such bill, if he applied for such taxation." This provision proceeds further than the Eng. Stat. 2 Geo. II. cap. 23, s. 23. In the latter statute, the words used are much the same as the words of the section under consideration. "If the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be *less, the court in their discretion shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills.*" In reference to this enactment, Baron Parke said: "It has been held by the court of Common Pleas, that the statute directing the payment of costs is not correlative: *Elwood* v. *Pearce*, 8 Bing. 83. It does not necessarily follow that the defendant is to pay the costs of taxation, though *less* than one-sixth be taken off; although if *more* be disallowed, the plaintiff's attorney is bound to pay these costs. The court have a discretion which they may exercise according to the reasonableness or unreasonableness of the charges in the bill, whether they will make the defendant pay the costs or not. I have always understood that where an attorney wilfully inserts any item of charge, even one shilling which he must know ought not to be charged, he is not entitled to the costs of taxation:" *Holderness* v. *Barkworth et al*, 3 M. & W. 341. Defendant should pay, within the eight days, the costs indorsed on the writ. If he pay more, he does so of his own fault: *Ward* v. *Gregg*, 5 Dowl. P. C. 729. Where therefore, in addition to the costs indorsed on the writ, defendant paid a sum of 5s., demanded of him by plaintiff's attorney, and afterwards on taxation a sum was taken off, which, with the 5s., was more than one-sixth, but without it, less than one-sixth of the bill; it was held that the attorney was not bound to pay the costs of reference: *Ib.*

15. (*k*) **In all cases where the Defendant resides within the Jurisdiction of the Court,** (*l*) **and the claim is for a debt or liquidated demand in money** (*m*)**, with or without interest** (*n*)**, arising upon a contract express or implied,** (*o*) **as for** In demands for liquidated sums, certain particulars may be endorsed on the Writ.

(*k*) Adopted from Eng. Stat. 15 & 16 Vic. cap. 76, s. 25. Founded upon first report of the Common Law Commissioners, s. 56. The object of this enactment is to prevent the expense of a declaration: *Rodway* v. *Lucas*, 10 Ex. 667, *per* Pollock, C. B. The very great majority of cases in which actions are brought are "debts" or "money demands," to which there is no defence. It has been considered extremely desirable that in such cases the parties should be put to the least possible expense: *per* Martin, B., same case.

(*l*) This section does not apply to proceedings taken either under sections 43 or 45, for in each of those cases defendant is supposed to be "without the jurisdiction of the court."

(*m*) It should appear upon the face of the indorsement that the claim is for a liquidated demand: *Rogers* v. *Hunt*, 10 Ex. 474, *per* Parke, B. Where in an action on a bill of exchange, the indorsement on the writ was £31 8s. 9d., being balance of principal, interest, *and expenses of noting*, &c.; *Held* that the latter item was not a liquidated demand: *Ib.* The endorsement consequently was treated as a nullity, and plaintiff held bound to declare in the ordinary manner: *Ib.*

(*n*) The indorsement applies solely to claims which are liquidated, and do not depend on the finding of a jury: *Rodway* v. *Lucas*, 10 Ex. 667, *per* Parke, B. The court in a later case said, "We wish that it should be distinctly understood by the profession, that in all cases except bills of exchange and promissory notes (as to which it is the usual practice of the court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract shall nevertheless claim it by special indorsement on the writ, in order to gain an improper advantage, and in default of appearance sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs:" *Rodway* v. *Lucas*, 10 Ex. 67[illegible], *per* Pollock, C. B. The amount of a judgment debt has been held a liquidated demand in money within the meaning of the section: *Hodsoll* v. *Baxter*, E. B. & E. 884. The late Sir John B. Robinson held that accounts delivered, but not liquidated by admission of the defendant, were not such debts as intended by the section: *McKinstry* v. *Arnold*, 4 U. C. L. J. 68. The Common Pleas afterwards decided that an account for work and labor, with the usual claim for interest, giving credits and claiming a balance, are the subject of special indorsement: *Smart* v. *The Niagara and Detroit Rivers Railway Co.* 12 U. C. C. P. 404. See further *Northern Railway Co.* v. *Lister*, 4 Prac. R. 120. But where a writ was endorsed thus: "The following are the particulars of the plaintiff's claim, £490 16s. 10d., on a recognizance dated the 6th day of July, A.D. 1856, conditioned by you for the payment of £3,000," the judgment entered thereon in default of an appearance was set aside as irregular, with costs: *Buell* v. *Whitney*, 11 U. C. C. P. 240. See further section 55, and notes thereto.

(*o*) Where the claim is for a debt, &c., "*with or without interest, arising upon a contract express or implied*, &c.," means with or without *interest arising upon a contract expressed or implied*, and does not apply to any case where it is optional with the jury to give interest as they may be advised according to the justice of the case: *Rodway* v. *Lucas*, 10 Ex. 672, *per* Parke, B. But, *per* Draper, C. J., "it has become so settled a practice to allow interest on all accounts after the time for payment has gone by, and particularly upon the balance of an account which

instance, on a Bill of Exchange, Promissory Note or Cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, (*p*) or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guarantee whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, note or cheque;—The Plaintiff may make upon the Writ of Summons and copy thereof, a special indorsement of the particulars of his claim, (*q*) in the Form A. No. 5, or to the like effect; (*r*) and when the Writ has been so indorsed, the

No further particulars need be given unless ordered.

imports that the accounts on each side are made up, and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement:" *Smart* v. *Detroit & N. & D. Riv. R. Co.* 12 U. C. C. P. 404. See also *Northern R. Co.* v. *Lister*, 4 Prac. R. 120.

(*p*) *Qui tam* actions included: see *Hall* v. *Scotson*, 9 Ex. 238.

(*q*) The indorsement necessary under section 14 is compulsory. This indorsement is discretionary. Plaintiff, if he omit it, must declare in the usual manner, and deliver his bill of particulars according to N. R. 20. Provided that if the case be proper for a special indorsement and the same be omitted, then plaintiff shall not be entitled to the costs of the declaration, &c.: see section 57.

(*r*) A reference to the form given in the schedule, by way of example, will show that plaintiff may in his indorsement give credit, as has been commonly done in particulars of demand under the old practice. Where in *assumpsit* for goods, the particulars contained an item of payment, "Cr. by bills, £1,500:" *Held* that it was to be taken as payment by the defendant to plaintiff: *Smethurst* v. *Taylor*, 12 M. & W. 545. If a plaintiff give credit in his particulars of demand for a sum paid by defendant, such payment is held to be upon the same footing as if there had been a plea of payment: *Goatley* v. *Herring*, 12 L. J. C. P. 32. But it cannot be taken as an admission as against defendant with respect to any particular items in the account: *Ib.* The court held in one case that they could not compel plaintiff to state the items or sums of money for which he voluntarily gave credit in his particulars: *Myatt* v. *Green*, 13 M. & W. 377. It was also held that plaintiff was not precluded from explaining admissions in the particulars of payments made to him by the defendant, and of showing on what account such payments were made: *Mercy* v. *Galot*, 3 Ex. 851. It is not necessary for a defendant in this Province to plead payment of any sums credited in the particulars. The following are the rules upon the subject: "In all cases in which the plaintiff, in order to avoid the expense of the plea of payment or set off, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for *any particular sum or sums*, or to cases of set-off where the plaintiff does not state the particulars of such set-off:" R. G. pl. 13. "Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar:" R. G. pl. 14. The Rules Pr. 13 and 14 are substantially a re-enactment of our old

indorsement shall be considered as particulars of demand, and no further or other particulars need be delivered unless ordered by the Court or a Judge. (*s*) 19 Vic. c. 43, s. 41.

Writs issued from any of the Courts may be served in any County.

16. (*t*) The Writ of Summons, whether issued by one of the Superior Courts or by any County Court, may be served in any County in Upper Canada, (*u*) and the service thereof, whenever practicable, shall be personal; (*v*) but the Plaintiff

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Rule 15 of E. T. 5 Vic. And the latter was copied from the English Rule 19 of T. T. 1 Vic. The English rule was made to settle doubts which arose in the cases of *Ernest* v. *Brown*, 3 Bing. N. C. 674; *Nicholl* v. *Williams*, 2 M. & W. 758; *Kenyon* v. *Wakes*, 2 M. & W. 764; *Coates et al* v. *Stevens*, 2 C. M. & R. 118; *Booth* v. *Howard*, 5 Dowl. P. C. 438. Since the English Rule 19 of T. T. 1 Vic., where, to an action of debt for £44 8s., the defendant pleaded payment of £15 in satisfaction, the plea was held to be good: *Turner* v. *Collins*, 2 L. M. & P. 99. The reason being that since credits given in the particulars of demand *need not now be pleaded*, a less sum than the debt in the declaration might, with credits so given, be equal to such debt: *Ib.* Our *old* rule does not apply to set-off: *Rowland* v. *Blaksley et al*, 1 Q. B. 403; *Townson* v. *Jackson*, 14 L. J. Ex. 57. Further as to credit in particulars of demand, see *Morris* v. *Jones et al*, 1 Q. B. 397; *Lamb et al* v. *Micklethwait*, *Ib.* 400; *Keesar* v. *Empey et al*, 4 U. C. Q. B. 47; *Eastwick* v. *Harman*, 6 M. & W. 13; *Nosotti* v *Page*, 20 L. J. C. P. 81; *Harris* v. *Montgomery*, *Ib.* 221.

(*s*) It has been made a question whether a defendant who has indorsed his writ under this section can subsequently deliver fresh particulars with his declaration, and proceed thereon. The words "need be" rather argue that plaintiff may deliver other particulars if he chooses: *Fromant* v. *Ashley et al*, 1 El. & B. 723. *per* Campbell, C. J. If plaintiff have not the right to do so and notwithstanding deliver fresh particulars, such a step will be irregular only and the irregularity waived if defendant plead over: *Ib.* Before the C. L. P. Acts, in a case where there was no waiver by defendant, it was held that plaintiff was concluded by the particulars he first delivered, and was also held to be unable to cure any defects therein by delivering fresh particulars: *Brown* v. *Watts*, 1 Taunt. 353. But it appears to be now the better opinion that a plaintiff who declares is not limited in his declaration to the particulars of his cause of action specially indorsed on the writ of summons: *Sowden et al* v. *Sowden*, 4 Prac. R. 276.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, ss. 14, 17. Founded on first Report of the Common Law Commissioners, section 8.

(*u*) The old practice required the writ to be served within the county "therein mentioned, or within two hundred yards of the border thereof, and not elsewhere:" 12 Vic. cap. 63, s. 22, copied from English Act 2 Wm. IV. cap. 39, s. 1; also see *Simpson* v. *Ramsay*, 5 Q. B. 371. Formerly, if it were discovered that defendant had removed to a county other than that "in the writ mentioned," it became necessary to issue an *alias* or *pluries* writ, describing defendant as being "late of the county of, &c.:" Old Rule 5 H. T. 13 Vic. This mode of proceeding caused both delay and expense, and was besides wholly unnecessary, inasmuch as the writ was directed to the defendant, and not to the sheriff of any particular county. The commissioners, unable to see "any advantage whatever arising from the restriction," advised its removal.

(*v*) Before this enactment, the judges in England came to a determination that as a general rule the service should be personal in all cases: *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Christmas* v. *Eicke*, 6 D. & L. 156. There was no proper

may on affidavit, from time to time apply to the Court out of which the Writ issued, or to a Judge having jurisdiction over

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equivalent: *Grand Junction Water Works Co.* v. *Roy*, 16 L. J. C. P. 200; *Russell* v. *Lowe*, 2 Dowl. N. S. 233. Unless an undertaking by an attorney to appear, which is enforced by attachment: *Anon*, 2 Chit. R. 36; *Morris* v. *James*, 6 Dowl. P. C. 514; *Jacob* v. *Magnay*, 12 L. J. Q. B. 93; also see R. G. pr. 8. If defendant avoided service, then plaintiff was driven to a writ of distringas: *Blake* v. *Cooper*, 11 C. B. 680. Service wherever "practicable," must still, as heretofore, be personal. Personal service means serving the defendant with a copy of the process, and showing him the original if he desire it: *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599, *per* Alderson, B. The copy of the writ must be left with and not merely shown to defendant: *Worley* v. *Glover*, 2 Str. 877. Though defendant refuse to take the copy, if the person serving it bring it away with him, the service will be defective: *Pigeon* v. *Bruce et al*, 8 Taunt. 410. A sheriff's officer took a writ intended for one person to another person of the same name; he was informed by defendant of his error, and took back the writ saying that he would go to the other party, the defendant having agreed that if he were wrong in his supposition, he would consider the service good, if the writ were left for him at the house of a third party named. The officer neither served the other party nor left the writ for defendant as directed, the plaintiffs nevertheless proceeded against defendant. The service and all subsequent proceedings were set aside for irregularity: *Erwin* v. *Powley*, 2 U. C. Q. B. 270. The original writ need not be shown, unless defendant at or within a reasonable time after service, make a demand to see it: *Petit* v. *Ambrose*, 6 M. & S. 274; *Thomas* v. *Pearce*, 2 B. & C. 761. A quarter of an hour held to be a reasonable time: *Westley* v. *Jones*, 5 Moore, 162. Where, at the time of service, an inspection of the original was demanded and refused, the service was set aside with costs: *Weller* v. *Wallace et al*, M. T. 1 Vic. *M. S.* R & H. Dig. "Process," 4. "Personal service" has never been defined by the legislature. Each case is left to depend on its own particular circumstances. The courts have not held it necessary to put process into the actual *corporal* possession of the defendant to constitute a personal service; but have looked more to the object of the service—timely notice to defendant of an action commenced against him: see *Sheehy* v. *The Professional Life Ins. Co.*, 18 C.B. 787. Whether under the particular circumstances of each case this object has been accomplished is a question for the court or a judge. Various cases under the old practice shew that the expression "personal service" is not to be understood in the strict sense of the term, thus, where a writ was put through the crevice of a door to defendant, who had locked himself within, the service was held to be sufficient: *Smith* v. *Wintle*, Barnes, 405. So where the writ had been enclosed in a letter to defendant, which he received, and out of which he had taken the copy: see *Boswell* v. *Roberts*, Barnes, 422; *Aldred* v. *Hicks*, 5 Taunt. 186. But service upon a wife, agent, or servant, is not personal service: see *Frith* v. *Lord Donegal*, 2 Dowl. P.C. 527; *Davies* v. *Morgan et al*, 2 C. & J. 237; *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Christmas* v. *Eicke*, 6 D. & L. 156; *Price et al* v. *Thomas*, 11 C. B. 543. Where the officer on seeing the defendant at his window, told him in a loud tone, that he had a writ against him, at the plaintiff's suit, and holding out the copy, threw it down and left it in the garden, in defendant's presence; held not a sufficient personal service: *Heath* v. *White*, 2 D. & L. 40. In a case where service was denied by the defendant, but the officer swore positively to its service personally on defendant, an application to set aside proceedings was refused: *Coates* v. *Hornby*, 1 Cham. R. 135. If there be more defendants than one, each should be served as if he were sued alone, except in the case of husband and wife, when service on the husband for both, will be sufficient: *Buncombe* v. *Love*, Barn. Notes, 406; *Collins* v. *Shapland*, *Ib.* 103. It is irregular to serve process on a witness while attending a court of *Nisi Prius*, under subpœna: *Thompson* v. *Calder*, 1 U.C.

the case, (*w*) and if it appears to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the Writ has come to the knowledge of the Defendant, or that he wilfully evades service of the same, (*x*)

If service evaded, how plaintiff to proceed.

Q.B. 403. Service upon a defendant while attending the assizes, as plaintiff in a civil action pending and entered for trial, held good: *Thompson* v. *Calder*, 1 U.C. Q.B. 403, doubted; *City of Kingston* v. *Brown*, 4 U. C. Q. B. 117; see also *Cole* v. *Hawkins*, 2 Str. 1094; *Poole* v. *Gould*, 1 H. & N. 99; s. c. 27 L. T. R. 110.

(*w*) *i. e.* Court in term time — Judge in vacation: *Wyatt* v. *Gerry*, 22 L. T. R. 92; *Todd* v. *Evans*, 22 L. T. R. 105.

(*x*) This provision is a new one, substituted in lieu of the practice, by distringas to compel an appearance. The distringas is superseded, because there is no longer any necessity for it. Wherever under the old practice, a distringas could have been obtained, it may be laid down as a general rule that an application made under this section will succeed. Of course there may be exceptions. That of a lunatic defendant noticed below is one. Two cases are contemplated by this section. 1. Where the writ has come to the knowledge of defendant. 2. Or where he wilfully evades service of the same. In support of the application, it is very clear under this section, that the affidavit must show—1. That reasonable efforts have been made to effect personal service. 2. That the writ has come to the knowledge of the defendant. 3. Or that he wilfully evades service of the same.

1. As to what will be considered reasonable efforts, &c., see *Gale* v. *Winkes*, 3 Bing. N. C. 294; *Mills* v. *Boultbee*, 1 Dowl. N.S. 707; *Crofts* v. *Brown*, 14 L. J. Q. B. 232; *Russell* v. *Knowles*, 2 D. & L. 595; *Cross* v. *Wilkins*, 4 Dowl. P. C. 279; *Rock et al* v. *Adam*, 15 L. J. C. P. 192; *Greenwood* v. *Selden et al*, 9 Dowl. P.C. 72; *Norman* v. *Winter*, 4 Bing. N. C. 637; *Jamieson* v. *Wilkins*, 2 Dowl. N. S. 331; *Baker* v. *Coe*, 1 Ex. 153; *Anon*, 2 D. & L. 1001; *Johnson* v. *Rouse*, 1 Dowl. P. C. 641; *Moody* v. *Morgan*, 7 Dowl. P. C. 144; *Newman* v. *Hickman*, 9 Dowl. P. C. 546; *Hill* v. *Moule*, 2 Dowl. P. C. 10; *Fisher* v. *Goodwin*, 2 C. & J. 94; *Wakeley* v. *Teesdale*, 2 L. M. & P. 85; *Dubois* v. *Lowther*, 4 C. B. 228; *Kitchin* v. *Wilson et al*, 4 C. B. N. S. 483; *Davies* v. *Westmacott*, 7 C. B. N. S. 829; *Flower et al* v. *Allan*, 2 H. & C. 688; *Goviller* v. *Fauntleroy*, 2 Week. Notes, 37; *Tomlinson* v. *Goatly*, L. R. 1 C. P. 230; *Gorringe* v. *Terrewest*, 2 L. M. & P. 12.

2. As to the writ coming to defendant's knowledge, see *Thomas* v. *Pearce*, 4 D. & R. 317; *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Russell* v. *Knowles*, 2 D. & L. 595; *Heath* v. *White*, 2 D. & L. 40; *Christmas* v. *Eicke*, 6 D. & L. 156.

3. As to defendant's keeping out of the way to avoid service, see *Houghton* v. *Howarth*, 4 Dowl. P. C. 749; *Channing* v. *Cross*, 9 Dowl. P. C. 118; *Wilkins* v. *Jones*, 15 L. J. Q. B. 226; *Gorringe* v. *Terrewest*, 2 L. M. & P. 12; *McDonough* v. *McCartney*, 3 Ir. C. L. R. 239; *Byrne* v. *Sherlock*, 8 Ir. C. L. R. App. xxxii.

Though an attempt has been here made to separate cases, it will be evident that the two latter states of circumstances must be more or less blended. If defendant wilfully evade service of the writ, it must be presumed that it has come to his knowledge. If it has come to his knowledge, and he cannot, after repeated efforts, be personally served, it may be presumed that he wilfully evades service of the same. The presumption must appear to the court or a judge upon facts to be disclosed upon affidavit. The plaintiff should detail the attempts at service, and then show why service has not been effected: see *Miller* v. *O'Brien*, 1 Ir. Jur. N.S. 109; *Grady* v. *Kearney*, 8 Ir. C. L. R. App. xliv. The case of a lunatic defendant is not in express terms provided for by the legislature. The court refused to supply the omission in a case before them, and refused to grant an application made under this section, where defendant was a lunatic, and it was not shown that the writ had come to his knowledge, or that he wilfully evaded service of

and has not appeared thereto, (*y*) such Court or Judge may by order (*z*) grant leave to the Plaintiff to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge seem fit. (*a*) 19 Vic. c. 43, ss. 31, 34.

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the same: *Holmes* v. *Service*, 15 C. B. 293; see also *Williamson* v. *Maggs*, 28 L. J. Ex. 5; *Ridgway* v. *Cannon*, 2 W. R. 473. Under the old practice, a distringas would have been granted in this case: see *Rawson* v. *Moss*, 8 Dowl. P.C. 412; *Jones* v. *Evans*, 8 Dowl. P. C. 425; *Blake* v. *Cooper*, 11 C. B. 680; *Wilkins* v. *Jones*, 3 D. & L. 747; *Sheppard* v. *Williams*, 11 C. B. 682; *Banfield* v. *Darell*, 13 L. J. Q. B. 202. And the court of Exchequer has held that if it be shown that the writ has come to the knowledge of the lunatic, the statute is applicable: *Kemberley* v. *Alleyne*, 8 L. T. N. S. 398. Service of process on a lunatic allowed by serving the manager of the asylum in which the lunatic was confined: *Wilmot* v. *Marmion*, 8 Ir. L. R. 224. So service on brother of the lunatic and keeper of the lunatic allowed: *Vance* v. *O'Connor*, 11 Ir. L. R. 60. If the keeper refuse service, an attachment may issue against him: *Danson* v. *LeCapelain et al*, 21 L. J. Ex. 219; *Denison et al* v. *Hardings et al*, 2 Week. Notes, 17. Service on a prisoner undergoing penal servitude, held to be good service: *Corby* v. *Robinson*, 5 Ir. Jur. N.S. 371.

(*y*) The affidavit must, in addition to the above, show the fact that no appearance has been entered: see *McAlpin* v. *Gregory*, 1 C. B. 299; *Drage* v. *Bird*, 3 D. & L. 617. The search for appearance should be as recent as possible before making application: see *Hocker* v. *Townsend*, 1 Hodg. 204. If practicable, on the same day that application is made: *Spence* v. *Barker*, 8 Dowl. P. C. 296. Four days too late: *Drinkwater* v. *Mills*, 12 C. B. 452. The affidavit must show when the search was made: *McClaine* v. *Abrahams*, 3 Scott, N.R. 474; s. c. 10 L.J. C.P. 318; *Penney* v. *Thomas*, 6 L.J. C.P. N.S. 55. The day of search must be shown to be after the expiration of the time limited by the writ for defendant to appear: *Brian* v. *Stretton*, 1 C. & M. 74; s.c. 1 Dowl. P.C. 642. The service of the writ must be shown to have been regular: *Wakeley* v. *Teesdale*, 2 L.M. & P. 85; *Fitzgerald* v. *Evans*, 5 M. & G. 207; s. c. 6 Scott, N. R. 220. If the affidavit be amended, and delay thereby ensue, a fresh search must be made: *McClaine* v. *Abrahams*, 3 Scott. N. R. 474. The old practice also made it necessary for the affidavit to state the place of defendant's residence, or else explain that efforts to find the same were unavailing: *Crofts* v. *Brown*, 2 D. & L. 935; s. c. 7 Q. B. 284; *Halton* v. *White*, 2 M. & G. 295; *Bowser et al* v. *Austen*, 2 C. & J. 45; *Bradbee* v. *Gustard*, 1 Dowl. N. S. 295; *Russell* v. *Knowles*, 7 M. & G. 1001.

(*z*) Order in general absolute in first instance, and need not be served: *Barringer* v. *Handley*, 12 C. B. 720. An order so obtained was set aside upon an affidavit made on the part of defendant "that at the time of the issuing of the writ and down to the time of the swearing the affidavit, the defendant was *out of the jurisdiction*:" *Hesketh* v. *Fleming*, 24 L. J. Q. B. 255; see also *Flower et al* v. *Allan*, 2 H. & C. 688. An application to rescind the order may, it seems, be made upon affidavits, contradicting those upon which the order was obtained: *Hall* v. *Scotson*, 9 Ex. 238; but see *Whitaker* v. *Crocker*, 2 L. M. & P. 76; *Naef* v. *Mutter*, 12 C. B. N. S. 816.

(*a*) The application, though it cannot be made until the expiration of the time limited for defendant to appear: *Brian* v. *Stretton*, 1 Dowl. P. C. 642. Should not be delayed for an unreasonable time thereafter: see *Bromage* v. *Ray*, 9 Dowl. P.C. 559. Two months have not been considered an unreasonable time: see *Peyton et al* v. *Wood*, 15 M. & W. 608. The court will not in general interfere with the direction of a judge in chambers refusing leave to proceed: *Tomlinson* v. *Goadly*, L. R. 1 C. P. 230.

Service on Corporations, how effected.

17. (*b*) Every such Writ issued against a Corporation aggregate, (*c*) and in the absence of its appearance by Attorney, all papers and proceedings in the action before final judgment may be served on the Mayor, Warden, Reeve, President, or other Head Officer, or on the Township, Town, City or County Clerk, (*d*) or on the Cashier, Manager, Treasurer or Secretary, Clerk or Agent of such Corporation, or of any branch or agency thereof in Upper Canada; (*e*) and every person who, within Upper Canada, transacts or carries

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(*b*) First part of this section taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 16. Applies only to corporations whose chief place of business is in Upper Canada, the remainder of the section applies to foreign corporations: *Wilson* v. *The Detroit and Milwaukee Railway Co.*, 3 Prac. R. 37.

(*c*) A corporation sole must be personally served. The old mode of proceeding against corporations aggregate is pointed out in Tidd. N. P. 81, *et seq.* *Semble*, a summons directed to the commissioners of the admiralty, must be served upon each: *Williams* v. *The Lords Commissioners of the Admiralty*, 11 C.B. 420. It was intimated that defendants were not a corporation: *Ib.* As to the effect of service of a writ on the president of a bank after forfeiture of charter: see *Brooke* v. *Bank of Upper Canada*, 4 Prac. R. 162.

(*d*) "*Clerk*"—Some principal officer is meant, not a mere clerk for instance in the office to the secretary to the corporation: see *Walton* v. *The Universal Salvage Co.*, 16 M. & W. 438.

(*e*) Substantially a re-enactment of Stat. 12 Vic. cap. 63, s. 28. The words of the Eng. C. L. P. Act, "Mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation," are the very words made use of in Eng. Stat. 2 Wm. IV. cap. 39, s. 13. Our statute 3 Wm. IV. cap. 7, provided "that all writs and process at law hereafter to be issued against any body or bodies corporate, in the commencement of any action, and all papers and proceedings before final judgment in any such action, may be served on the president, presiding officer, cashier, secretary, or treasurer thereof, in the same manner as upon any individual defendant in his natural capacity, *or on such other person, or in such other manner as the court in which the action shall be brought, may direct.*" The officers named are all included in our C. L. P. Act; but it is important to notice the wide discretionary power which was vested in the courts by the sentence italicized, and which has been dropped in the consolidation of the statute in the text. A service on any one, other than the officers named in the statute, was required to be made upon some person representing the interests of the corporation: *Sherwood et al* v. *The Board of Works*, 1 U.C.Q.B. 517, *per* Hagerman, J. It was held that where the corporation (the Board of Works) were in Lower Canada, but had work under contract in Upper Canada, process could not be served on the engineer in charge of the works in Upper Canada, as there was nothing to show that he had any share in making the contracts, or that he had authority to bind or represent the corporation; and the court refused to direct that a copy of the process put up in the crown office should be deemed valid service on defendants: *Ib.* Before taking proceedings against a corporation created by or in pursuance of an act of parliament, it will be advisable to consult the particular act, as it may prescribe a mode of procedure different from that laid down in this act, and may be obligatory on the parties to pursue its special provision. Service on a director of a company, registered under Eng. Stat. 19 & 20 Vic. cap. 47, held bad: *Towne* v. *The London and Limerick Steamship Co.*, 5 C. B. N. S. 730.

on any of the business of, or any business for any Corporation whose chief place of business is without the limits of Upper Canada, shall, for the purpose of being served with a Writ of Summons issued against such Corporation, be deemed the agent thereof. (*f*) 19 Vic. c. 43, s. 33; 3 W. IV. c. 7, s. 1.

Time of delivery of Writ at Sheriff's office to be endorsed.

18. (*g*) Upon the delivery of the Writ of Summons at the office of any Sheriff to be served by him, he, his Deputy or Clerk, shall endorse thereon the time it was so delivered, (*h*) and in case the Writ is not fully and completely served within fifteen days after such delivery, the Plaintiff, his Attorney or Agent, shall be entitled to receive back the same, and such Sheriff, Deputy Sheriff or Clerk shall endorse thereon the time of such re-delivery, and in the taxation of costs, the costs of the mileage and service of such Writ by any literate person afterwards, shall be allowed as if the same had been served by the Sheriff or his officer; (*i*) and if such Sheriff neglects or refuses to return any such Writ after the expiration of the said fifteen days, the Plaintiff may issue a Duplicate, or concurrent Writ on the *Præcipe* already filed, and the costs of the first or other Writ not returned may be charged against and recovered from the said Sheriff by the

If not served within fifteen days may be withdrawn and served by any literate person.

(*f*) The latter part of this section authorizes proceedings against a foreign corporation, provided such corporation have an agent in Ontario for the transaction of the business of the corporation: see *Wilson* v. *The Detroit and Milwaukee R. R. Co.*, 3 Prac. R. 37. *Kisbey* v. *The Chester and Holyhead Railway Co.*, 6 Ir. C. L. R. 393. But the station master of a railway company, the head office of which is not within Ontario, is not an agent on whom service can be effected under this section: *Taylor* v. *Grand Trunk R. R. Co.*, 5 U. C. L. J., N. S., 18; see also *Thompson* v. *N. B. R. R. Co.*, 42 Law Times, 95, Ex. M. T. 1866. This provision in cases of contract, can only apply either where the contract has been entered into in this province, or entered into abroad, to be executed here: see *Thelwall* v. *Yelverton*, 12 W. R. 877. In connexion with this note, two English decisions may be mentioned, though each of them turned it is conceived upon the particular circumstances of the case. 1. *Wilson* v. *The Caledonian R. R. Co.* 5 Ex. 822, where the principal office was in Scotland, service on the secretary while in London on temporary business, was held good. 2. *Evans* v. *Dublin and Drogheda R. R. Co.*, 2 D. & L. 865, where the principal office was in Ireland, and there was no office in England, service upon one of the directors of the company in London, was held to be null and void.

(*g*) Original. Not in the English Common Law Procedure Acts.

(*h*) *Shall*—imperative: Con. Stat. U. C. cap. 2, s. 18, sub-s. 2.

(*i*) The rule is not to tax mileage, &c., unless where mesne process is served by the Sheriff: section 19. This section is an exception to that rule created owing to the necessity of the case. If the Sheriff return the writ within the time limited, he is not apparently subject to any penalty.

Plaintiff or his Attorney. (*j*) 16 Vic. c. 175, ss. 13, 14. See 20 Vic. c. 57, s. 28.

19. (*k*) The person serving (*l*) such Writ (*m*) shall, within three days next after such service, indorse thereon (*n*) the

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(*j*) The penalty (payment of costs of writ not returned) arises only in the event of the neglect or refusal of the sheriff to return it after the expiration of the fifteen days: see further Stat. 27 & 28 Vic. cap. 28, ss. 34, 35, 36.

(*k*) The first part of this section is adopted from Eng. Act 15 & 16 Vic. cap. 76, s. 15, and is substantially the same as our old Rule 3 H. T. 13 Vic., which was copied from Eng. R. G. M. T. 3 Wm. IV. No. 6: Jervis, N. R. p. 94. The origin of the rule is Eng. Stat. 2 Wm. IV. cap. 39, s. 1, from which our 12 Vic. cap. 63, s. 22, was taken.

(*l*) Who is the proper person to serve a writ of summons? Under the old practice, the service of a non-bailable writ of *ca. re.*, the process then in use for the commencement of non-bailable actions, could only be effected by the sheriff, his deputy, or bailiff: Stat. 2 Geo. IV. cap. 1, s. 4, now repealed; also see *Whitehead* v. *Fothergill et al*, Draper's Rep. 210. This was held to be the law even in a case where the deputy was a party to the suit: *Ruttan* v. *Ashford*, 3 O. S. 302. The direction of the Stat. 2 Geo. IV. cap. 1, s. 4, was positive. Though this statute was so construed, it was thought that the spirit of the act had a contrary leaning: *Whitehead* v. *Fothergill et al*, Draper's Rep. 210. Before non-bailable writs of *ca. re.* were adopted, writs of summons were in use. When the *ca. re.* was substituted for summons (2 Geo. IV. cap. 1, s. 4) it became necessary to enact that the sheriff should serve it, for he could not otherwise have been bound to serve a copy of process which on the face of it *required the defendant to be arrested.* Hence when non-bailable writs of *ca. re.* were abolished, and writs of summons restored, under 12 Vic. cap. 63, it was held by Macaulay, J., that service by a person other than a sheriff, his deputy, or bailiff, was not irregular: *Leach* v. *Jarvis*, 1 Cham. R. 264. Plaintiff's right to tax costs for such services, was doubted by the learned judge: *Ib.* Subsequently Stat. 16 Vic. cap. 175, s. 13 (now repealed), was passed, which enacted that "no fees shall be allowed for the service or mileage of writs of summons or other mesne process, unless served by the sheriff, his deputy, or bailiff, &c." For a review of our statutes bearing upon the subject, anterior to 16 Vic. cap. 175, see *Leach* v. *Jarvis*, 1 Cham. R. 269. Since the latter statute has been repealed, it must be taken that the law is the same as if it had never been enacted. Then the law would be that laid down in *Leach* v. *Jarvis*, by Macaulay, J. Service by any person other than the sheriff, his deputy, or bailiff, is regular. Such is the law at the present time. The writ may be served by the attorney or his clerk, or in fact by any person who can read and write, so as to be able to swear that he served a true copy of the writ, &c. There is no legislative declaration to the contrary now in force in this Province. The only penalty is loss of mileage, &c.

(*m*) It is not clear whether the summons here meant, is the ordinary summons under section 2, and no other. Provision is made by this act, for the issue of two other forms of summons, one to be served on British subjects resident abroad: section 43. And the other on foreigners, also abroad: section 45. Since writs of summons on foreigners are not to be served, but only a *notice* thereof, it may be presumed that the section under consideration will not apply: section 45. Until a decision to the contrary, it will be advisable to indorse the time of service of writs served on *British subjects* abroad, as prescribed by this section: 1 Chit. Arch. 12 ed. 201.

(*n*) The indorsement may be made by a marksman, if able to read writing or printing: *Baker* v. *Coghlan*, 7 C. B. 131. The rule is sufficiently complied with

Time of service of Writs to be indorsed three days after service.

day of the week and of the month of the service thereof, (*o*) otherwise the Plaintiff shall not be at liberty in case of non-appearance to proceed under this Act; (*p*) and every affidavit of service of such Writ shall mention the day on which such indorsement was made, (*q*) and in the taxation of costs no fees shall be allowed for the mileage or service of the Writs unless served and sworn in the affidavit of service to have been served by the Sheriff, his Deputy or Bailiff being a lite-

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when all but the handwriting is either printed or in the handwriting of a stranger. The party putting his mark to it, thereby becomes responsible for the whole: *Baker* v. *Coghlan*, 7 C. B. 131, *per* Wilde, C. J. This section does not apply to actions of ejectment: *Leeson* v. *Higgins*, 4 Prac. R. 34.

(*o*) The object of the rule is "to pin the party to a precise date of service:" *Baker* v. *Coghlan*, 7 C.B. 131, *per* Maule, J. Held necessary on writ of ejectment: *Vandeleur* v. *Smith*, 3 Ir. C. L. R. 86. A mere process-server is not ordinarily liable in an action for negligence in not making the endorsement: *Curlewis* v. *Broad*, 1 H. & C. 322. The form may be thus: "This writ was served by me, X. Y., on C. D., on ——— the ——— day of ——— 18 —, X. Y."

(*p*) This indorsement must be made when the court directs a special mode of service, as well as where the service is personal: *Rogers* v. *Burke*, 9 Ir. C.L.R. App. xxxiv. The penalty for neglect under the old rule, was that the plaintiff should not be at liberty to enter an appearance for the defendant. This was almost in effect to prevent plaintiff from going on with his suit, if defendant did not voluntarily appear, and the consequences of such neglect seem to be still the same. The indorsement shall be made, "otherwise the plaintiff shall not be at liberty in case of non-appearance, to proceed under this act:" see *Curlewis* v. *Brood*, 1 H. & C. 322. Appearances per statute are virtually abolished: section 54. Where defendant snatched the original writ out of the hands of the person serving him, ..ad kept it, and the party who served the writ was in consequence unable to make the indorsement on "such writ," the court granted a rule to show cause why the defendant should not return the writ, or why in default of his so doing plaintiff should not be allowed to enter an appearance for him without indorsement, *i. e.* "to proceed with his suit:" *Brook* v. *Edridge*, 2 Dowl. P. C. 647. But when the original writ was sent by plaintiff to defendant at his request, and he kept it and did not appear, the court refused to allow the plaintiff to enter an appearance for defendant without the indorsement: *Atkinson* v. *Howell*, 7 M. & W. 213. Plaintiff in this case brought himself into the difficulty by not following the usual course. No doubt, as a man of honor, defendant was bound to appear; but in point of law, if he did not choose to do so, the court was not bound to assist plaintiff: *Ib. per Cur.* Where the "three days" for making the indorsement had been allowed to elapse owing to the falsehood of defendant in denying herself to be the party named in the writ, the indorsement was allowed to be made: *Burrows et al* v. *Gabriel et al*, 4 D. & L. 107. Where a person who made the service died within the "three days," a judge at chambers allowed the substitution of an affidavit by plaintiff's attorney of the facts, and his belief of the service: *MS.* Lush. Prac. 3 ed. 374; but see *Studdert* v. *Leary*, 7 Ir. C. L. R. 543; *Johnston* v. *Briscoe*, 8 Ir. C. L. R. App. xxx.

(*q*) The affidavit should show that the writ and indorsement were regular: *Wakeley* v. *Teesdale*, 2 L. M. & P. 85. It should be made by the person who served the writ. If an officer of the court, he may be compelled to make the affidavit: *Rex* v. *Rudge*, 1 W. Bl. 432. It ought not to be made before the plaintiff's attorney or his clerk or agent: *In re Gray*, 21 L. J. Q. B. 38C.

rate person, (or by a Coroner when the Sheriff is a party to the suit), except as provided in the last preceding section of this Act. (*r*) 19 Vic. c. 43, s. 32; 20 Vic. c. 57, s. 28.

Concurrent Writs may be sued out.

20. (*s*) The Plaintiff in any action may, at any time during six months from the issuing of the original Writ of Summons, (*t*) sue out from the office whence the same issued, one or more concurrent Writ or Writs of the same kind (*u*),

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(*r*) The effect of this part of the section is to secure to the sheriff or coroner, as the case may be, the fees for service of mesne process. Others may serve such process, but no charge can be made for it. This part of the section, it is apprehended, relates only to service of writs intended for service in this Province.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 75, s. 9. The practice was first allowed by the courts as being necessary and convenient. Being such, it is continued by the Common Law Procedure Act: see first report of Commissioners, s. 5.

(*t*) Suppose original writ to be renewed under the next following section (21), would the time for issuing concurrent writs be thereby extended? Would there be six months allowed from the date of the renewal, for the issue of a concurrent writ? What is the meaning of the expression, "original writ." Does it mean original writ as contra-distinguished to "renewed" writ? These questions have been judicially considered. It has been held—1. That a concurrent writ can only be issued within six months and no longer *from the first commencement of the action by the "original writ."* 2. That if a writ issued before the act came into operation be renewed under the act, becomes by such *first* renewal *quasi*, the "original writ," on which a concurrent writ may be issued within six months from such renewal. 3. Where therefore a writ of summons, issued before the first English Common Law Procedure Act came into force, was renewed from time to time under that act, and within six months after the last renewal, *but more than six months from the first renewal*, the plaintiff issued, for the first time, a concurrent writ for service abroad, that writ was set aside as irregular: *Coles* v. *Sherard*, 11 Ex. 482.

(*u*) These writs are issued when it is desirable to proceed against a defendant without delay, and it is doubtful in which county he resides, or if known it is anticipated that he is about to flee from one county to another. Under the old practice a defendant was described in the writ as of "Middlesex;" but, it being afterwards discovered that he resided in "Surrey," the writ was altered by plaintiff's attorney, by substituting the latter county for the former. The writ not having been re-sealed, the court set the proceedings aside: *Siggers* v. *Sansom*, 2 Dowl. P. C. 745. To obviate the trouble and difficulty which may arise in cases of this nature, it is enacted that concurrent writs may be issued. Besides it is now enacted, "that the writ of summons may be served in *any* county:" section 16. Concurrent writs are in fact original writs, describing defendant as residing in different counties. One writ only is necessary for the commencement of an action: section 2. If several be issued, defendant is only liable to the costs of the writ served upon him: *Dunn* v. *Harding*, 2 Dowl. P. C. 803. Even of concurrent writs of capias, defendant cannot complain, as he can be arrested only once: *Ib.* It was therefore held that concurrent writs of capias might issue into different counties: *Rodwell* v. *Chapman*, 1 C. & M. 70; *Angus* v. *Coppard et al*, 3 M. & W. 57; *Angus* v. *Medwin et al*, 7 L.J. N.S. Ex. 10. Concurrent writs of summons, where there is only one defendant, may not, under the Common Law Procedure Act, be as necessary as formerly. It is sufficient in the summons to state the residence

to be tested of the same day as the original Writ, (*v*) and to be marked by the Clerk or Deputy Clerk of the Crown or Clerk of the County Court issuing the same with the word *concurrent* in the margin, with the memorandum required by the sixth section of this Act; (*w*) but such concurrent Writ or Writs shall only be in force for the period during which the original Writ continues in force. (*x*) 19 Vic. c. 43, s. 27.

Within what time Writs must be served, &c.

21. (*y*) No original Writ of Summons shall be in force for more than six months (*z*) from the day of the date thereof inclusive; (*zz*) but if any Defendant therein named has not

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or "supposed residence" of the party defendant: section 2. And the writ when issued, may be served upon defendant in any county in which he may be found: section 16. The main object of this enactment is to meet the case of several defendants residing in different counties. And a concurrent writ for service, within the jurisdiction, may be marked as concurrent with one for service without the jurisdiction, and *vice versa*: section 46. Concurrent writs will therefore be a great convenience where there are several defendants resident in different places, and it is desired to proceed against all without delay. They cannot be an inconvenience to any one defendant, for he would be liable only to the costs of the writ served upon him individually: *Angus* v. *Coppard et al*, 3 M. & W. 57; *Crow* v. *Crow et al*, 1 D. & L. 709.

(*v*) Though tested on the same day as the original writ, it must be remembered that the concurrent writ need not be issued on that day. It may be issued at any time "during six months from the issuing of the original writ."

(*w*) Memorandum stating from what office and in what county such writ was issued.

(*x*) Original may be renewed and continued in force for a period longer than six months: section 21. The difference between a concurrent writ under this act, and an alias writ under the old practice, appears to be this: a concurrent writ must be issued while the original writ is in force; an alias was only resorted to when the exigency of the original writ had been spent.

(*y*) Taken from 15 & 16 Vic. cap. 76, s. 11. The commissioners were not in favour of the writ of summons having an indefinite duration. They recommended that "it should have a limit, but that it might be renewed, and if renewed, should for all purposes be renewed in the same manner." The object is to provide for cases where plaintiffs may be really unable to serve the writ within the period limited by the original writ. The legislature have in this provision followed their suggestions. The effect of the section will be, *first*—to prevent the necessity for *alias* and *pluries* writs; and, *secondly*, in cases where the Statute of Limitations is pleaded to prevent the trouble and expense of making up and proving the roll on which the writs and continuances were formerly entered.

(*z*) In computing the six months, the long vacation from 1st July to 21st August is included: *Mullin* v. *Bonjor*, 5 Ir. C. L. R. 475.

(*zz*) A defendant who has been served with a writ, after its exigency has expired, should not treat it as a nullity, but apply to set the service aside: *Hemp* v. *Warren*, 2 Dowl. N. S. 758. And where a writ under these circumstances was served at defendant's request, in order to save expense, the service was held good:

been served therewith, (*a*) the original or any concurrent Writ may at any time before its expiration be renewed for six months from the date of such renewal, (*b*) and so from time to time, (*c*) during the currency of the renewed Writ, by being marked in the margin, with a memorandum to the effect

Renewing Writs.

Coates v. *Sandy*, 2 M. & G. 313. It was held not to be a waiver by defendant, but an agreement to accept service after the time for service had expired: *Ib.* As to the course to be taken by parties, served by mistake, see *Walker* v. *Medland*, 1 D. & L. 159; *Richards* v. *Hanley*, 10 Jur. 1057; *Stevenson* v. *Thorne*, 13 M. & W. 149. It is not necessary for a party so served to state in his affidavit when applying to set aside the copy and service of the writ, that he is the defendant in the cause: *Stevenson* v. *Thorne*, 13 M. & W. 150, *per* Pollock, C. B.

(*a*) Service on a wrong person is the same as no service at all: see ——— v. *Johnson*, 2 B. & C. 95. Any person served with a writ may apply to set it aside, though he may not be the party intended to be served: *Pilbrow* v. *Pilbrow*, 3 C.B. 730; *Stevenson* v. *Thorne*, 13 M. & W. 149. It must appear, if the application be made by defendant to set aside proceedings because writ not served in time, that the writ did not come to his knowledge or possession: *Johnson* v. *Smallwood*, 2 Dowl. 586; *France et al* v. *Wright*, 3 Dowl. 325; *Emerson* v. *Brown*, 8 Scott, N.R. 219; *Prov. Ins. Co.* v. *Shaw*, 19 U. C. Q. B. 360. Such an application must be made promptly: *Tilly* v. *Hodgson*, 2 D. & L. 365; *Fox et al* v. *Money*, 1 B. & P. 250; *Rex* v. *Hare et al*, 1 Str. 155; *Steele* v. *Mogan*, 8 D. & R. 450; *Newnham* v. *Hanny*, 5 Dowl. 263; *Anon*, 1 Chit. 129; *Hompay* v. *Kenning*, 2 Chit. 236; *Holliday* v. *Lewes*, 3 Bing. N. C. 541.

(*b*) It is now settled that the six months must be reckoned so as to include the day of renewal: see *Black* v. *Green*, 15 C. B. 262; *Anon*, 24 L. J. Q.B. 23; *Anon*, 1 H. & C. 664; *Fisher* v. *Cox*, 16 L. T. N.S. 397. Under the English Act 2 Wm. IV. cap. 39, it was held that in order to renew an original writ by the issue of an *alias*, when the original writ would expire on 7th May, the subsequent process should be entered of record no later than 6th June: *McKellar* v. *Reddie*, 4 M. & G. 769.

(*c*) It is to be understood that a writ once renewed may be again and again renewed, if necessary. The renewal of the first to be effected within six months from the date of the original writ, including such date. The second and subsequent renewals to be effected within six months from the date of the first renewal. When a writ has been once renewed, the time does not run from the date of the original writ, but from the time of the renewal: *Anon*, 24 L. J. Q. B. 23, *per* Crompton, J. If the time expires on Sunday 5th, the writ ought to be renewed on Saturday 4th. The plaintiff has not till the following Monday: *Ib.* The court will not allow a renewal *nunc pro tunc* where there is neglect of the plaintiff's attorney: *Evans* v. ———, 2 B. & S. 45. Especially if no default on the part of an officer of the court: *Nazer et al* v. *Wade et al*, 1 B. & S. 728; see also *Bailey* v. *Owen*, 9 W. R. 128. The method of renewal here provided is intended as substitutionary for the issue of *alias* and *pluries* writs. The cases decided under the latter practice were the following: an indorsement on an *alias* or *pluries* writ must contain the date of the first writ and return thereto: *Williams* v. *Williams*, 2 Dowl. N. S. 209. But an amendment in this particular was permitted: *Ib.* and see *Mayor* v. *Spalding*, 1 D. & L. 878. Where an *alias* had not issued in due time, the court refused to amend the date of the preceding writ, in order to admit of its issue: *Campbell* v. *Smart et al*, 5 C. B. 196; s. c. 5 D. & L. 335. An *alias* was amended by inserting the date of the first writ: *Culverwell* v. *Nugee*, 4 D. & L. 30.

following: (*d*) "Renewed for six months from the ——— day of ———," signed by the Clerk or Deputy Clerk of the Crown or Clerk of the County Court who issued the Writ, or his successor in office, upon delivery to him by the Plaintiff or his Attorney, of a *Præcipe*, in the form formerly required to be delivered upon the obtaining of an *Alias* Writ; (*e*) and the Writ so renewed, shall remain in force and be available to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing the original Writ. (*f*) 19 Vic. c. 43, s. 28.

Effect of renewal as to Statute of Limitations.

Memorandum of renewal to

22. (*g*) The production of the Writ of Summons with the memorandum signed shewing such Writ to have been renewed, (*h*) shall be sufficient evidence of its having been so

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(*d*) English Act. "*By being marked with a seal*," &c.

(*e*) The *præcipe* for an *alias* writ only differed from the ordinary *præcipe* by the insertion of the word "*alias*." The form now will be, "Renewal writ of ——— for A. B. against C. D., of ——— in the county of ———."

(*f*) The production of the writ, with a mem. purporting to be signed as above required, and showing such writ to have been renewed, is sufficient evidence of renewal: section 22. The question of renewal arises on an issue joined on a plea of the Statute of Limitations: see *Higgs* v. *Mortimer*, 5 D. & L. 756. Where the writ issued within six months after the cause of action accrued, and was not duly continued, pursuant to Eng. Stat. 2 Wm. IV. cap. 39, s. 10, it was held that the defendant was not bound to plead such non-continuance specially, but might take advantage of it, under the general plea that "the cause of action did not accrue within six years next after the commencement of the suit: *Pratt* v. *Hawkins*, 15 M. & W. 399. For this purpose the last writ served was held to be the commencement of the suit: *Ib.* Where the original *alias* and *pluries* writs of *ca. re.* had been sued out, and the last writ served, it was held that the plaintiff, in order to acquire the advantage of having the action considered as commenced by the first writ, with reference to a plea of payment or the Statute of Limitations, should show at the trial that the first writ was returned: *McLean* v. *Knox*, 4 U.C. Q. B. 52.

(*g*) Taken from English Act 15 & 16 Vic. cap. 76, s. 13.

(*h*) The mere production of the writ with the necessary memorandum, purporting to be signed, &c., is all that is required. No extrinsic proof as to the genuineness of the officer's signature seems to be necessary. It will be assumed *prima facie* to be his. It has been held that the production of first process, with the minute of the deputy clerk of the crown, "issued 5th August, 1843, W. D. M., D. C. C.," was *prima facie* proof of the fact and date of issue: *Upper* v. *McFarland et al*, 5 U. C. Q. B. 101. The court observed that it has long been the practice so to treat the writ at *Nisi Prius*, and as the practice is convenient and saves expense to the parties, it ought to be upheld: *Ib.* 103, *per* Robinson, C. J. It is only necessary to state in the marginal memorandum the office whence the writ issued: section 6. The writ must bear date on the day when issued: section 24. The date of issue will therefore appear from the teste, and not necessarily from the marginal note, as formerly.

renewed, and of the commencement of the action as of the first date of such renewed Writ. (*i*) 19 Vic. c. 43, s. 30. be sufficient evidence thereof.

WRITS OF CAPIAS.

23. (*j*) No writ of *Capias* shall be in force for more than two months (*k*) from the day of the date thereof inclusive; (*l*) nor shall any such writ be renewed, (*m*) but on the expiration thereof a new order may be obtained in the manner directed by the Consolidated Statute for Upper Canada respecting "Arrest and Imprisonment for debt." (*n*) 22 Vic. c. 96, ss. 7, 5. (1858.) Writs of Capias to be in force two months, and not renewable.

24. Every such Writ shall bear date on the day on which the same issues. (*o*) 19 Vic. c. 43, s. 19. Date of.

25. Every such Writ shall be indorsed with the name and place of abode of the Attorney actually suing out the same, and when he sues out the same as agent for another Attorney, the name and place of abode of such other Attorney shall also be indorsed thereon. (*p*) 19 Vic. c. 43, s. 21. Indorsation on.

26. When the Writ is sued out by the Plaintiff in person, he shall indorse thereon a memorandum expressing that the same has been sued out by him in person, and mentioning If sued out in person.

(*i*) It may be a question whether the writ so produced, can be looked upon as a record of the court. If a record, then parol evidence would not be admissible to contradict it. It might be argued that as the new method of renewing writs, by signing a memorandum in the margin, is to have the effect of an *alias* or *pluries* writ; so by analogy the production of a writ thus renewed, would be the same in effect as the production of a continuance roll under the old practice. A continuance roll from the proper custody, has been held to be a record of the court, and as such not to be contradicted by parol testimony: *Prentice* v. *Hamilton*, Draper's R. 410. The objection to the renewed writ being so considered if left in the possession of plaintiff, would perhaps be that it did not come from the "proper custody."

(*j*) An original provision, first enacted in 22 Vic. cap. 96, ss. 5, 7.

(*k*) Unlike a writ of summons, which remains in force for six months: sec. 21.

(*l*) See note *zz* to section 21.

(*m*) Under the Common Law Procedure Act, 1856, a capias might be renewed in the same manner and with the same effect as a summons: 19 Vic. cap. 43, s. 28. The statute 22 Vic. cap. 96, s. 7, first made the alteration which is preserved in this section.

(*n*) Con. Stat. U. C. cap. 24.

(*o*) See notes to section 11.

(*p*) See section 12, and notes thereto.

the City, Town, incorporated or other Village or Township within which such plaintiff resides. (*q*) 19 Vic. c. 43, s. 21.

Concurrent Writs of Capias may issue.

27. Concurrent Writs of *Capias* may be issued from time to time in like manner and form as the original Writ in the action, and shall only be in force for the same period as such original Writ, and no longer. (*r*) 19 Vic. c. 43, s. 27.

Copies, &c., to be served.

28. (*s*) Every Writ of *Capias*, and so many copies thereof as there are persons intended to be arrested thereon or served therewith, together with every memorandum or notice subscribed thereto and all indorsements thereon, (*t*) shall be delivered with the original Writ to the Sheriff or other officer to whom such Writ is directed and who has the execution and return thereof, (*u*) and the Plaintiff or his Attorney may order such Sheriff or officer, to arrest one or more of the Defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such Sheriff or officer. (*v*) 19 Vic. c. 43, s. 22.

29. (*w*) Such Sheriff or officer shall, within two months

(*q*) See section 13, and notes thereto.

(*r*) See section 20, and notes thereto.

(*s*) See note *i* to section 3.

(*t*) *Qu.*—If matter required to be subscribed on an original writ is indorsed, or *vice versa*, would the writ be bad? see *Chamberlain et al* v. *Wood et al*, 1 Prac. R. 195, *per* Burns, J. It would seem as regards a copy, that if it have at the *foot* a copy of the *indorsement* on the original writ, there would be no irregularity: *Ib.* So where the warning was indorsed on the back, instead of its appearing on its face, the copy was held to be regular: *Gilmour* v. *McMillen*, 3 U. C. L. J. 71.

(*u*) *Sheriff or other officer, &c.* The process may be delivered to the coroner, if there should be any just exception to the sheriff: Jervis, Cor. 3 ed. p. 53. Upon the death of the sheriff the deputy is entitled to act until the appointment of a successor: Con. Stat. U. C. cap. 38, s. 14. Process when intended for the sheriff should, properly speaking, be delivered to him at his office.

(*v*) It is sufficient to serve a copy of the writ *immediately after* the arrest: *McNider* v. *Martin*, 1 Prac. R. 205. If a party when arrested, refuse to receive a copy of the writ offered to him, he will not be allowed afterwards to urge as a ground for his discharge, that a copy of the writ was not left for him: *Hetherington* v. *Whelan et al*, 1 Cham. R. 153; *McNider* v. *Martin*, 1 Prac. R. 205. It has been the practice, simply to serve a copy of the capias on defendants who are not intended to be held to bail. The practice is retained by this act. Where, under the old practice, the action was commenced against several defendants by summons, and after commencement of action, plaintiff desired to arrest one of the defendants: *held* that he might do so by capias, without serving more than the defendant to be arrested: *Chamberlain et al* v. *Wood et al*, 1 Prac. R. 195.

(*w*) An original provision.

from the day of the date of the Writ of *Capias*, but not afterwards, execute the same according to the exigency thereof, (*x*) and shall upon or immediately after the execution of such process cause one copy thereof, and of the memorandums and indorsements thereon, to be delivered to every person upon whom he executes the same whether by service or arrest. (*z*.) Sheriff to execute within two months from date.

30. Such service shall be of the same force and effect as the service of the Writ of Summons hereinbefore mentioned; and subsequent proceedings whether after an arrest and service or service only, shall, in all the Courts, be according to the practice in force in the Superior Courts of Common Law in like cases. (*a*) 19 Vic. c. 49, s. 22; 22 Vic. c. 96, s. 5. Service equivalent to service of Writs of Summons.

31. (*b*) Any person arrested upon any writ of *Capias* issued out of either of the Superior Courts of Common Law (*c*), may apply at any time after his arrest (*d*) to the Court in which the action has been commenced, (*e*) or to a Defendant may apply to a Judge to be discharged from custody.

(*x*) This follows from section 23, which declares that no writ of capias shall be in force for more than two months.

(*z*) See note *v* to section 28.

(*a*) See section 9 *et seq.* and notes thereto.

(*b*) This section is taken from Stat. 22 Vic. cap. 96, ss. 8 and 10, the origin of which is apparently English Stat. 1 & 2 Vic. cap. 110, s. 6.

(*c*) Applies only to mesne process: *Bank of Montreal* v. *Campbell et al*, 2 U. C. L. J. N. S. 18.

(*d*) If the application be made on the ground of irregularity, it is apprehended it should be made promptly: *Sugars* v. *Concanen*, 5 M. & W. 30. But if founded on a substantial objection to the arrest, may be made at any time during the pendency of the action: *Walker* v. *Lumb*, 9 Dowl. 131. And a defendant is not precluded from making the application by having put in special bail: *Bowers et al* v. *Flower*, 3 Prac. R. 62.

(*e*) The court out of which the process issues may interfere either by virtue of its general jurisdiction or under the statute, to order the discharge of the defendant from custody, if it thinks the materials before the judge were insufficient, or that he exercised an improper discretion: *Graham et al* v. *Sandrinelli*, 16 M. & W. 191; *Brown* v. *Riddell*, 13 U.C. C.P. 457. The party arrested may on such an application use affidavits to explain or contradict those on which the order for the capias was granted: *Gibbons* v. *Spalding*, 11 M. &. W. 173. And they may be answered by the plaintiff in showing cause: *Ib.* The court would not before the act entertain any discussion as to the existence or non-existence of the cause of action: *Brackenbury* v. *Needham*, 1 Dowl. P. C. 439. Since the act, the law is different in this respect: *Pegler* v. *Hislop*, 1 Ex. 437. But the court will not on that ground *per se* interfere, unless it is made clear that the plaintiff has no cause of action: *DeLisle* v. *LeGrand et al*, 6 U.C. L.J. 12; *McInnes* v. *Macklin*, 6 U.C. L.J.

Power of Judge.

Judge of one of such Courts, (*f*) for an order or rule on the Plaintiff, to show cause why the person arrested should not be discharged out of custody; (*g*) and such Court or Judge may make absolute or discharge any such order or rule and direct the costs of the application to be paid by either party, or make such other order therein as to such Court or Judge may seem fit; (*h*) but any such order made by a Judge may

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14. If the ground of the application be that the defendant had no intention of quitting Canada, he should swear positively to that effect: *Robinson* v. *Gardner*, 7 Dowl. P. C. 716. Where defendant had no intention of quitting at the time of the arrest, but had some intention of doing so in about two months afterwards, the arrest was held to be premature: *Pegler* v. *Hislop*, 1 Ex. 437; see also *Bowers et al* v. *Flower*, 3 Prac. R. 62. Where the objection is rested on the ground that the order was granted on insufficient affidavits, the defendant should bring them before the court: *Needham* v. *Bristow*, 1 Dowl. N.S. 700; *Heath* v. *Nesbitt*, 2 Dowl. N. S. 1041. The motion is an original one and not to be considered as a revision of the discretion of the judge who granted the order: *Lamond* v. *Eiffe*, 3 G. & D. 256. A defendant who claimed to be privileged from arrest was held precluded from setting up a ground of privilege not urged at chambers: *Flight* v. *Cook*, 1 D. & L. 714. Where it appears that the debt for which defendant was arrested was contracted through fraud, and that defendant had no more ties in Canada than anywhere else, his application was refused: *Terry* v. *Comstock*, 6 U. C. L. J. 235. But where defendant was illegally detained in close custody, without warrant, at the instance of plaintiff, on a charge involving the subject matter which was afterwards stated in the affidavit for a capias, as creating the demand for which the defendant was ordered to be held to bail, the defendant was discharged on entering a common appearance.—*Palmer* v. *Rodgers*, 6 U. C. L. J. 188.

(*f*) The party arrested under the order of a judge may apply to another judge for his discharge, and may appeal to the court from the decision of the latter: *Graham* v. *Sandrinelli*, 16 M. & W. 191; *Moore* v. *Magan*, 16 L. J. Ex. 57. But it has not yet been decided by the court whether, if the judge secondly applied to, differ from the first on the same state of facts, he has or has not power to discharge the defendant, as on an appeal to the court: *Terry* v. *Comstock*, 6 U.C.L.J. 235, *per* Draper, C. J.; *Palmer* v. *Rodgers*, 6 U. C. L. J. 188, *per* Richards, C. J.; *Demill* v. *Easterbrook*, 10 U. C. L. J. 246, *per* Adam Wilson, J. In an action by husband and wife for verbal slander, not actionable without proof of special damage, and the affidavit stated only that persons not named had in consequence withdrawn their custom, the learned judge to whom defendant applied for his discharge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only, expressing no opinion as to his right to review the decision of the judge who ordered the arrest: *Allman et ux* v. *Kensel*, 3 Prac. R. 110, *per* Hagarty, J.: see note *w* to section 48.

(*g*) This section contemplates simply "a discharge from custody," leaving the capias in force as a protection for anything done under it. The right to set aside the capias, or more properly the order on which it issued, on grounds of irregularity, exists independently of this section and is governed by principles entirely different to those applicable to this section: see *Hopkins* v. *Salembieer*, 5 M. & W. 493.

(*h*) It is not usual to make absolute the rule or order with costs, unless some deceit has been practised upon the judge who granted the order for arrest: see *Bowers et al* v. *Flower*, 3 Prac. R. 62; *Brown* v. *Riddell*, 13 U. C. C. P. 457.

be discharged or varied by the Court on application by either party dissatisfied with such order; (*i*) and the Judge, or acting Judge of a County Court making any order to hold to bail, whether in one of the Superior Courts or in his own Court shall, in respect to such order, the Writ of *Capias* thereon issued, and the arrest made thereupon, possess all the powers given to a Judge of either of the said Superior Courts under this Section, and may in like manner, on application to him, order the Defendant to be discharged out of custody, direct the costs of the application to be paid by either party, or make such order therein as to such County Court Judge seems fit. (*j*) 22 Vic. c. 96, ss. 8, 10.

Court may discharge or vary Judge's order.

BAIL.

32. (*k*) If any Defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the Plaintiff may, (*l*) before the end of the next term after the arrest of the Defendant, declare (*m*) against him and proceed thereon, in the manner and according to the directions contained in the one hundredth and one hundred and thirty-second rules of the Superior Courts of Common Law, made in Trinity Term, in the twentieth year of Her Majesty's reign. (*n*) 19 Vic. c. 43, s. 22.

Declaration when to be made, when defendant is imprisoned for want of bail.

33. (*o*) The Sheriff to whom a *Capias*, issued out of a County Court is directed, shall take bail from any Defendant arrested thereon, and if required shall assign the bail bond in like manner as the law directs in cases where like process is

On Writs from County Courts, the Sheriff to take bail from persons arrested

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(*i*) See note *f* to this section.

(*j*) The county judge or acting county judge has, for the purposes of this section in regard to any order made by himself for a capias, all the powers of a judge of one of the superior courts, but has no power to sit in review on orders made by a judge of the superior court or a county court judge other than himself.

(*k*) Taken from section 22 of 19 Vic. cap. 43.

(*l*) "*May*," construed "shall:" see *Tyson* v. *McLean*, 1 Prac. R. 339.

(*m*) Merely filing the declaration is not "declaring," within the meaning of this section. It must be served: *Tyson* v. *McLean*, 1 Prac. R. 344, *per* Richards, J.; see also R. G. pr. 100.

(*n*) Rules 100 and 132 will be found in a subsequent part of this work.

(*o*) Taken from the original County Court Act, 8 Vic. cap. 13, ss. 21, 26.

and assign bail bond, &c.

issued from one of the Superior Courts of Common Law, and such assignment shall have the same effect as if the Writ had issued from one of the said Superior Courts. (*p*) 8 Vic. c. 13, ss. 21, 26.

(*p*) It may not be out of place to make some remarks here as to bail, and the practice of putting in bail in the superior courts of law.

The writ of capias commands the sheriff to take defendant and him safely keep until he shall have given him (the sheriff) bail, or until he shall by other lawful means be discharged from his custody: C. L. P. A. sch. A. No. 2. The capias upon which arrests are made, originally issued for injuries, *vi et armis*, and in such cases only were arrests at the common law allowable: 3 Bl. Com. 281. Various early statutes permitted arrests to be made in other cases, but the power to arrest appears to have been much abused. And although it seems the sheriff had power at common law to admit to bail: 2 Saund. 60, *b* (8); Tidd's Pr. 9 ed. 221, yet *he was under no obligation to do so.* Prisoners were therefore compelled to resort to the tedious and expensive proceeding "*de homine replegiando*," to recover their liberty, by which writ, if obtained, they were literally replevied by their friends. To remedy this state of the law, Stat. 23 Hen. VI. cap. 9, was passed.

This statute which extends only to persons arrested on *mesne* process: *Rogers* v. *Reeves*, 1 T. R. 421, *per* Buller, J., directs sheriffs to let out of prison all manner of persons by them arrested, or being in their custody, in any action personal, upon *reasonable sureties of sufficient persons*, to keep their days in such place as the writ doth require.

This however, was but a partial correction of the evil for the *amount* of the reasonable surety to be taken by the sheriff, was not defined, nor could it well be ascertained, as the process communicated no further information than the form of action; and even that might be and was almost always fictitious. This occasioned the passing of the 13 Car. II. stat. 2, cap. 2, which required the true cause of action to be expressed in the writ, otherwise no greater security should be taken than £40. Also see 12 Geo. I. cap. 29, s. 2.

Under the joint operation of these statutes, the sheriff is now obliged to admit to bail persons arrested on *mesne* process; provided good and sufficient sureties are tendered to him, but not otherwise. The bail when taken is known as sheriff's bail, or bail *below*, and is an undertaking by the sureties "to *keep their day when the writ doth require.*" The writ at present in use, requires defendant to put in special bail, that is, bail to action, or bail *above*, as it is technically called, within ten days after the execution of it upon him. It is in the power of defendant at any time within these ten days, to avail himself of the Stat. 23 Hen. VI. cap. 9, by tendering bail to the sheriff. The bond to be taken by the sheriff, recites the writ and arrest, and is conditioned to be void "if defendant do put in *special bail* to the said action, as required by the said writ."

By special bail, or bail *above*, is meant the procuring of two or more persons to acknowledge a recognizance of bail in the sum sworn to, and mentioned on the face of the bail-piece. It may be remarked that the English practice differed in the several courts. In the Queen's Bench, the bail acknowledged a sum certain, being double the sum sworn to in the affidavit; while in the Common Pleas no specific sum was stated. The practice of the Common Pleas in this respect, seems to have been adopted in Upper Canada. But in any event, the liability of the bail is the same in all courts; that is to say, the amount sworn to and costs: Petersdorff on Bail, 350, 351; R. G. pr. No. 89. The condition of the recognizance must follow our statute, which enacts that "if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render himself, herself or themselves, to the custody of the sheriff of the

34. Special bail may be put in and perfected according to the established practice; (*q*) and after special bail has been so put in, the Plaintiff may, by filing a declaration or otherwise, proceed to judgment, in like manner as if the action had been commenced by Writ of Summons and the Defendant had appeared thereto. 19 Vic. c. 43, s. 24; 8 Vic c. 13, s. 23; 22 Vic. c. 96, s. 3.

Special bail may be entered according to the form of practice, after which plaintiff may proceed as upon a Writ of Summons

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county in which the action against such defendant has been brought, or that the cognizor will do so for such defendant or defendants:" section 35.

It would also appear that the sheriff is empowered, at any time to take from defendant, confined in gaol, either upon *mesne* or *final* process, a bond to the *limits;* upon the giving of which defendant would be entitled to be released from custody, subject to be produced by his bail on certain contingencies described in the statute: Con. Stat. U. C. cap. 24, ss. 25, 28, 29.

Notwithstanding these several statutes, authorizing the sheriff at his option to take either bail *below*, or bail to the *limits*, it seems that the sheriff will be equally liable, as before the statutes, to be called upon by the plaintiff, to bring in the body of defendant, or in default thereof, to be attached.

The conclusion therefore appears to be this, that the sheriff, though he *may* either, under 23 Hen. VI. cap. 9, or Con. Stat. U.C. cap. 24, ss. 25, 28, 29, take bail, yet such bail in either case is at his peril, and only for *his security:* see *Wolfe* v. *Collingwood*, Wils. 262; Sellon Pr. I. 136. Plaintiff after breach of the condition may, if he see fit so to do, instead of attaching the sheriff, take an assignment of either bond, and in his own name sue the sureties therein mentioned: section 33 of Con. Stat. U. C. cap. 24.

If defendant cannot find bail to the sheriff, or to the limits, or to the action, he must remain in custody. Though in England defendants are permitted, under Stat. 43 Geo. III. cap. 46, instead of giving bail, to deposit the sum endorsed upon the writ, and £10 more, this practice does not prevail in Upper Canada. Bail to the sheriff, and to the limits, and to the action, must as a general rule consist of two persons at least: see R. G. pr. 75. If defendant will not or cannot put in special bail as directed by the writ, the plaintiff, nevertheless, may proceed with his action: *Regina* v. *Sheriff of Hastings*, 1 Cham. R. 230.

(*q*) Bail is "put in" by acknowledging before the court or a judge, or a commissioner for taking bail, an instrument called a bail-piece. The bail-piece usually states that the defendant having been arrested, is delivered to bail on a *capi corpus*, to (naming his bail) and the amount for which the arrest was made. When taken before the court, or a judge in chambers or elsewhere, or before a commissioner and filed, the bail-piece becomes a binding recognizance. The condition, when set out, must follow the words of section 35, already mentioned. When acknowledged out of court, it is signed by the judge or officer who takes the acknowledgment, and may be afterwards enrolled according to the practice of the court: Petersdorffon, Bail, 360. The officer who takes the acknowledgment is an officer of the court, and when filed, the bail-piece is as if taken in court. It must state in the margin the county from which the process issued: *Ward* v. *Skinner*, 3 O. S. 163. Where there were two plaintiffs with the same surname, "Michael and Robert Meighan," the non-repetition of the surname after the christian name of each, was held to be only an irregularity: *Meighan et al* v. *Brown*, Draper's Rep. 175. A bail-piece may be amended in the names of either the plaintiff or defendant, with the consent of the bail: *Daniell* v. *Janus*, H.T. 4 Vic. *MS.*, R. & H. Dig. "Bail" III. 3. The affidavit of justification cannot be sworn before the defendant's attorney: *Koyle* v. *Wilcox*, 2 O. S. 113. Bail will be

Condition of recognizance of bail.

35. The condition of the recognizance of special bail shall be, that, if the Defendant be condemned in the action at the suit of the Plaintiff, he will satisfy the costs and condemnation money, or render himself to the custody of the Sheriff of the County in which the action against such Defendant has been brought, or that the cognizors will do so for him. (*r*) 8 Vic. c. 13, s. 26; 2 Geo. IV. c. 1, s. 11.

How bail may justify.

36. Upon due notice given to the Plaintiff or his Attorney, and upon production of the bail-piece, and whether the defendant is detained in custody or not, bail may justify (either in term time or in vacation) before any Judge of the Court in which the action is pending, (*s*) and such justification and the opposing thereof may be by affidavit or affirmation without the attendance of the bail in open Court or before such Judge, unless specially required by such Court or Judge, (*t*) and such Court or Judge may thereupon order a

And order for allowance to issue

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allowed to justify by affidavit, made at the time of the acknowledgment, though an exception to them be afterwards entered, where nothing is shown to repel such affidavit, or to impeach their solvency: *Duggan* v. *Derrick*, 5 O. S. 75. Bail, after due notice of exception by plaintiff, or of justification by defendant, may justify in court, or before a judge, and the affidavit just mentioned will be sufficient, if no new matter be shown: *Ib.* Bail excepted to in vacation must justify in vacation, and have not till the following term for that purpose: *McKenzie et al* v. *Macnab*, E. T. 2 Vic. *MS.* R. & H. Dig. "Bail" I. 3.

Bail may be, during term, put in before the court whence process issued: 1 Sellons, Pr. 138. In vacation, before any judge of such court: section 36. Or the judge in chambers for the time being, no matter to which court he may belong. The common mode, both in superior and county courts, is before a commissioner appointed by either of the superior courts: Con. Stat. U.C. cap. 39, s. 7. These commissions were issued for all and every the several counties of this province. It has been held that a commissioner appointed for the Gore District before the division of that district into counties, had no power afterwards to act as a commissioner for Brant: *Carter* v. *Sullivan et al*, 4 U. C. C. P. 298; but see now 31 Vic. cap. 11.

(*r*) A bail-piece conditioned to render the defendant to a sheriff of a county in which the venue is not laid, has been held not to be void: *Billings et al* v. *Barry et al*, E. T. 2 Vic. *MS.* R. & H. Dig. Bail, III. 8. But see ss. 37, 39, of this act.

(*s*) Bail may be also in certain cases and in practice generally is taken before commissioners appointed for the purpose: Con. Stat. U. C. cap. 39, ss. 3, 4.

(*t*) The affidavit of justification cannot be sworn before the defendant's attorney: *Kayle* v. *Wilcox*, 2 O. S. 113. When bail which has been put in, in the country, is to be justified in court, the bail-piece, with the affidavit of the due taking thereof, and the affidavit of justification, shall be transmitted by the deputy clerk of the Crown, for the county in which they have been filed, to the principal office in Toronto, to be filed and produced in court, upon the motion for allowance, on proper notice being given such deputy clerk to produce the same: R. G. pr. 80.

rule to issue for the allowance of such bail and for the discharge of the Defendant (if in custody) by a Writ of *Supersedeas*. (*u*) 2 Geo. IV. c. 1, ss. 13, 41; 4 Wm. IV. c 5, s. 2.

Bail may surrender their principal to the Sheriff of any County, &c.

37. Special bail, on production of a copy of the bail-piece certified by the Clerk of the Court having the custody thereof, may surrender their principal to the Sheriff of the County in which such principal is resident or found, (*v*) and such Sheriff shall receive such principal into his custody (*w*) and give such bail a certificate under his hand and seal of office

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(*u*) When a rule or order for allowance be obtained, it should be served on the attorney of the opposite party, in which event the bail is considered perfected, and the bail below discharged, or the defendant, if still in close custody, entitled to be liberated upon a writ of *supersedeas*.

(*v*) In civil actions there are now at least two ordinary kinds of bail,—to the sheriff, and to the action. Bail to the sheriff cannot as of right take their principal into custody or surrender him in discharge of themselves, but like mainpernors at the common law can do nothing, except perform the condition of their bond. They are barely and unconditionally sureties for their principal. Like sureties for the performance of any other act, they become liable when the condition of their obligation is broken, and are entitled to no favour beyond what is allowed by the Stat. 4 Anne, cap. 16, s. 20, and the equitable powers and practice of the court: see Petersdorff on Bail, 214. Bail to the action, generally called special bail, are not only responsible for the safe keeping of their principal, but have the right to surrender him in discharge of themselves: see *Evans* v. *Shaw*, Draper's Rep. 28, *per* Sherwood, J. An interim order for protection under the Insolvent Debtor's Act does not prevent bail from surrendering their principal: *Ross et al* v. *Brookes et al*, 3 U. C. L. J. 110, *per* Robinson, C. J. Bail to the limits will not be allowed to enter an *exoneretur* upon the ground that the principal has obtained a final order for his discharge: *Nordheimer* v. *Grover*, 3 U. C. L. J. 74. The final order does not discharge the bail from liability, if bail be previously fixed: *Ross et al* v. *Brookes et al*, 3 U. C. L. J. 110. It is not stated when or under what circumstances the surrender may be made. It was a question under the old law whether bail had the right to follow their principal beyond the limits, retake and then surrender him. The point was raised in *Evans* v. *Shaw*, Draper's Rep. 28; and one judge (Sherwood, J.) expressed an opinion that the legislature, under the statute then in force, "intended to allow the bail for the limits the right of taking and surrendering their principal, if they found him within or without the limits:" *Ib.* p. 25. When the plaintiff proceeds by action on the recognizance of bail, the bail are at liberty to render their principal at any time within the space of eight days next after service of process on them: R. G. pr. 88.

(*w*) It is not the duty of the sheriff or his deputy to receive from the sureties their principal wherever they choose to tender him. Reason and convenience alike require the tender to be at the gaol wherein the sheriff without risk and without delay may at once incarcerate the prisoner. But if the sheriff waive this privilege and accept a surrender elsewhere than at the gaol, the surrender will be good: *Strong* v. *Rorzel*, Chambers, Aug. 11, 1865, *per* Richards, C. J. A debtor on bail went to the sheriff's office and told the clerk there that he wished to surrender himself, the clerk told him to remain in the office till he found the sheriff, the clerk went for the sheriff, leaving the debtor in the office, but before he returned with the sheriff the debtor had absconded, *held* that this was a fraud and no render: *Kennedy et al* v. *Brodie*, 4 U. C. Q. B. 189.

of such surrender, for which certificate the Sheriff shall be entitled to the sum of one dollar, (*x*) and any Judge of the Court in which the action is pending, (*y*) upon proof of due notice to the Plaintiff or his Attorney of such surrender, and upon production of the Sheriff's certificate thereof, shall order an *Exoneretur* to be entered on the bail piece, and thereupon the bail shall be discharged. (*z*) 8 Vic. c. 13, s. 27; 4 Wm. IV. c. 5, s. 1; 2 Geo. IV. c. 1, s. 12.

Such surrender not to effect the *venue*.

38. In cases where such surrender is made to any other Sheriff than the Sheriff of the County specified in the condition of the recognizance of bail, (*a*) the Plaintiff shall not be compelled to change the *venue* or to conduct his suit in any manner different from that which he would have been required to do, had the render been made to such last mentioned Sheriff. (*b*) 8 Vic. c. 13, s. 27; 4 Wm. IV. c. 5, s. 1.

Where the bail took the debtor to an office some distance from the court house, where the deputy sheriff was in the habit of transacting business with practitioners, and there tendered him in their discharge, and the deputy referred them to the sheriff's office as the proper place for the render, and they went there, but found only a clerk who had no authority to act in such matters, and then they went to the gaol and tendered him to the gaoler's wife, the gaoler being absent, but she refused to receive him, held to be no render: *Read et al* v. *Scovill*, 16 U. C. Q. B. 453. If there be any doubt as to the validity of the render of bail by their principal, a judge in Chambers will not order an *exoneretur*, but leave the bail to plead in bar to any action brought against them on the recognizances: *Blackman* v. *O'Gorman*, 5 U. C. L. J. 161. The sheriff may retake a debtor who escapes after render: *Arnold* v. *Andrews*, 8 U. C. C. P. 467; *Scatcherd* v. *Andrews*, *Ib.* 473.

(*x*) The court refused to order an *exoneretur* in the absence of a certificate from the sheriff to whom the render was made: *Linley* v. *Cheeseman*, Draper's Rep. 55.

(*y*) *Qu. any* judge in chambers, whether a judge of the court in which the action is pending or not? see Con. Stat. U. C. cap. 10, ss. 9, 10. Chief Justice Draper held that as a judge of the court of Queen's Bench he had no power under this section to order an *exoneretur* to be entered on the bail piece, in an action pending in the Common Pleas: *Robins* v. *Strong*, Chambers, Aug. 4, 1865.

(*z*) The application is not *ex parte*: *Robins* v. *Strong*, Chambers, July, 1865, *per* Richards, C. J. The bail may plead the discharge in any action against them on the recognizance: *Mannin* v. *Partridge*, 14 East. 599; *Armitage* v. *Rigby*, 5 A. & E. 81; *Sherratt* v. *Floyer*, 2 Bing. 18; *Mitchell* v. *Noble*, 1 Cham. R. 284. Where action commenced, payment of costs of writ would appear to be a condition of the stay or discharge: see R. G. pr. 88, and notes.

(*a*) Bail may surrender to the sheriff of the county in which their principal is "resident or found:" section 37, see also section 39.

(*b*) It is not intended that plaintiff shall be in any manner inconvenienced or prejudiced in the conduct of his action by reason of the privilege given to bail in the foregoing section.

Person arrested out of his County may be transferred to it, paying the costs.

39. In case a person is surrendered by his bail to the Sheriffs of any County other than that in which he resided or carried on business at the time, such person shall be entitled to be transferred to the gaol of his own County on prepaying the expense of his removal; (*c*) and the Sheriff in whose County he was arrested may, if he is satisfied of the facts, transfer him accordingly; but if the Sheriff declines to act without an order of the Court or a Judge, such an order shall be made on the application of the prisoner and notice to the opposite party. (*d*) 22 Vic. c. 33, s. 9, (1859.)

In cases in a County Court, how Plaintiff to proceed when defendant surrendered in a County different from that in which the action was brought.

40. In case (in any action in a County Court) the Defendant has been surrendered by his bail into the custody of the Sheriff of a County other than that in which the action has been instituted, the Plaintiff may charge the Defendant in execution, and take all other necessary proceedings in like manner as if the suit had been instituted in one of the Superior Courts. (*e*) 4 Wm. IV. c. 5, s. 3.

Recognizance of bail in County Courts may be recorded and proceeded upon in like manner as in the Superior Courts.

41. A recognizance of bail taken in a County Court may be entered of Record in such Court, and an action of debt or *Scire Facias* shall lie thereupon in such Court as in similar cases in the Superior Courts, (*f*) and in cases in the County Courts the Judges thereof may grant the same remedies to the Plaintiff against the Sheriff or Sheriff's Bail or

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(*c*) Inasmuch as the principal may be rendered to the sheriff of the county where he, the principal, may be found, and a sat the time of his render he may be in a county different to that in which he resides, provision is here made for his transfer to the latter county, on the simple condition of his "prepaying the expense of his removal."

(*d*) Questions may arise as to the legality of the render or place of res idence, and it would not be reasonable to expect the sheriff to whom the alleged render is made to decide such questions if really doubtful. His course therefore in such a case is "to decline to act without an order of the court or a judge." No provision is made for the payment of the costs attending such an order, and whether to be borne by the sheriff or the debtor remains to be decided.

(*e*) The plaintiff must proceed to trial and final judgment against a prisoner in the term next after issue is found, or at the sittings or assizes next after such term, unless the court or a judge otherwise order, and must cause the defendant to be charged in execution within the term next after such trial or judgment: R. G. pr. 99.

(*f*) An action will lie in a County Court on a recognizance of bail taken in the County Court, no matter what the amount may be for which the bail are liable: Con. Stat. U. C. cap. 15, s. 17, sub-s. 4. This is one of the exceptions to the restricted jurisdiction of the court as to amount.

the Bail to the action, and afford relief to the Defendant, Sheriff or Bail in like manner and form as might be done by either of the Superior Courts, had the action been instituted in such Court. (*g*) 8 Vic. c. 13, ss. 27, 50; 12 Vic. c. 66, s. 7.

Plaintiff may obtain *capias* in certain cases after commencing the suit by Writ of Summons; affidavit required.

42. (*h*) The Plaintiff, after the commencement of any action by Writ of Summons but before Judgment in such action, upon obtaining a Judge's order for that purpose, in the manner provided for in the fifth section of the Act respecting arrest and imprisonment for debt, (*i*) may sue out of the office whence such Summons issued a Writ of *Capias*, and one or more concurrent Writs; (*j*) and such Writ of *Capias* shall, in every such case, notwithstanding the fourth section of this Act, number three, be issued by the Court out of which the original Writ in the cause was issued, (*k*) and shall be in the form (A) No. 6, (*l*) and may be directed to the Sheriff of any County in Upper Canada, and so many copies of such Writ, with every memorandum or notice sub-

Writ to issue from the same Court as the original Writ.

Form of Writ.

To whom directed.

Copies.

(*g*) As to which see the foregoing sections: s. 32, *et seq.*

(*h*) The first part of this section is substantially a re-enactment of Prov. Stats. 16 Vic. cap. 175, s. 3, and 2 Geo. IV. cap. 1, s. 14. There is no such provision in either of the English C. L. P. Acts. The object of it is to allow plaintiff, if he see cause for so doing, to arrest defendant on mesne process during the progress of an action.

(*i*) The affidavit under this section for an order to arrest must be intitled in the court and cause: see *Brown* v. *Palmer*, 3 U. C. Q. B. 110; *Glass* v. *Colclough*, E. T. 3 Vic. *MS.* R. & H. Dig. "Arrest," iii. 9.

(*j*) See section 27.

(*k*) Section 4, sub-s. 3, provides for the alternate issue of writs, one from each court. No delay can occur where the suit is commenced by capias, for it is expressly provided that the affidavit need not be entitled of any court, so that in such case the writ may be issued from either court: Con. Stat. U.C. cap. 24, s. 6. But under this section the writ of capias must be issued from a particular court—the one from which the original writ in the cause was sued out, and to prevent delay and difficulty, an exception is made to the alternate system, in respect to the capias in suits commenced by summons.

(*l*) The form of capias here given resembles that where the writ of capias is made the commencement of the action. The dissimilarities are just such as might be expected [illegible] are necessary, owing to the difference in the practice. The writ [illegible] sets forth a statement that the action has been already commenced [illegible] the sheriff, &c. We command you that you take C. D., &c., and him safely [illegible] he shall have given you bail in the action, &c., which A. B. *has commenced* against him, and which action is now pending, &c." The clauses requiring defendant to put in special bail within ten days, though transposed in the two writs, are verbatim the same in each. The indorsements of necessity a little vary.

scribed thereto, and all endorsements thereon as there may be persons intended to be arrested thereon, shall be delivered with such writ to the Sheriff or other Officer who may have the execution or return thereof, and such Sheriff or Officer shall immediately upon, or after the execution thereof, cause one such copy to be delivered to every person upon whom such process may be executed by him, and shall, within three days at farthest after such execution, indorse upon such Writ the true day of the execution thereof; (*m*) and the proceedings in any such action may be carried on to Judgment without regard to the issuing of such *Capias* or to any proceedings in any way arising from or dependent thereon; (*n*) and on entering Judgment, the Plaintiff shall be entitled to tax the costs of such Writ or Writs of *Capias* and the proceedings thereon, in like manner as if the suit had been originally commenced by *Capias*, (*o*) together with the other costs incurred and taxable in the cause. (*p*) 8 Vic. c. 13, s. 27; 19 Vic. c. 43, s. 42; 22 Vic. c. 96, s. 4.

One copy to be delivered to each person on whom the Writ is executed.

Costs.

ABSENTEES.

43. (*q*) In case any Defendent being a British subject, is residing out of Upper Canada, (*r*) the Plaintiff may issue a

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(*m*) See section 28, *et seq.*, and notes thereto.

(*n*) It is declared by this section that the capias may be issued at any time after the commencement of an action by writ of summons, but before judgment in such action. No matter at what stage of the cause it be issued, the progress of the suit will not be thereby affected. The suit is to proceed in the same manner step by step as if no such capias had issued. In short the capias to be issued under this section is not so much a step in the suit as something collateral to it. The capias intended is in the nature of mesne process. Being such, the reasons for enacting that it must be issued *before* judgment are obvious.

(*o*) In so far as relates to the taxation of costs, the costs of the "capias and the proceedings thereon" shall be allowed "in like manner as if the suit had been originally commenced by capias." This may raise a doubt as to plaintiff's right to tax the costs of the summons. If the capias is to be taken for the purposes of taxation as a substitution for the summons, then the costs of the summons should not be allowed. But if the section as to capias is to be taken cumulatively, then plaintiff would be entitled to the costs of both writs.

(*p*) "Together with the *other* costs taxable and *incurred* in the cause," &c. This favors the idea that the costs of the summons should be included and taxed as costs in the cause.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 18. Founded upon first report of the Common Law Commissioners, ss. 11, 12.

(*r*) As to the territorial jurisdiction of the courts of common law in this province: see note *f* to section 2 of this act.

Summons to party, being a British subject, residing out of the jurisdiction of the said Courts. Service thereof, &c.

Writ of Summons in the form (A) No. 3, (*s*) which Writ shall bear the indorsement contained in the said form, purporting that such Writ is for service out of Upper Canada, and the time for appearance by the Defendant shall be regulated by the distance from Upper Canada of the place where the Defendant is residing, having due regard to the means of, and necessary time for postal or other communication. (*t*) 19 Vic. c. 43, s. 35.

44. (*u*) Upon the Court or Judge being satisfied (*v*) that there is a cause of action which arose in Upper Canada, or in

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(*s*) One point of difference between this and the ordinary writ is that this writ does not specify the time for appearance; but as a general rule the law already explained with respect to the contents of a summons, the issuing of a summons, and the renewal of a summons will apply to writs issued under this section. The indorsement of the "debt" and costs, under section 14, when the summons is issued for the recovery of a "debt," differs from the indorsement made necessary by this section in one particular. Under section 14, the time allowed for payment of the debt and costs is "eight days." Under this section, it is "two days less than the time limited for appearance: see Schedule A. No. 3. In effect, however, both provisions coincide, as the time limited for appearance in the ordinary writ is ten days: Schedule A. No. 1. It is uncertain whether the indorsement required by section 19 applies to this writ. It is apprehended it does not apply: see 1 Chit. Archd. 12 ed. 201.

(*t*) From what has been already mentioned, it will be observed that provision is made by this act for two forms of writs of summons. The first (section 2) contemplates the case of a person, who either is or is supposed to be residing *within the jurisdiction*, and in such case the time for appearance is fixed in all cases at ten days, and certain proceedings may be taken in case personal service cannot be effected: section 16. The second form of writ, that given by this section provides for those cases where the defendant, being a British subject, is resident *out of the jurisdiction*, and in this case the time for entering an appearance is to be regulated by the distance the defendant resides from Upper Canada. Two different cases are separately contemplated. Where therefore defendant, being a British subject, resident *without the jurisdiction*, was proceeded against under section 2 of first English C. L. P. Act (section 2 of ours), which provides for the case of defendants within the jurisdiction, an order obtained under section 17 of the same act (section 16 of ours) allowing plaintiff to proceed as if personal service had been effected, was set aside: *Hesketh* v. *Fleming*, 24 L. J. Q. B. 255.

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 18. Founded upon the first report of the Common Law Commissioners, ss. 11, 12.

(*v*) "*By affidavit*," in English Act. It is not known whether the omission of these words by our legislature was intended or accidental. Whether or not, the usual mode of satisfying the court in cases like the present is "by affidavit." It may be stated that the only mode of *satisfying* a judicial tribunal is by legal evidence—either written or oral—and that the clause under consideration must be read consistently with the common law principles: see also section 45, at the end. An affidavit, if used, should contain averments of—1. The cause of action; 2. The residence of defendant; 3. Service or attempted service. An irregularity

respect of the breach of a contract made therein, (*w*) and that the writ has been personally served upon the Defendant, or that reasonable efforts have been made to effect personal service thereof upon the Defendant, and that it came to his knowledge, and either that the Defendant wilfully neglects to appear to such Writ, or that he is living out of Upper Canada, in order to defeat or delay his creditors, such Court or Judge may from time to time direct that the Plaintiff shall be at

If service made or cannot be made after due diligence.

Order in such case by the Court or a Judge on affidavit.

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in the affidavit may be waived by attending before the master: *Harrison* v. *Williams*, 24 L. T. Rep. 143.

(*w*) Much difficulty has arisen as to the meaning of the words "cause of action," as here used. Where there is a contract with reference to some act to be done within the jurisdiction, it is immaterial where such contract was made, for the cause of action though not the contract is within the jurisdiction, within the meaning of this section: *Fife* v. *Round*, 30 L. T. Rep. 291; s. c. 6 W. R. 282. A writ of summons having been served on the defendant in France, he appeared by attorney, and the declaration having been delivered, he obtained an order to inspect, and inspected the promissory notes on which the action was brought. He then applied to set aside the writ and subsequent proceedings, on the ground that the action was brought for a breach of contract made *beyond the jurisdiction*. Held that he was estopped: *Forbes et al* v. *Smith*, 10 Ex. 717; see also *Staniforth* v. *Richmond*, 13 W. R. 724; *Green* v. *Braddyll*, 4 W. R. 487. There is such a thing as attornment to the jurisdiction. Where the secretary of a legation, otherwise privileged by virtue of his office, appeared and pleaded to an action commenced against him: *held* that by voluntarily attorning to the jurisdiction he was estopped from applying to the court to strike out his name or to stay proceedings on the ground of his privilege: *Taylor* v. *Best et al*, 14 C. B. 487. A writ of summons, in the form given in the schedule, but with no indorsement on it and nothing to show the defendant the cause of action, was issued in order to sue the defendant, who was a British subject resident abroad, an order to proceed was subsequently made by a judge on an affidavit, which contained the statement that the cause of action arose within the jurisdiction. It appeared by affidavit (inferentially at least) that the judge's order had not been served. A declaration in the action was filed, which declaration, according to English practice, defendant took out of the office: *held* that any prior irregularity on the part of the plaintiff was thereby waived: *Bayne* v. *Slack*, 6 W. R. 171. A merchant in Norway, not a British subject, drew there a bill of exchange and endorsed it to the order of D. He then sent it by post to London. D. endorsed it to the plaintiff: *held* that plaintiff could not sue defendant under this section: *Sichel* v. *Borch*, 2 H. & C. 954; but see *Chapman* v. *Cottrell*, 3 H. & C. 865; *Glover* v. *Persigny et al*, 11 W. R. 146; *Aslin* v. *London & N. W. R. Co.*, 15 W. R. 694. A claim for a balance due as the result of cross consignments and remittances between a merchant in England and a British merchant carrying on business at the Cape of Good Hope, was held to be such a cause of action as could be so sued: *Horwood* v. *Wood*, 17 C. B. N. S. 749. An Irish judgment for a debt contracted in England has been held not to be a cause of action within the meaning of the section: *Thelwall* v. *Yelverton*, 16 C. B. N.S. 813. Where a cargo had been loaded abroad under a foreign charter party, a claim for demurrage at an English port was held in chambers to be within the section: *Slade* v. *Noel*, 4 F. & F. 424. So where goods delivered for a foreign buyer on board a ship in an English port: *Nettleford* v. *Fünck ex rel am.*, Eng. C. P. 3rd March, 1866. It is enough that the court or judge be satisfied that there is a

liberty to proceed in the action (*x*) in such manner and subject to such conditions as to such Court or Judge (having regard to the time allowed to the Defendant to appear being reasonable and to the other circumstances of the case) may seem fit; (*y*) but the Plaintiff, before obaining judgment, shall prove the amount of the debt or damages claimed by him in such action, either before a Jury or an assessment in the usual mode, or by reference in the manner hereinafter provided, (*z*) according to the nature of the case, as such Court or Judge may direct. (*a*) 19 Vic. c. 43, s. 35.

Plaintiff must prove his case.

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cause of action which arose in this province: *Hutton* v. *Whitehouse*, 1 H. & N. 32. But if the contrary be shown, the writ will be set aside: *Binet* v. *Picot*, 4 H. & N. 365. Unless plaintiff undertake to prove a cause of action within the jurisdiction, and confine himself to that cause of action: *Diamond* v. *Sutton*, L. R. 1 Ex. 130.

(*x*) As if personal service had been effected: section 16. Proceedings to be taken by plaintiff should be under sections 56, 57.

(*y*) Before being entitled to proceed under this section, it is necessary for plaintiff to satisfy the court or judge upon one or more of these heads—1. That there is a cause of action which arose within this province. 2. That the writ was personally served on defendant, or that reasonable efforts were made to effect personal service, *and* that it came to his knowledge. 3. That defendant either neglects to appear to the writ, or is living out of this province in order to defeat or delay his creditors. "Wilful neglect to appear," or living out of this province to defeat, &c. These can seldom be sworn to as positive facts. They must arise as presumptions from the facts disclosed to the court. To prove simply that defendant has not appeared, from which the presumption arises that he has neglected to appear, it will undoubtedly be necessary to show that no appearance has in fact been entered. A. B., who had contracted a debt in England, went to Melbourne, in Australia. He was there sued by his creditor, who issued a writ under the section in the English act, which corresponds with the one under consideration. He was required by the writ to appear within five months. Having been personally served, and no appearance having been entered, application was made by plaintiff for liberty to proceed, without giving any notice of declaration. An order was thereupon made by a judge in Chambers, "that the plaintiff should be at liberty to proceed in the action by filing a declaration against the defendant, requiring him to plead thereto in eight days, and by sticking up a notice of such declaration in the master's office, and that in default of the defendant pleading within the said eight days, it be referred to one of the masters to examine into and see that the plaintiff's case is proved by affidavit or otherwise, as the master shall see fit, and that the plaintiff shall be at liberty to sign final judgment for the amount found due by the master:" *Firmin* v. *Perry*, 27 L. T. Rep. 72; see also *Bates* v. *Bates*, 9 W. R. 255.

(*z*) In section 212 of this act.

(*a*) It is apprehended that judgment once obtained will carry with it the incidents of any ordinary judgment. The fruit of the judgment is of course the execution. It may be issued in the usual mode, and perhaps issued forthwith. The costs of service in the foreign country will be allowed on taxation: *White* v. *Brett*, 28 L. J. Ex. 32.

45. (*b*) In any action against a person residing out of Upper Canada and not being a British subject, (*c*) the like proceedings may be taken as against a British subject resident out of Upper Canada, (*d*) except that the Plaintiff shall, instead of the Summons mentioned in the forty-third section,

If the Defendant be not a British subject.

(*b*) Taken from English Act 15 & 16 Vic. cap. 76, s. 19. Founded upon the first report of the Common Law Commissioners, sections 11, 12, 13, 14.

(*c*) Held not to apply to foreign corporations: *Ingate* v. *Austrian Lloyds Co* 4 C. B. N.S. 704.

(*d*) In a former note (section 43, note *t*) writs of summons were said to be of two classes—those issued against defendants *within* the jurisdiction; and those against defendants *without* the jurisdiction. It is now necessary to subdivide the latter class into—1. Those against British subjects; 2. Those against persons *not being British subjects*, resident abroad. For this latter description of defendants the present section provides. It will seldom happen that proceedings will be taken against defendants resident abroad, unless such defendants have property liable to execution in this province. Proceedings under any other circumstances would be, in most cases, comparatively useless. The common law courts may by their process act upon property within their jurisdiction; but in no case can they affect the person of a defendant without their jurisdiction: see *Buchanan* v. *Rucker*, 9 East. 192. In the case of a defendant resident abroad there can be no *complete* remedy against him, unless by suing him in the courts of the country where he resides. The rule is, that those who seek redress from a foreigner or others resident abroad, must resort to the *forum* of the defendant. The enactments here annotated attempt to make such a defendant in a manner amenable to our courts. It is sought to accomplish this end by acting upon the property of defendant, and thereby notifying him of its danger, in order that he may, if so disposed, satisfy the claim against him. The Common Law Commissioners very justly observed that wherever property was situate within the jurisdiction, the probabilities were that some means of communication with the owner would be found to exist. Defendants being foreigners, without the jurisdiction, may be considered as of two descriptions—1. Such as were at one time resident in this province, but have gone abroad; 2. Such as are and always have been foreigners, never having been in this province. With respect to these, the act does not seem to make any distinction. True it is that the notice given in the schedule is addressed to "C. D., *late* of the city of Hamilton in Upper Canada," but it continues "*or* (now residing at Buffalo, in the State of New York):" No. 4 Schedule. The word "or" seems to place matters in the alternative, *i. e.*, defendant may be addressed as "late of, &c., *or* now residing, &c." This must be the meaning, for it never could have been the intention of the legislature that the remedies prescribed by this section should be confined to the case of parties at one time resident in this province. As regards these latter, a further remark may be made. If a defendant, having been a resident in this province, and having acquired property therein and contracted debts subsequently depart from the Province, leaving the property behind him, it may be that he can be proceeded against as an absconding debtor. One distinction would appear to be this: proceedings against an absconding debtor are commenced by a writ of attachment sued out *shortly* after his departure: proceedings against a resident abroad may be had at any distance of time after his departure from the Province, provided the Statutes of Limitations do not interfere. Besides a comparison of the sections here annotated with those relative to absconding debtors will show that there are other cases in which a plaintiff's remedy must be exclusively under the sections here annotated.

issue a Writ of Summons according to the form (A.) No. 4, and shall in manner aforesaid serve a notice of such last mentioned Writ upon the Defendant, which notice shall be in the form also contained in the said form No. 4; (*e*) and such service or reasonable efforts to effect the same, shall be of the same force and effect as the service or reasonable efforts to effect the service of a Writ of Summons in any action against a British subject resident abroad, (*f*) and by leave of the Court or a Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon. (*g*) 19 Vic. c. 43, s. 36.

Certain Writs may be made concurrent.

46. (*h*) A Writ for service within the Jurisdiction may be issued and marked as a concurrent Writ with one for service out of the Jurisdiction, and a Writ for service out of the Jurisdiction may be issued and marked as a concurrent Writ with one for service within the Jurisdiction. (*i*) 19 Vic. c 43, s. 39.

(*e*) The only material difference between the forms here given and those under section 44, is in the notice and its service. A notice, the form of which is given in the schedule addressed to defendant, and informing him that a writ has been issued, must be served on defendant in lieu of a copy of the writ. This is to prevent a difficulty which occurred to the Common Law Commissioners in the service of the process of one court within the jurisdiction of another, on a foreigner resident within the latter. Instead of serving the writ itself, it is thought that the difficulty will be obviated by serving the notice made necessary by this section. In other respects, the proceedings made necessary by this section resemble proceedings against British subjects resident abroad.

(*f*) As to such see section 44, and notes thereto generally.

(*g*) The Common Law Commissioners, in their suggestions for the enactment of the practice set forth in this section, had before them the example of France. Reference was made by them to *Le Code Civil*, Art. 14, which, translated, is as follows: "A foreigner non-resident in France can be cited before the French tribunals for the enforcement of obligations contracted by him in France with a Frenchman. He can also be summoned before the French courts for obligations contracted by him in a foreign country with a Frenchman:" see Code Napoleon. "By a Barrister;" Story's Conflict of Laws, 6 ed. 743. Where leave had been given to proceed against a foreigner, as if personal service had been effected, upon an affidavit of a cause of action for work and labour done in England, the plaintiff, in answer to a rule to rescind the order for leave, made affidavit that orders were given in England by certain persons who were afterwards recognized by the defendant as his agent, and although this was denied by defendant, it was held there was sufficient evidence to satisfy a judge of a cause of action within this section: *Glover* v. *Persigny et al*, 11 W. R. 146.

(*h*) Adopted from English Act 15 & 16 Vic. cap. 76, s. 22.

(*i*) This will assist plaintiff when in doubt as to whether defendant is resident within or without the jurisdiction of the court, as he may issue concurrent writs

Affidavits for enabling proceedings to be taken against a party out of the jurisdiction, before whom to be made.

47. (*j*) Any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a Defendant residing out of Upper Canada, may be sworn before the Chief Justice or Judge of any Court of Superior Jurisdiction in the Country wherein the Defendant may reside or be served, or before the Mayor or Chief Magistrate of any City, Town or place wherein the Defendant may reside or be served, or before any Consul-General, Consul, Vice-Consul or Consular Agent for the time being appointed by Her Majesty (*k*) at any foreign port or place at or near which the Defendant may reside or be served; (*l*) and saving all just

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of different forms at one and the same time, so as without delay to proceed against defendant in either event. Or if after the issue of an original writ plaintiff discover that he has been mistaken as to the residence of defendant, it only remains for him to issue a concurrent writ of a different form and so to rectify his error, while continuing his proceedings. In the case of several defendants, some resident within and some without the jurisdiction of the court, the practice will be no less convenient. Though not so enacted, it must be intended that concurrent writs issued under this section should bear the same date as the original writ, and be in force only during the period when such original writ shall be in force: see section 20, and notes.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 23. There are some variations between this and the English section, which will be noticed presently.

(*k*) "*Appointed by Her Majesty*," &c. From these words it would appear that deputies or other consular officers not so appointed have not the power to act under this act. It may be that if the affidavit purport to be sworn before a consular officer, the courts will presume an appointment by the Crown till the contrary appear.

(*l*) It seems according to the current of authority in England that neither a British consul nor a British minister is entitled, by virtue of his office, to administer affidavits: *Williams* v. *Welch et al*, 3 D. & L. 357; *Le Veux* v. *Berkeley*, 2 D. & L. 31; In re *Baroness Dunsany*, 7 C. B. 119; *Pickardo* v. *Machado*, 4 B. & C. 886; *Ex parte Hutchinson*, 4 Bing. 606. The powers conferred by this act upon certain public officers named does not authorize them to administer *all* affidavits of *either* party to a cause. It is restricted to "any affidavit for the purpose of enabling the court or a judge to direct proceedings to be taken *against a defendant* residing out of Upper Canada," that is, to affidavits made by or on behalf of a *plaintiff*, who is desirous of proceeding with his cause. Though not strictly applicable to the section under consideration, a reference may be here made to Eng. Stat. 5 Geo. II. cap. 7, s. 1, as to affidavits to be made in England in proof of debts sued for in this Province. In connexion therewith read *Gordon* v. *Fuller*, 5 O. S. 174. It is now enacted that "Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made, out of Canada, before any commissioner authorized by the Lord Chancellor to administer oaths in Chancery in England, or before any notary public, certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of her Majesty, or in any foreign country, and certified under the common seal of such city, borough or town corporate, or before a judge of any court of supreme jurisdiction in any colony

exceptions, every affidavit so sworn (*m*) may be used and shall be admitted in evidence, provided it purport to have been sworn before such Chief Justice, Judge, Mayor or Chief Magistrate, Consul-General, Consul, Vice-Consul or Consular Agent. (*n*) 19 Vic. c. 43, s. 40.

MISCELLANEOUS PROVISIONS RESPECTING WRITS, &c.

Amendment if the plaintiff omits

48. (*o*) If the Plaintiff or his Attorney omits (*p*) to insert in or to indorse on (*q*) any Writ or copy thereof, (*r*) any

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belonging to the crown of Great Britain, or any dependency thereof, or before any consul, vice-consul, acting consul, pro-consul or consular agent of her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any cause, matter or thing depending, or in any wise concerning any of the proceedings to be had in the said courts, shall be as good, valid and effectual, and shall be of like force and effect to all intents and purposes, as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this province before a commissioner for taking affidavits therein, or other competent authority of a like nature: see *Merchant's Express Co.* v. *Mereton*, 15 Grant, 274; s. c. 2 Chan. Cham. 319.

(*m*) "Signed by" are the words used in the English C. L. P. Act. The official seal of office does not seem to be made necessary either by this or the English act.

(*n*) The English C. L. P. Act continues "upon proof of the official character and signature of the person appearing to have signed the same." The omission of this proviso by our legislature is not without significance. It will throw upon the sentence "provided it (the affidavit) *purport* to have been sworn, &c.," the burthen of elucidating how and in what manner an affidavit so sworn shall be receivable—whether purporting to be signed by a person having authority, it shall be *prima facie* taken to have been so in fact; or whether, before being received, it will be necessary to prove *dehors* the affidavit both the official character and the signature of the party who signed, &c.

(*o*) Taken from English Act 15 & 16 Vic. cap. 76, s. 20. Also a *verbatim* copy of our old rule 10 H. T. 13 Vic., which was taken from Eng. R. G. 10 M.T. 3 Wm. IV., Jervis N. R. 96; 9 Bing. 445.

(*p*) This section seems to apply only to *omissions* in writs or indorsements. *Mistakes* are provided for by section 222.

(*q*) The expressions *insert in* or *indorse on* apply as well to the contents of the writ as to its indorsements. If the forms in Schedule A, Nos. 1, 2, 3, 4, 5 and 6, be not strictly followed, this section will apply.

(*r*) The court always had power to amend the writ, which was the act of the court; but not the copy, which was the act of the party: see *Byfield* v. *Street*, 2 Dowl. P. C. 739; *Eccles* v. *Cole*, 8 M. & W. 537; *Lyman* v. *Brethron*, 2 Cham. R. 108; *Nicol* v. *Boyne*, 2 Dowl. P. C. 761. An amendment therefore, when made of the original writ, but not of the copy served, often caused a variance which placed the party affected in a worse position than before amendment. The powers formerly vested in the courts as regards original writs is by this section extended to the *copy* also. It was a question whether a copy could be amended after service, so as to make such service good: see *Byfield* v. *Street*, 2 Dowl. P. C. 739; also see *Crow* v. *Field*, 8 Dowl. P. C. 231; *Hall* v. *Redington*, 5 M. & W. 605. It was said that the court by ordering the amendment would be ordering a fiction

of the matters required by this Act to be inserted therein or indorsed thereon, such Writ or copy shall not on that account be held void, (*s*) but it may be set aside (*t*) as irregular, (*u*) or be amended (*v*) upon application made to the Court out

any thing in the indorsement on or in the Writ.

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by making it appear that defendant had been served with the amended copy: see *Cornish et al* v. *Hockin*, 1 El. & B. 602. But such amendments of late have been freely made: see *Wilson* v. *Storey*, 3 U.C. L. J. 50. Amendment allowed on terms of re-service: *Davis* v. *Carruthers*, 2 U. C. L. J. 209, *per* Burns, J. Where after arrest made on a defective capias, the writ was amended, but defendant discharged, the judge refused to impose the condition that defendant should be again arrested on the writ as amended: *Lyman* v. *Brethron*, 2 Cham. R. 108. Where a judge in chambers improperly ordered a *writ* and service to be set aside, the court above amended his order by setting aside only the copy and service: *Tadman* v. *Wood*, 4 A. & E. 1011.

(*s*) An irregular proceeding is good for many purposes. It remains in force until set aside. A nullity has no effect whatever. A nullity is therefore incapable of being amended: Macnamara on Nullities, 24. Where there is a doubt as to whether a proceeding is an irregularity or a nullity, it should be viewed as an irregularity merely: *Herr* v. *Douglass*, 4 Prac. 102.

(*t*) "*May be set aside*," &c. This of course intends an application to be made by the party adverse to the party whose proceeding is defective. But it is apprehended that the party in fault may, if he be the first to perceive the irregularity himself, apply to have it amended.

(*u*) An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding. It consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an improper manner. By the former is meant "omissions," by the latter "mistakes."

(*v*) An amendment has been generally allowed where the situation of the parties was not changed by it, and where otherwise there would have been a failure of justice: *Plock* v. *Pacheo*, 1 Dowl. N. S. 383, *per* Alderson, B.; see also *Goodchild* v. *Leadham et al*, 5 D. & L. 383. Thus plaintiff's attorney may amend the writ of summons before service, by correcting a mistake as to the name or number of defendants, and may cause it to be resealed without altering the teste: *Gibson* v. *Varley*, 28 Law T. Rep. 158. Where an irregular proceeding was amendable as of course, the court refused to set it aside: see *Popkins* v. *Smith*, 7 Bing. 434. Since the Uniformity of Process Act in England, it has been unusual for the judges to amend the forms of process prescribed by that act, except where the Statute of Limitations would otherwise be a bar to the action, or where the irregularity was a mere clerical error: see *Lukin* v. *Watson*, 2 Dowl. P. C. 633; *Mills* v. *Gossett*, 1 Scott, 318; *Partridge* v. *Wellbank*, 5 Dowl. P. C. 93; *Brown et al* v. *Fullerton*, 13 M. & W. 556; *Christie et al* v. *Bell et al*, 16 M. & W. 669; *Carne et al* v. *Malins et al*, 20 L. J. Ex. 434; *Green et al* v. *Kettelby*, 8 Dowl. P. C. 783.

The following cases, though not strictly examples of "omissions," may be referred to in illustration of these remarks:

1. *Name of Plaintiff—Moody* v. *Aslatt*, 3 Dowl. P.C. 486; *Carne et al* v. *Malins et al*, 2 L. M. & P. 498.

2. *Name of Defendant—Carr* v. *Shaw et al*, 7 T. R. 299; *Rutherford* v. *Mein*, 2 Smith, 392; *Wood* v. *Hume*, 4 D. & L. 136; *Goodchild* v. *Leadham et al*, 5 D. & L. 383; see also *Sale* v. *Crompton*, 2 Str. 1209; *Roberts et al* v. *Bate et al*, 6 A. & E. 778; *Brown et al* v. *Fullerton*, 13 M. & W. 556; *Christie et al* v. *Bell et al*, 16 M. & W. 669; *Carne et al* v. *Malins et al*, 6 Ex. 803.

of which the same issued, or to a Judge, (*w*) and such amendment may be made upon any application to set aside the Writ,

3. *Date of Writ—Kirk* v. *Dolby*, 8 Dowl. P.C. 766; *Williams* v. *Williams*, 10 M. & W. 476; *Mavor* v. *Spalding*, 1 D. & L. 878; *Culverwell* v. *Nugee*, 4 D. & L. 30; *Campbell* v. *Smart et al*, 5 C. B. 196; s. c. 15 M. & W. 559; *Bailey* v. *Owen*, 9 W. R. 128; *Clarke* v. *Smith*, 2 H. & N. 753.

4. *Teste of Writ — Wakeling* v. *Watson*, 1 C. & J. 467; *Edwards* v. *Collins*, 5 Dowl. P. C. 227; *Corrall* v. *Foulkes*, 5 D. & L. 590; *Myers* v. *Rathburn*, Tay. U. C. R. 127.

Many important cases with respect to the amendment of process, decided since the Uniformity of Process Act will be found collected in a note to *Wood* v. *Hume*, 4 D. & L. 139 note *a*.

The reluctance of the court to amend the writ when not in strict compliance with the Uniformity of Process Act did not extend to *indorsements* upon the writ. A distinction was made between non-compliance with the terms of an act of parliament and of a rule of court: see *Cooper* v. *Waller*, *Tabram* v. *Thomas*, 3 Dowl. P. C. 167. The forms of the writ were prescribed by the Eng. Stat. 2 Wm. IV. cap. 39. The indorsements were made necessary by Rules H. T. 2 Wm. IV. R. II. and M. T. 3 Wm. IV. No. 3: see Jarvis' New Rules, p. 90, 94.

The following cases in reference to amendment of indorsements may be useful:

1. *Indorsement required by section* 14 *of our C. L. P. Act as to debt and costs:* see *Urquhart* v. *Dick*, 3 Dowl. P. C. 17; *Shirley* v. *Jacobs*, 3 Dowl. P. C. 101; *Cooper* v. *Waller*, *Tabram* v. *Thomas*, 3 Dowl. P. C. 167; *Trotter* v. *Bass*, 3 Dowl. P. C. 407

2. *Indorsement on pluries writ*, of date of issue of former writ: *Medlicott* v. *Hunter*, 5 Ex. 34.

The writ and indorsements as regards amendment must now be deemed upon an equal footing. The C. L. P. Act makes no distinction. An enactment similar to the one here annotated has been introduced into the recent Bills of Exchange Act in England. Where a writ issued under that act omitted the name of the maker of the note sued upon, the court allowed the indorsement to be amended: *Knight* v. *Pocock*, 17 C. B. 177.

(*w*) 1. *Generally as to proceedings by summons and order.* Unless a distinction be made in a statute between the powers of a judge in chambers and those of the court, the judge has the same powers as the court: *Smeeton* v. *Collier*, 1 Ex. 459. And where a judge exercises the duties which belong to the court, it is to be taken that he is to exercise them in the same manner as the court itself, unless there be something in the context of the statute which leads to a different construction: *Ib.* 463, *per* Parke, B. If a party make application to full court in a vexatious and oppressive manner, when his object might have been more speedily obtained at a far less cost upon an application to a judge in chambers, the court may discharge his rule with costs: *Duke of Brunswick* v. *Sloman*, 5 C. B. 218. If the judge to whom an application be made, having in the matter before him concurrent jurisdiction with the full court, refuse the order applied for, an appeal as a general rule will lie to the full court: see *Chapman* v. *King et al*, 4 D. & L. 311; *Teggin* v. *Langford*, 10 M. & W 556; *Stokes* v. *Grissell*, 23 L. J. C. P. 141; s. c. 14 C. B. 678. An application may be made to a judge in chambers to rescind his own order: *Shaw et al* v. *Nickerson*, 7 U.C. Q.B. 541. If he refuse, no appeal can then be made to the full court: *Thompson et al* v. *Becke*, 4 Q.B. 759. One judge may rescind the order of another judge even on the same material that was before the first judge, but whether the second judge will do so or not must always be a question for himself, according to the nature of the fact: *Demill* v. *Easterbrook*, 10 U. C. L.J. 246. A judge in chambers has the same jurisdiction in respect of the costs of a summons as the court whom he represents has over the costs of a rule: *Doe d. Prescott* v. *Roe*, 9 Bing. 104; *In re Bridge and Wright*, 2 A. & E. 48; *Sheriff* v.

Gresley, 1 H. & W. 588; *Davy* v. *Brown*, 1 Bing. N. C. 460; *Wilson* v. *Northorp*, 4 Dowl. P.C. 441. The practice formerly was otherwise: see *Spicer et al* v. *Todd*, 2 C. & J. 165; *Read* v. *Lee*, 2 B. & Ad. 415. The judge who makes an order may, if so disposed, fix the amount of costs: *Collins* v. *Aron*, 4 Bing. N. C. 233. And if, having the power, he exercise his discretion in doing so, a difference of opinion between him and the court in the particular case cannot avail against his order: *Tomlinson* v. *Bollard*, 4 Q. B. 642. If the judge in any matter before him exceed his jurisdiction, it is the duty of the party affected by his order, to apply to the court to vary or rescind it, on the ground that it is not the result of a correct exercise of discretion. It is said that there is no inflexible rule as to the period at which such application should be made; but the party must at least apply within a reasonable time: *In re Glass & Springer*, 13 U. C. C. P. 419. Two years is an unreasonable time: *Griffin et al* v. *Bradley*, 6 C. B. 722. Four terms unreasonable: *Buffalo and Lake Huron R. Co.* v. *Hemmingway*, 22 U. C. Q. B. 562. Reasonable time means at all events before next step taken: *Meredith* v. *Gittins*, 18 Q. B. 257. The application should as a general rule be made in the course of the term next after the decision: *Orchard* v. *Moxsy*, 2 El. & B. 206; affirmed in *Collins et al* v. *Johnson*, 16 C.B. 588. If application made on the last day of the ensuing term for a rule returnable on the first day of the next term, it will be too late: *Bank of Montreal* v. *Harrison*, 19 U.C. C.P. 276. If an order appear to have been made "by consent," the court cannot presume that it is incorrect. A party to the order cannot move the court to set aside an order made with his own consent. If the words "by consent" were improperly inserted, then application should be made to the judge to set the order aside: *Hall* v. *West*, 1 D. & L. 412. Under the Interpleader Acts, an order by consent disposing of the property in dispute, though bad for not stating the consent on the face of it, was held to be a good award between the parties who had consented: *Harrison* v. *Wright*, 13 M. & W. 816. The court cannot take notice of a consent on a summons, unless followed in due time by an order drawn up and served: *Wood* v. *Harding*, 3 C. B. 968. And generally an order is of no force till served: see *Belcher et al* v. *Goodered*, 4 C. B. 472. If a party lie by for an unreasonable time after an order has been made and served, and after that order has been made a rule of court, he cannot move the court to set it aside: *Clement* v. *Weaver*, 3 M. & G. 555, *per* Tindal, C. J. If the application be made at chambers in August and refused, and a similar application be made again in November, the period for appeal is reckoned from August: *Clarke* v. *Smith*, 6 W. R. 522. A judge in chambers is, in general, for the purpose of all motions before him, a judge of all the courts: *Palmer* v. *The Justice Assurance Society*, 28 L.T. Rep. 120; see also Con. Stat. U.C. cap. 10, s. 10. When the order has once been made a rule of court, the application should be to set aside the rule of court in which the judge's order is merged: *Ib.* 553; see also *Cassidy* v. *Steuart*, 2 M. & G. 439, note *a*. On a motion in court to rescind a judge's order, the affidavits on which such order was obtained should be before the court: *Needham* v. *Bristowe*, 1 Dowl. N.S. 700; *Pocock* v. *Pickering* 21 L.J. Q.B. 365; *Mitchell* v. *Harding*, 5 L. T. N.S. 348. The rule, if obtained, should be drawn up on reading the affidavits filed in chambers: see *Edwards et ux* v. *Martyn et al*, 21 L. J. Q. B. 87 n.; *Grissell* v. *Stokes*, 23 L. J. C.P. 141; s. c. 14 C. B. 678; and notes thereto. Where a judge in chambers discharged a summons to set aside a final judgment, it was held that an application to the court for the same purpose must be by way of appeal from the order and not as an original motion: *Waddell* v. *Corbett et al*, 26 U.C. Q.B. 243. Where upon a summons at chambers the judge makes no order and the same application is made by motion to the court, the party is not confined to the affidavits used in chambers, but may use fresh affidavits disclosing additional facts, although he cannot do so upon a motion to rescind a judge's order: *Cesarini* v. *Ronzani*, 31 L. T. Rep. 203.

2. *Particularly as to applications under this section.* In ordinary cases the application should be made in chambers. If the irregularity happen during vacation, the application should always be made in chambers: *Cox* v. *Tullock*, 2 Dowl.

P. C. 47; *Hinton* v. *Stevens*, 4 Dowl. P. C. 283; Bag. Cham. Pr. 96. If the party applying be dissatisfied with the decision of the judge and an appeal to the full court be intended, the motion should be made as early as possible during the following term: see *Sugars* v. *Concanen*, 5 M. & W. 30; *Collins et al* v. *Johnson*, 16 C.B. 588. When notice of intention to move necessary: see *Dougall* v. *Maclean*, Dra. Rep. 330; *Ferrie* v. *Tannahill*, *Ib.* 340. If the question before the judge in chambers be whether the application to set aside process for irregularity is made in sufficient time, it is a question for his discretion, and it would seem that the court will not review his decision: see *Tadman* v. *Wood*, 4 A. & E. 1011. The court will very seldom entertain an appeal against the decision of a judge in chambers, declining to give effect to a motion for irregularity: *Gilmour et al* v. *Wilson et al*, 5 U. C. Q. B. 154. *Semble*, although the judge himself might entertain the application a second time, yet he is not bound to do so upon a mere irregularity: *Ib. per* Robinson, C. J. A judge in chambers has authority to open again an order granted by himself, or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts: *Shaw et al* v. *Nickerson*, and *Gillespie et al* v. *Nickerson*, 7 U. C. Q. B. 543, *per* Robinson, C. J. The motion should be either that the writ be set aside or amended at the costs of the plaintiff. All such applications, whether to the court or a judge, should be promptly made, as a general rule, within the time allowed by the writ for appearance: *Tiling* v. *Hodgson*, 13 M. & W. 638; *Tyler* v. *Green*, 3 Dowl. P. C. 439; *Herbert* v. *Darley*, 4 Dowl. P. C. 726; *Edwards* v. *Collins*, 5 Dowl. P. C. 227; *Davis* v. *Skerlock*, 7 Dowl. P. C. 530; *Child* v. *Marsh*, 3 M. & W. 433. It must be borne in mind, when referring to English authorities, that the time limited for appearance in ordinary cases used to be, there as here, only *eight* days. It is now *ten* days in both countries. Cases therefore, under the old practice deciding that applications made eight, nine, or ten days after knowledge of the irregularity were too late, cannot be received as positive authority under the new practice. By rule of court, "It is ordered that no application to set aside *process* or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying be taken a fresh step after the knowledge of the irregularity:" R. G. pr. 196. This rule must not be rigidly construed as applying to persons in close custody: *Barry* v. *Eccles*, 2 U. C. Q.B. 383, P. C. *per* Hagerman, J. *Sed qu.* "We cannot admit the argument advanced on behalf of the defendant, that because she is a prisoner, she is entitled to greater favor than any other person:" *Claridge* v. *McKenzie*, 2 Dowl. N. S. 898, *per* Tindal, C. J.

1. "*Reasonable time*," *as applied to the setting aside of mesne process*—five days reasonable: *Firley* v. *Rallett*, 2 Dowl. P. C. 708. Six days reasonable: *Smith* v. *Pennell*, 2 Dowl. P. C. 654. Twenty-three days not so: *Fownes* v. *Stokes*, 4 Dowl. P. C. 125. From 4th June till following M. T. too late: *Lewis* v. *Davison*, 3 Dowl. P. C. 272. Arrest 28th August, application 6th November following, too late: *Parker* v. *Bayley*, 5 D. & L. 296. The time begins to run from the time when the party complaining had the *means of knowledge*, though in fact he did not *know* of the irregularity till afterwards: *Lewis* v. *Davison*, 1 C. M. & R. 655; *Seymour* v. *Maddox*, 1 L. M. & P. 543.

2. "*Fresh step*" *after knowledge of the irregularity as applied to process*—Too late after appearance: *Fox et al* v. *Money*, 1 B. & P. 250; *Hompay* v. *Kenning*, 2 Chit. 236; see also *Steele* v. *Morgan*, 8 D. & R. 450. Too late after justification of bail: *Jones* v. *Price*, 1 East. 81. Too late after bail perfected: *Chapman* v. *Snow*, 1 B. & P. 132. For this purpose the affidavit to hold to bail is part of the process: *D'Argent* v. *Vivant*, otherwise *Taylor*, 1 East. 330.

The following have been held to be "fresh steps" so as to estop defendant objecting to previous irregularities. An undertaking to appear: *Anon.* 1 Chit. 129; *Holliday* v. *Lawes*, 8 Bing. N. C. 541. Payment of part of debt and costs: *Monday* v. *Sear*, 11 Price, 122. Admission of the debt with a request for time: *Rawes* v. *Knight*, 1 Bing. 132. Demand of declaration not a fresh step: *Hodgson*

upon such terms as to the Court or Judge seems fit. (*x*) 19 Vic. c. 43, s. 37.

Amendment if one form of Writ be substituted by error for another.

49. (*y*) If any one of the forms of Writs of Summons in the Forms (A) respectively Nos. 1, 3 and 4, has by mistake or inadvertence been substituted for either of the others, (*z*) such mistake or inadvertence shall not be an objection to the Writ or any other proceeding in such action, (*a*) but upon an

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v. *Dowell*, 3 M. & W. 284. A defendant having appeared and examined evidence on an assessment of damages which had been carried down by a writ of trial issued from the Queen's Bench, under our statute 8 Vic. cap. 13, s. 54, was held by such conduct to have waived irregularities in the proceedings before them had in the Queen's Bench: *Small* v. *Beasley*, 3 U. C. Q. B. 141. If defendant lie by and allow plaintiff to take several steps, he thereby waives all previous irregularities in his proceedings: *Arnold* v. *Fish*, 5 O. S. 140; *Proctor* v. *Young*, H. T. 4 Vic. *M.S.* R. & H. Dig. "Irregularity," 15. If he move a judge in chambers, he must state all the irregularities he relies upon, and cannot afterwards in term resort to other irregularities, which, though existing at the time of the application in chambers, were then passed over without objection: *Arnold* v. *Fish*, 5 O. S. 140. The summons should state the several objections intended to be insisted on: see R. G. pr. 107.

(*x*) It is thought that the court will impose costs upon the plaintiff only in cases of irregular proceedings, such as before the act would have been set aside: Lush. Pr. 2 ed. 250. Formerly it was not usual to set aside process where there was a substantial compliance with the act, or rules regulating the same: see *Yardley* v. *Jones*, 4 Dowl. P. C. 45; *Lewis* v. *Davison*, 5 Tyr. 198; *Pickman* v. *Collis*, 3 Dowl. P.C. 429; *Englehart* v. *Eyre*, 2 Dowl. P.C. 145; *Youlton* v. *Hall*, 7 Dowl. P.C. 175; *Arden et al* v. *Jones*, 4 Dowl. P. C. 120; *Rust* v. *Chine*, 3 Dowl. P. C. 565; *King* v. *Monkhouse*, 2 Dowl. P. C. 221. These cases are noted not so much as authorities applicable to the state of our laws, as proofs that it was not usual for the court to set aside process *when there was a substantial compliance with the governing statute or rule of court.* Each case must rest upon its particular circumstances. The discretion of a judge in chambers in such matters when exercised by him will be seldom reviewed by the court above: *Tadman* v. *Wood*, 4 A. & E. 1011. In the first place, it appears that application under this section will in general be made by an adverse party. It will, in most cases, be by a defendant seeking to set aside proceedings for irregularity, or to have them amended by the plaintiff. In many cases, if the application succeed, it may be held that plaintiff ought of right to pay the costs, inasmuch as his error occasioned the application: see *Urquhart* v. *Dick*, 3 Dowl. P.C. 17; *Turner* v. *Gill*, 3 Dowl. P.C. 30; *Shirley* v. *Jacobs*, 3 Dowl. P. C. 101; *Cooper* v. *Waller*, 3 Dowl. P. C. 167. If the rule or order be moved with costs, and be afterwards discharged without any special directions as to costs, it will be understood as with costs: see R. G. pr. 108.

(*y*) Adopted from Eng. Stat. 15 & 16 Vic. cap. 76, s. 21.

(*z*) The preceding section (sec. 48) applies to omissions in process generally. The present section applies only to the erroneous substitution of one of the three forms of writs given in the schedule for any other of them: see *Green* v. *Braddyll* 4 W. R. 487.

(*a*) Where the form No. 1 to be used when the defendant resides within the jurisdiction was substituted for form No. 3, the defendant being resident without the jurisdiction, the court, though they did not set aside the writ, set aside an

ex parte application to a Judge, (*b*) whether before or after an application to set aside the Writ or any proceeding thereon, and whether the same or notice thereof has been served or not, the Writ may be amended by such Judge without costs. (*c*) 19 Vic. c. 43, s. 38.

Attorney whose name is endorsed on the writ, to declare whether he sued it out, and if so, plaintiff's name, &c., if so ordered.

50. (*d*) Every Attorney whose name is endorsed on any Writ issued for the commencement of any action, (*e*) shall, on demand in writing made by or on behalf of any Defendant, (*f*) declare forthwith whether such Writ has been issued by him or with his authority or privity, and if he answers in the affirmative, (*g*) then he shall also, in case the Court or a Judge so direct, declare in writing within a time to be limited by such Court or Judge, the profession or occupation and place of abode of the Plaintiff, (*h*) on pain of

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order obtained by plaintiff allowing him to proceed as if personal service had been effected: *Hasketh* v. *Flemming*, 24 L.J. Q.B. 255. But independently of this enactment, the court, it seems, has the power to order all amendments to be made necessary for determining the real question in controversy between the parties: see section 222 of this act, and *Cornish et al* v. *Hockin*, 1 El. & B. 602.

(*b*) This is an enabling clause, and it is the plaintiff who is to avail himself of it: see *Hasketh* v. *Flemming*, 24 L. J. Q. B. 255, *per* Coleridge, J.

(*c*) The difference between this and the preceding section (sec. 48) with respect to costs, should be noticed. Amendments under this section shall be made without costs. Amendments under the preceding section shall be upon such terms as to the court or the judge may seem fit.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 7. Much resembles repealed Stat. 12 Vic. cap. 63, s. 31, which was a transcript of Eng. Stat. 2 Wm. IV. cap. 39, s. 17. The object of this section is to give the defendant full information as to the place where he may go, in order to settle the action: see *Dawes* v. *Solimonson*, 6 Scott, 596.

(*e*) Applies equally to writs of capias and summons: see *Gilson* v. *Carr*, 4 Dowl. P. C. 618.

(*f*) No time is mentioned within which the demand must be made. It would be clearly too late after verdict: see *Hooper* v. *Harcourt*, 1 H. Blac. 534; *Shindler* v. *Roberts*, Barnes, 126. It should be made at least soon after the circumstances which render it necessary have come to defendant's knowledge.

(*g*) If the attorney answer in the affirmative, and defendant insists upon knowing the plaintiff's profession, abode, &c., defendant should take out a summons for the purpose. Plaintiff's attorney is only bound to deliver such particulars in case the court or a judge shall so order and direct. In one case an order was refused where it appeared that the object of the application was to arrest plaintiff on a criminal charge: *Harris* v. *Holler*, 7 D. & L. 319. But though required for a collateral purpose, it may sometimes be ordered: *Cox* v. *Bockett*, 18 C.B. N.S. 239.

(*h*) A temporary abode at a coffee house is insufficient. Defendant entitled to ask for a better residence: *Hodson* v. *Gamble*, 3 Dowl. P. C. 174; *Gilson* v. *Carr*, 4 Dowl. P. C. 618. If the information given be insufficient, a summons should be taken out for better particulars: *Smith* v. *Bond*, 2 D. & L. 460. If the information be false, the parties who give it are punishable for contempt: *Ib.* In a case

being guilty of a contempt of the Court from which such Writ appears to have issued; (*i*) and if such Attorney declares that such Writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereon without leave of the Court or a Judge. (*j*) 19 Vic. c. 43, s. 25.

Proceedings stayed if he declares he did not sue it out.

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where the particulars were false, an application to stay the proceedings made after trial was refused, as it did not appear that the defendant had sustained any real prejudice from the fraud practised upon him: 2 D. & L. 460. Upon an application by defendant, grounded on an affidavit of his attorney, stating—1. That he had applied to plaintiff's attorney for particulars of plaintiff's residence and was informed by the attorney that he did not positively know plaintiff's residence, but believed it to be at Windsor; but—2. That the defendant had good ground to believe and did believe that plaintiff's residence was not at Windsor, but in the United States of America; an order for stay of proceedings was made, no cause being shown: *Houghton* v. *Great Western R. Co.*, 3 U. C. L. J. 70. The liability to costs of an attorney who brings an action without knowing or being able to give the address of his clients, was much discussed in a recent case. No decision was come to, for the case went off upon other points: see *Collins et al* v. *Johnson*, 16 C. B. 588.

(*i*) Where an attorney received instructions by a letter dated at "Bridport," and afterwards received from the plaintiff another dated at "Lynn," and an order having been obtained he gave "Bridport" as the place of residence; it afterwards appeared that the plaintiff had left Bridport before the action was commenced, and a second order was obtained, upon which the attorney gave "Lynn." This too, turned out to be incorrect. The court, upon motion for an attachment against the attorney, ordered him to pay the costs of the inquiry and of the motion, and stayed proceedings until such time as a true address could be given: *Neal* v. *Holden*, 3 Dowl. P. C. 493. Under the old practice, when an attorney refused to comply with the judge's order, the court allowed defendant to *non pros.* plaintiff, and ordered the attorney to pay the costs: *Gynn* v. *Kirby*, 1 Str. 401. Plaintiff's attorney was required by a judge's order to give forthwith the address of the plaintiff. Failing to comply with the order, the attachment was applied for in disobeying the judge's order. The order was not in the terms of the statute, nor was it made a rule of court, *held* that the application could not be granted: *Malpass* v. *Mudd*, 3 H. & N. 246. Before an attachment will issue it must be shown that there was a demand *in writing* made: *Brown* v. *Williams*, 1 N. R. (Q. B. 1863) 260.

(*j*) These latter words, "all proceedings upon the same shall be stayed," &c., were not used either in 12 Vic. cap. 63, s. 31, or in the English act 2 Wm. IV. cap. 39, s. 17. The provision is a new one, founded upon Eng. Rule, No. 14 of M. T. 3 Wm. IV.: Jervis N. R. 4 edn. 98, from which our Rule H. T. 13 Vic. No. 12, was copied. It is not clear but that the court, independently of this enactment, has the powers therein conferred. In *Oppenheim* v. *Harrison*, 1 Burr. 20, proceedings were set aside on the ground of an attorney's name having been used without his authority. See also *Hopwood* v. *Adams*, 5 Burr. 2660, where a judgment was set aside under like circumstances. The attorney, besides, is an officer of the court, and as such bound to obey orders of the court in reference to actions by him conducted. The general jurisdiction of the court gives it power to control its own process, and prevent that process from being abused: see *Johnson* v. *Birley et al*, 5 B. & Al. 540; *Worten* v. *Smith*, 5 B. & Al. 543, note *a*; *Braceby* v. *Dalton*, 2 Str. 704.

APPEARANCE.

Defendant may appear at any time before Judgment.

51. (*k*) The Defendant may appear (*l*) at any time before Judgment, (*m*) and if he appears after the time specified either in the Writ of Summons or in the warning indorsed on any Writ of *Capias* served on him, or in any rule or order

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 29. Founded upon the first report of the Common Law Commissioners, section 16. The immediate object of the writ is "to cause the defendant to appear," which is done by the entry of a memorandum of appearance with the proper officer. This memorandum was until lately entered either by defendant himself when he chose to appear, or by plaintiff for him when he neglected to do so. Some persons are of opinion that an appearance is an unmeaning form and "altogether needless;" but the Common Law Commissioners thought differently. They described it as "a convenient mode of intimating to plaintiff defendant's intention of resisting the action." When, however, the time fixed by the practice of the court for appearance is allowed by defendant to elapse without appearance, it may reasonably be assumed that defendant, as he has not "intimated his intention," has no intention of resisting the plaintiff's proceedings. In the face of such a presumption an appearance by plaintiff for defendant is most undoubtedly an "unmeaning form." Therefore the legislature by the enactments following have, upon the recommendation of the Common Law Commissioners, abolished the latter mode of appearance, technically known as "appearances per statute." But as the presumption arising from the fact that no appearance has been entered by defendant, and that he has no intention of defending, may not always be consistent with facts, it is provided by this act that defendant may, upon certain conditions, "appear at any time before judgment." Defendant may at any time come in and watch his rights, without prejudice to the plaintiff. Appearing before plea pleaded, he will have every advantage that an appearance would have given if made within the appointed time. If he appear after plea pleaded he will be in a position to see to the regularity of plaintiff's proceedings. *Qu.* If defendant appear after the time limited to a writ *specially indorsed*, is plaintiff thereby debarred from entering judgment? see *Royers* v. *Hunt*, 10 Ex. 474. If a plaintiff under the old practice entered an appearance for defendant it was unnecessary for plaintiff afterwards to serve a demand of plea before signing judgment. This too was held to be the law in a case where the defendant after the time limited for appearance and after an appearance *per statute* by plaintiff, himself entered an appearance and gave notice to plaintiff: see *Davis* v. *Cooper*, 2 Dowl. P. C. 135. An infant can only appear by guardian: *Frescobaldi* v. *Kinaston*, 2 Str. 784; *Leech* v. *Clabburn*, 2 L. M. & P. 614; *Jarman* v. *Lucas*, 15 C. B. N. S. 474. And not by *prochein amy: Simpson* v. *Jackson*, Cro. Jac. 640; *Fitzgerald* v. *Villiers*, 3 Mod. 236; *Carr* v. *Cooper*, 1 B. & S. 230. See further *Lees* v. *Smith*, 5 H. & N. 632; *Collins* v. *Brook* (in Error), 5 H. & N. 700. The appearance must be duly stamped when entered: *Bank of Montreal* v. *Harrison*, 4 Prac. R. 331, *per* Draper, C. J.

(*l*) If defendant appear under this section, he will thereby waive irregularities in the writ, copy, and service, nay, even the total want of a writ. Moreover, in doing so he submits himself to the jurisdiction of the court in which he appears, no matter where the cause of action arose: see *Forbes et al* v. *Smith*, 10 Ex. 717; also *Humble et al* v. *Bland*, 6 T. R. 255. The appearance if defective but not void may be amended: see *Wheston* v. *Packman*, 3 Wils. 49; *Bate* v. *Bolton*, 4 Dowl. P. C. 677.

(*m*) There can be no judgment until judgment has been fully signed. An appearance filed while plaintiff is signing judgment is in time, though plaintiff affect to disregard it: *Harris* v. *Andrews*, 3 U. C. L. J. 31.

to proceed as if personal service had been effected, (*n*) he shall, after notice of such appearance to the Plaintiff or his Attorney, be in the same position as to pleadings or other proceedings in the action as if he had appeared in time; (*o*) but a Defendant appearing after the time appointed by the Writ, shall not be entitled to any further time for pleading or for any other proceeding than if he had appeared within such appointed time; (*p*) and if the Defendant appears after the time appointed by the Writ, and omits to give such notice of his appearance, the Plaintiff may proceed as in case of non-appearance. (*q*) 19 Vic. cap. 43, s. 62. His position

52. (*r*) Every appearance by the Defendant in per-

(*n*) *i. e.* "Within ten days after service of writ:" see Schedule A. No. 1. An attorney, by accepting service of a writ of summons for his client, undertakes to appear for him, but the attorney has the same time to appear for defendant as if the service of the writ of summons had been made on defendant himself: *Starratt* v. *Manning*, 3 U. C. L. J. 10.

(*o*) "*He shall, after notice, &c.*" Where appearance is entered after due time though before judgment, there should be notice of it: *Rhodes* v. *Bryant*, 2 F. & F. 265. Though the notice here intended is a written one (R. G. pr. 131), a *knowledge* by plaintiff that an appearance has been entered may in some cases be held to dispense with the necessity for such a notice. Thus, where the writ of summons specially indorsed was served on 30th August; defendant on 9th September, entered an appearance, but gave no notice thereof to plaintiff's attorney, as required by this section. On the same day, plaintiff's attorney having seen the entry of the appearance in the proper book, at the office of the deputy clerk of the crown, and having also seen the appearance itself, notwithstanding, signed judgment for non-appearance. *Held* that the "knowledge of the plaintiff, that an appearance was entered, though it was entered on the morning of the day after it should have been entered according to the time of the service of the writ of summons, was sufficient to dispense with a written notice by the defendant that he had appeared:" *Lanark and Drummond Plank Road Co.* v. *Bothwell*, 2 U. C. L. J. 229. Besides, it was in this case considered that "plaintiff did not allow time for such notice to be given—for the appearance was entered at the opening of the office in the morning, and plaintiff's attorney came at the same time with the papers prepared to sign judgment, although seeing the appearance entered:" *Ib.* The summons to set aside the judgment was made absolute without costs, because "it appeared that the deputy clerk of the crown had received the appearance the day before with instructions to keep it and file it the first thing next morning:" *Ib.*

(*p*) Otherwise plaintiff might be prejudiced: see *Davis* v. *Cooper*, 2 Dowl. P.C. 135, *per* Bayley, J.

(*q*) This is not contained in the English section. It is necessary in order to relieve plaintiff from searching the crown office from day to day as he proceeds with his suit, in anticipation of an appearance after the time limited for appearance has expired.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 30. Founded on the first report of the Common Law Commissioners, section 18. The object of this section

Defendant appearing in person to give an address.

son (*s*) shall give an address (*t*) at which all pleadings and other proceedings not requiring personal service may be left for him, (*u*) and if such address be not given, the appearance shall not be received, (*v*) and if an illusory or fictitious address be given, the appearance shall be irregular and may be set aside (*w*) by the Court or a Judge, (*x*) and the Plaintiff may, by the Court or Judge, be permitted to proceed (*y*) by

Where pleadings, &c., may be served.

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is to compel defendants appearing in person to give to plaintiff's attorney full and correct information as to the address or place at which all papers not requiring personal service may be left.

(*s*) This section applies only to cases where defendant appears in person. The form of appearance is given in the following section (sec. 53). A defendant who appears in person is bound to know the practice of the court and cannot be suffered to excuse himself on the ground of ignorance: see *Gillingham* v. *Waskett*, McClel. 568. He is bound too by the same rules as he would have been had he appeared by attorney: *Kerry* v. *Reynolds*, 4 Dowl. P.C. 234. But there is nothing to prevent a defendant who appears in person afterwards pleading by attorney: see *Soper* v. *Draper et al*, 2 O. S. 289; *Kerrison* v. *Wallingborough*, 5 Dowl. P. C. 564; see also R. G. pr. 139.

(*t*) The memorandum stating the address together with the appearance to be given to the proper officer and filed by him: section 53. The memorandum of address to be filed "as a paper in the cause." "Such address or place to be not more than two miles from such office:" see R. G. pr. 138.

(*u*) Notices, summonses, rules, orders, and generally all proceedings subsequent to the writ, including pleadings, may be sufficiently served though the service be not personal: see R. G. pr. 138. A rule *nisi* for an attachment is an exception to this practice. The address given by defendant may or may not be his residence. If his residence, the service may be made on a servant, and must at all events be shown to have been made upon some person connected with his residence: *Taylor* v. *Whitworth*, 1 Dowl. N. S. 600. If the place of address be not his residence, then it seems the service must be made upon some person connected with the place so named. Service of pleadings, notices, summonses, orders, rules, and other proceedings, must be made before 7 o'clock P.M., except on Saturdays, when it must be made before 3 o'clock P.M.: see R. G. pr. 135.

(*v*) *i. e.* By the officer whose duty otherwise it would be to file it.

(*w*) It is important here to note the distinction between an irregularity and a nullity. The former may be waived by the conduct of the party, who is entitled to take advantage of it, and stands good at least till set aside. The latter is incapable of being waived, and has no force or effect whatever. An appearance, if defective in the particulars mentioned in this section, is declared to be an irregularity. To set aside an irregularity, the party objecting must apply within a reasonable time and before taking any fresh step after knowledge of the irregularity: see R. G. pr. 106. See also *Herr* v. *Douglass*, 4 Prac. 102.

(*x*) *Court or judge:* see note *w* to section 48.

(*y*) "*Permitted to proceed*," &c. *Qu.* Does this intend an application to the court or judge for the necessary permission? There is nothing to hinder plaintiff moving at one and the same time to set aside the appearance and to be allowed to proceed in the manner pointed out by this section.

sticking up the proceedings in the office from whence the Writ was sued out. (*z*) 19 Vic. c. 43, s. 63.

Mode and form of appearance.

53. (*a*) The mode of appearance to every such Writ of Summons under the authority of this Act, shall be by filing with the proper officer in that behalf, (*b*) a memorandum in writing according to the following form, or to the like effect: (*c*)

(*z*) Plaintiff in his application must show that the appearance is without an address; *or* an address which is illusory or fictitious; *or* that the address or place given is more than two miles from the office of the clerk or deputy clerk of the crown: as to this latter see R. G. pr. 138. To prove an appearance without the necessary address, the fact after search may be sworn to in positive terms. To prove a given address to be illusory or fictitious, it will be necessary to set forth particular facts which lead to that conclusion. "Illusory" means that which deceives, while "fictitious" may mean that which is designedly untrue. If from inquiries made at the place given as the address of defendant it turn out that the address be really fictitious or illusory, plaintiff, it is apprehended, is in a position to apply without further inquiry. But it must be shown by plaintiff that he used due diligence in order to find the address given by defendant: *Fry* v. *Rogers*, 2 Dowl. P. C. 412. Special inquiries must be made at the place designated. As to the sufficiency of the inquiries see *Fry* v. *Rogers*, 2 Dowl. P. C. 412; also *Hemming* v. *Duke*, 2 Dowl. P. C. 637. To prove that the address or place given is more than two miles from the office of the clerk or deputy clerk of the crown, an affidavit of the fact must be produced. If the application by plaintiff to be permitted to proceed in manner directed by this section be an application separate and distinct from that to set aside the appearance for irregularity, it may be that the order will be granted absolute in the first instance: see *Bridger* v. *Austin*, 1 Dowl. P. C. 272.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 31. This section is also a copy of our statute 12 Vic. cap. 63, s. 23. The origin of both sections appears to be Eng. Stat. 2 Wm. IV. cap. 39, s. 2, with which both almost literally agree.

(*b*) In Eng. Act, "By delivering a memorandum to the proper officer or person in that behalf, &c." The difference between ours and the English section appears to be one rather of form than of substance. It must be intended that the officer should keep an appearance book or other record in which entries may be made. The statute is silent upon the subject; but R. G. pr. 1 makes positive provision for an appearance book. The rule is in effect a re-enactment of old Rule 13 of H. T. 13 Vic.

(*c*) The forms here given are substantially the same as those of Eng. Stat. 2 Wm. IV. cap. 39, Sch. No. 2, and Prov. Stat. 12 Vic. cap. 63, Sch. No. 2. The schedules to both these statutes in reality gave three forms. 1. Where defendant appeared in person. 2. Where he appeared by attorney. 3. Where plaintiff's attorney appeared for defendant. The last of these three has of course been omitted from the forms above given. Appearance by plaintiff for defendant is practically abolished by section 54 of this act. The form here prescribed must be strictly followed. Where an act of parliament expressly provides that a thing is to be done in a given form, the statute must be closely pursued: see *Warren* v. *Love*, 7 Dowl. P.C. 602; *Codrington* v. *Curlewis*, 9 Dowl. P.C. 968. Still the form so given need only be followed in cases in which it is applicable. In cases where the form does not apply an appearance may be entered by keeping as closely to the form prescribed as possible: see *Smith* v. *Wedderburne*, 4 D. & L. 297, *per* Pollock, C. B. If two or more defendants in the same action appear at the same

A. B., Plaintiff, against C. D., Defendant, *or* against C. D., and another *or* against C. D., and others.	The Defendant, C. D., appears in person, (*d*) *or* E. F. (*e*) Attorney for C. (*f*) D. (*g*) appears for him.

(*If the Defendant appears in person, here give his address.*) (*h*)

Entered the ——— day of ———, A.D., one thousand eight hundred and (*i*) ———. 19 Vic. c. 43, s. 64.

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time by the same attorney, the names of all such defendants may be inserted in the one memorandum of appearance: R. G. pr. 2.

(*d*) If defendant be sued by initials or by his wrong name he would do well to appear by his right name: *Lomax* v. *Kilpin*, 4 D. & L. 295. In the margin of the appearance paper it may be stated that he is sued by the wrong name: see *Hobson* v. *Wodsworth*, 8 Dowl. P. C. 601; *Kitchen* v. *Roots*, *Ib.* 232. If he appear by his right name, then plaintiff may declare against him in such name, mentioning, however, that he was sued by the other thus—"A. B., by E. F. his attorney, sues C. D., who has been summoned by the name of G. D.:" see *Doo* v. *Butcher*, 3 T. R. 611. Thus the suit may proceed without difficulty. But if defendant appear by the wrong name, plaintiff may also declare against him by that name: see *Clark* v. *Baker*, 13 East. 273; *Stroud* v. *Gerrard*, 1 Salk. 8; Chit. Arch. 12 ed. 220. Also see *Gould* v. *Barnes*, 3 Taunt. 504; *Williams* v. *Bryant*, 5 M. & W. 447. If the mistaken name be *idem sonans* there will be no irregularity, thus—Lawrance for Lawrence: *Webb* v. *Lawrence*, 1 C. & M. 806.

(*e*) The name of the attorney must be given: see *Warren* v. *Love*, 7 Dowl. P.C. 602. And defendant cannot appear by more than one attorney: see *Williams* v. *Williams*, 10 M. & W. 178, *per* Abinger, C. B. But such an appearance would be an irregularity only, and not a nullity: *Ib.*

(*f*) An appearance by a person who is not an attorney of the court, does not, it seems, entitle the opposite party to sign judgment but only to move to set aside proceedings: see *Bazley* v. *Thompson*, 4 Tyr. 955. And when an attorney without authority appeared, and defendant had not received any notice of the writ, the service of the writ and all subsequent proceedings were set aside: *Wright et al* v. *Hull*, 2 Prac. R. 26.

(*g*) An appearance thus worded—"In Q. B., Thomas Warren, plaintiff, against George Love, defendant, ——— attorney, appears for ———," was held to be a nullity: *Warren* v. *Love*, 7 Dowl. P. C. 602; see *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.

(*h*) As to appearances in person, see preceding section and notes thereto.

(*i*) This blank it is presumed must be filled in as of the date of entry. The English statute is to the effect that the appearance must "be dated on the day of the delivery thereof:" section 31. These words have not been copied by our legislature; but their omission cannot be of much importance. A blank is left by the legislature in the form here given for some date which the appearance is to bear. It cannot be any other than the day of the date of filing. The officer who files an appearance is bound to mark upon it the day upon which it was filed with him: see R. N. pr. 1. Supposing the assumption here made as to the date of an appearance to be correct, it follows that no appearance ought to be entered *nunc pro tunc*. If defendant enter an appearance, having a mistake in name, date,

54. (*j*) In no case shall it be necessary for the Plaintiff to enter an appearance for the Defendant. 19 Vic. c. 43, s. 59. Plaintiff need not enter appearance for defendant.

55. (*l*) In case of non-appearance by the Defendant where the Writ of Summons has been indorsed in the special form hereinbefore provided, (*m*) and in case the Plaintiff files the Proceedings on non-appearance of defendant

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&c., he should apply to amend it and not enter a fresh one: see *Bate* v. *Bolton*, 4 Dowl. P. C. 677. Where an appearance is improperly entered and not a nullity, it may, on application be struck out: see *Paget* v. *Thompson*, 3 Bing. 609. A judge's order to set aside an appearance must be served before it will operate: see *Belcher* v. *Goodered*, 4 D. & L. 814.

(*j*) Taken from Eng. Stat. 15 & 16 Vic cap. 76, s. 26. The phraseology of R.G. pr. 132, which provides for the service of declarations and subsequent pleadings "*as well as where the plaintiff has entered an appearance for the defendant*, as where the defendant has appeared in person," is not quite correct. Appearances by plaintiffs for defendants are by this section rendered unnecessary, if not abolished: *Wallace* v. *Frazer*, 2 U. C. L. J. 184.

(*k*) Held not to apply to actions in which the writ had been issued before the act came into force: *Goodliffe* v. *Neaves*, 8 Ex. 134; *Eadon* v. *Roberts*, 9 Ex. 227.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 27. Founded upon the first report of the Common Law Commissioners, section 15. This section introduces an entirely new proceeding, the words of the section have no reference whatever to established practice. *Lowberry* v. *Morgan*, 9 Ex. 736, *per* Parke, B. *Qu.* Whether the words of the section being affirmative take away the general powers of the court over their judgments, or are merely cumulative in their effects: see *Hall* v. *Scotson*, 9 Ex. 238.

(*m*) *i. e.* by section 15, which, be it observed, merely applies to cases where the defendant is within the jurisdiction of the court. Proceedings under this section can only be had "in case of non-appearance by defendant." Plaintiff's attorney should therefore be careful to search for an appearance immediately before making his application to the court or a judge. The search ought to be made if possible on the day of the application. The affidavit should be explicit and positive to the effect that a search for appearance was made and that no appearance has been entered. Thus, "And I further say, that the said defendant hath not appeared to this action [*or* had not appeared in this action at the hour of ——— in the afternoon of the ——— day of ——— instant, and that he has not, to the best of my knowledge and belief, since appeared thereto"]: see R. G. pr. 112. Under the old practice, where an appearance had in fact been entered for defendant but was mislaid by the deputy clerk of the crown and overlooked by plaintiff's attorney, who entered an appearance per statute and proceeded to judgment, the proceedings were set aside: *Ryan et al* v. *Leonard*, 3 O. S. 307. But held under almost similar circumstances that after judgment by default and notice of assessment, it was too late to object to the irregularity: *Ketchum et al* v. *Keefer*, 6 O. S. 56; see also *Mapel* v. *Woodgate*, 10 Jur. 839. Where an appearance filed by defendant was by mistake indorsed with the letters "C. C." which misled the deputy clerk of the crown, who was also clerk of the county court, and caused him to file the appearance among his county court papers, and the plaintiff finding no appearance signed judgment, the judgment was set aside upon payment of costs by defendant: *Dickie et al* v. *Elmslie*, 3 U. C. L. J. 107; but see *Bank of Montreal* v. *Harrison*, 4 Prac. R. 331, *per* Draper, C. J. The court refused to allow

on Writ specially endorsed.

Writ of Summons, and an affidavit of personal service thereof, (*n*) or in case of service on a corporation, files an affidavit of service in the manner in this Act authorized for service on corporations, or files a rule of Court, or a Judge's Order for leave to proceed under the provisions of this Act, (*o*) such Plaintiff may at once sign final judgment in the form (A), No. 7, for any sum not exceeding the sum indorsed on the Writ, together with interest to the date of the judgment, and costs to be taxed in the ordinary way, (*p*) and no proceeding

Signing judgment.

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a plaintiff to enter an appearance per statute without the usual affidavit and the day of indorsement of service upon the writ, although defendant admitted the receipt of the copy of writ left at his dwelling-house: *Russell* v. *Lowe*, 2 Dowl. N. S. 233; but see *Aston* v. *Greathead*, 2 Dowl. N. S. 547; *Rolfe* v. *Paget*, 1 B. C. Rep. 78, *per* Wightman, J. An appearance entered by plaintiff for an infant defendant has been held to be a ground of error: *Stephens* v. *Lowndes*, 3 D. & L. 205; *James* v. *Aswell*, 11 Jur. 562.

(*n*) This provision is in a manner a substitution for the old form of appearance per statute. And it has been held that in order to entitle a plaintiff to enter an appearance per statute actual personal service of the writ was necessary: see *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; and *Christmas* v. *Eicke*, 6 D. & L. 156. The affidavit need not, it seems, now more than formerly show the manner of service. Deponent if positive may in general terms swear that he "personally served defendant with a true copy of the annexed writ of summons."

(*o*) This rule or order to be obtained pursuant to section 16. An application to rescind the order when obtained may be supported by affidavits contradicting those upon which the order was obtained. This too without an affidavit of merits: see *Hall* v. *Scotson*, 9 Ex. 238.

(*p*) "*At once to sign final judgment.*" Plaintiff, it would appear, is not bound to delay signing judgment until a copy of the order has been brought to defendant's notice: *Hall* v. *Scotson*, 9 Ex. 238, *per* Parke, B. This, if a correct opinion, is in strict conformity with the old practice. A plaintiff who had entered an appearance for defendant was not bound to take much further notice of him in the subsequent proceedings. Judgment signed where defendant has not appeared without filing an affidavit of personal service or obtaining a judge's order to be allowed to proceed, would be, it is apprehended, utterly void: see *Lane* v. *McDonell*, H. T. 7 Wm. IV. *MS.* R. & H. Dig. "Appearance," 4; *Nichol* v. *McKelvey*, E. T. 2 Vic. *MS.* R. & H. Dig. same title, 6; *Roberts* v. *Spurr*, 3 Dowl. P. C. 551, *sed. qu.* See *Watson* v. *Dow*, 5 Dowl. P. C. 584; *Williams* v. *Strahan*, 1 N. R. 309. But held that a defendant who pleaded a plea which was a nullity, was not in a position to move afterwards to set aside interlocutory judgment, upon the ground that there was no appearance entered: *Brewster* v. *Davy*, H. T. 2 Vic. *MS.* R. & H. Dig. "Appearance," 5. *Qu.* Whether plaintiff is prevented from signing judgment when a defendant has in fact appeared but entered his appearance *after* the time limited by the writ? see *Rogers* v. *Hunt*, 10 Ex. 474. It is improper to sign judgment for a sum including interest, when the interest is not due upon a contract expressed or implied: see *Rodway* v. *Lucas*, 10 Ex. 667. The only exception to this rule appears to be an action upon a bill of exchange or promissory note, in which action plaintiff may in his special indorsement claim interest as a matter of course: *Ib.* 10 Ex. 674, *per* Pollock, C.B. The court after judgment signed will not presume that the claim for interest indorsed upon the writ is made without

in Error or Appeal shall lie on any such Judgment; (*q*) and the Plaintiff may, at the expiration of eight days from the last day for appearance and not before, issue execution upon such judgment; (*r*) but the Court or a Judge may, after final judgment, let in the Defendant to defend, (*s*) upon an application supported by satisfactory affidavits accounting for the

Execution.

Defendant may be let in to defend.

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foundation. If such were the fact, it was the duty of defendant to appear and question it. Not having done so, he will be impliedly taken to have admitted the correctness of the claim: *Ib.* 10 Ex. 670, *per* Pollock, C. B. See further *Smart* v. *Niagara & Detroit R. Co.* 12 U.C.C.P. 404; *Northern R. Co.* v. *Lister*, 4 Prac. R. 120; and note *n* to section 15. On an application to set aside a final judgment on a writ not specially indorsed or indorsed so improperly, on the ground that the judgment should have been interlocutory, defendant should produce the writ or copy showing that it was not so indorsed, or that it was not a proper case for special indorsement: *Kerr et al* v. *Bowie*, 3 U. C. L. J. 150.

(*q*) These words are not in the English act. They have reference to appeals under our Error and Appeal act, Con. Stat. U. C. cap. 13. "Error" in the English act, where the word is used, has reference to proceedings in error in the Exchequer Chamber. There are in England three courts of co-ordinate jurisdiction—Queen's Bench, Common Pleas, and Exchequer. No appeal lies directly from one to the other. But an appeal may be had from any one of the three to the other two united. The two so united form the court known as the "Exchequer Chamber."

(*r*) The judgment is now final, instead of being interlocutory as heretofore; though final execution cannot be issued until the expiration of eight days from the last day for appearance. As to computation of the time, see *Blunt* v. *Haslop*, 9 Dowl. P. C. 982. These eight days include Sunday, whether that day be either one of the intermediate days or the last of such eight days: *Rowberry* v. *Morgan*, 9 Ex. 730. If the last of the eight days be Sunday, plaintiff will be entitled to issue execution on the following day, Monday: *Ib. per* Martin, B. Where the writ specially indorsed was issued on 9th February, and was served on 11th February, and consequently the time for appearance expired on 19th February (eight days only being allowed by the English act, ten by ours) and judgment was signed on 20th February, plaintiff then desirous to issue execution, and finding the eight days under the act expire on Sunday, issued the writ on the following day (Monday, 27th February), *held* regular: *Ib.* Where the writ specially endorsed was served on 31st December, 1856, and execution in default of appearance issued on 17th January, held too soon and therefore irregular: *Kerr et al* v. *Bowie*, 3 U. C. L. J. 111, *per* Robinson, C. J.

The summons was served on 31st December, and by it the defendant was told that he must cause an appearance to be entered for him *within* ten days after the service of the writ, *inclusive* of the day of such service. We must therefore count 31st December as one of the ten days, and besides that day the defendant has the first nine days of January to enter his appearance. Having therefore the 9th January as his tenth day, he has all that day on which to enter his appearance, and judgment could not be legally signed on that day. Then 9th January being the last day *for entering appearance*, execution could not be issued until eight days *had* elapsed *from that day*; in other words *after* that day, and the 17th January being the last of the eight days, execution could not go until 17th January had expired: see also *Ross et al* v. *Johnstone et al*, 4 U.C. L. J. 21: *Mumford* v. *Hitchcock*, 32 L. J. C. P. N.S. 168; *Weeks* v. *Wray*, L. R. 3 Q. B. 212.

non-appearance and disclosing a defence upon the merits. (*t*) 19 Vic. c. 43, s. 60.

(*t*) The meaning of the expression "disclosing a defence upon the merits" has been much discussed in the English Court of Exchequer. It was held *per* Parke, B., and Platt, B. (Pollock, C. B., *hesitante*, and Martin, B., *dissentiente*), that an ordinary "affidavit of merits" was a sufficient compliance with the act: see *Warrington* v. *Leake*, 11 Ex. 304. But in a later case, it was held that an affidavit under this section must show some facts, upon which the judge may exercise his discretion: *Whiley et al* v. *Whiley*, 4 C.B. N.S. 653; see also *Bouchier et al* v. *Patton et al*, 3 U.C. L.J. 48; *Perry* v. *Lawless*, 1 Cham. R. 168. An affidavit of merits under this section is of course only necessary when the judgment has been regularly signed: *Hall* v. *Scottson*, 9 Ex. 238, *per* Parke, B. If irregularly signed irregularity must be pointed out: *The Birkenhead, &c., Junction R. Co.* v. *Dimmack*, 31 L. T. R. 213. The ordinary affidavit must express that defendant has a good defence upon the merits: *Lane* v. *Isaacs*, 3 Dowl. P. C. 652; *McGill et al* v. *McLean*, 1 Cham. R. 6. An affidavit that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, held to be insufficient: *Tate* v. *Bodfield*, 3 Dowl. P. C. 218; *Bromley* v. *Gerish*, 1 D. & L. 768; *Bower* v. *Kemp*, 1 Dowl. P. C. 282; *Page* v. *South*, 7 Dowl. P. C. 412; *Crossby* v. *Innes*, 5 Dowl. P. C. 566. It is not sufficient to say that deponent believes the defendant has "a defence on the merits," he should say "a good defence:" *Kenney* v. *Hutchinson*, 4 Jur. 106. Where judgment was signed for want of a plea, an affidavit of the defendant's attorney, which stated that "considering he had a good defence on the merits," was held insufficient: *Pope* v. *Mann*, 2 M. & W. 881. An affidavit of merits by a clerk of defendant's attorney, "that he is apprised and believes that the defendant has good grounds of defence upon the merits," insufficient: *Bromley* v. *Gerish*, 1 D. & L 768. An affidavit by a clerk under similar circumstances, in which he swore that he had the conduct and management of the defence, and that defendant had been advised by counsel that he had a good defence to the action on the merits, was held to be insufficient: *Nash* v. *Swinburne*, 1 Dowl. N. S. 190. The affidavit if sworn by the managing clerk of defendant's attorney, must state that he had the management of the particular cause: *Doe d. Fish* v. *McDonnell*, 8 Dowl. P. C. 501; but see *Doe d. King's College* v. *Roe*, 1 Cham. R. 111. It must appear to be made either by the defendant, his attorney or agent, or some person who has been concerned in the cause in such a way as to make him acquainted with its merits: *Rowbotham* v. *Dupree*, 5 Dowl. P. C. 557; *Doe d. King's College* v. *Roe*, 1 Cham. R. 111. An affidavit by defendant's attorney as to his belief, from instructions received, insufficient, where the defendant himself might make the affidavit: *Brown* v. *Austin*, 4 Dowl. P. C. 161: see further, *Schofield* v. *Huggins*, 3 Dowl. P. C. 427; *Arndt* v. *Porter*, 30 L. J. Ex. 19. Pleas of the Statute of Limitations: *Maddocks* v. *Holmes et al*, 1 B. & P. 228; or infancy: *Delafield* v. *Tanner*, 5 Taunt. 856; are defences on the merits: see also *Beck* v. *Mordaunt*, 4 Dowl. P. C. 112; *Cavallier* v. *Michael et al*, 17 L. T. N. S. 290. Affidavits in reply ought not to be received: *Warrington* v. *Leake*, 11 Ex. 304, *per* Pollock, C. B., and Platt, B.; 2 Chit. Arch. 12 edn. 982. But this is apparently not an inflexible rule: *Wilson* v. *The Municipal Council of Port Hope*, 10 U. C. Q. B. 405. The defendant must not only disclose merits but satisfactorily account for the non-appearance. Showing a mistake in the entry of appearance or entry in the wrong count or office by mistake, would it is apprehended be sufficient in this respect: see *Dickie et al* v. *Elmslie*, 3 U. C. L. J. 107; *Ryan et al* v. *Leonard*, 3 O. S. 307. It is probable that a defendant making application under this section will at least if successful be expected to pay the costs of the application: see *Sisted* v. *Lee*, 1 Salk. 402. He may in the discretion of the judge be compelled to pay the amount claimed into court to abide the event: see *Wade* v. *Simeon*, 13 M. & W. 647.

56. (*u*) In case of such non-appearance where the Writ of Summons has not been indorsed in the special form hereinbefore provided, and in case the Plaintiff files the Writ of Summons, and an affidavit of personal service thereof, or in case of service on a corporation, files an affidavit of service in the manner in this Act authorized for service on corporations, or files the Writ of Summons and a Judge's Order for leave to proceed under the provisions of this Act, (*v*) such Plaintiff may file a declaration (*w*) indorsed with a notice to plead in eight days, (*x*) and in default of a Plea may sign judgment by default at the expiration of the time to plead so indorsed. (*y*) 19 Vic. c. 43, s. 61.

And if the Writ be not so specially indorsed.

Declaration.

Signing judgment.

(*u*) Taken from Eng Stat. 15 & 16 Vic. cap. 76, s. 28. Founded upon the first report of the Common Law Commissioners, section 15. Not retrospective: *Goodliffe* v. *Neaves*, 8 Ex. 134; *Cuff* v. *Sproule*, 3 U. C. L. J. 12.

(*v*) See sections 16, 17, and notes thereto.

(*w*) Plaintiff filing a declaration under this section should observe the provisions of R. G. pr. 20 as to particulars of demand. Of course if the writ of summons be specially indorsed pursuant to section 15, such particulars will be unnecessary.

(*x*) The notice to plead here mentioned is substituted for a demand of plea which by section 92 of this Act is declared to be unnecessary. Where plaintiff having served his declaration and a demand of plea under the old practice, and having signed judgment for want of a plea before this act came into force, applied to be allowed to proceed under this section, his application was refused. And, *per* Burns, J., "You must take a rule to compute under the old practice. The 61st section refers specially to writs issued under the new act, and declarations which should be indorsed with a notice to plead, informing the defendant fully of his liability in case of neglect:" *The Queen* v. *Hunter*, 2 U. C. L. J. 183. The declaration and notice to plead under this enactment should be served as well as filed, unless otherwise ordered by the court or a judge. "Service as well as filing is evidently contemplated by this section, though not specially mentioned:" *Wallace* v. *Frazer*, 2 U. C. L. J. 185, *per* Richards, J.; also *The Queen* v. *Hunter*, 2 U. C. L. J. 183; see also R. G. pr. 132. But it is not a valid objection to an interlocutory judgment that the copy of declaration filed was not endorsed with the notice to plead: *Corrigan* v. *Doyle*, 4 Prac. R. 238.

(*y*) Apparently the filing of a declaration under this section would have the effect of delaying plaintiff in his proceedings, but such may not really be the result to the extent supposed. If plaintiff sign judgment ever so promptly under the preceding section, still he will be obliged to wait the expiration of eight days from the last day for appearance before issuing an execution. If plaintiff sign judgment under this section execution may be issued forthwith. But before he can be entitled to judgment he must delay eight days after filing declaration so as to allow defendant, if disposed, to plead. In either proceeding the time is nearly equal. The former perhaps, upon the whole, is the most expeditious. Judgment under the preceding section is, properly speaking, signed "in default of appearance." Under this section it will be signed "in default of plea." In either case it would seem that the judgment after default may be signed without any notice to defendant: see *Goodliffe* v. *Neaves*, 8 Ex. 134.

Execution.

57. (*z*) In case the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the Writ of Summons, (*a*) and in the event of no plea being filed and served, the Judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the Writ of Summons with interest and costs; (*b*) but in such case the Plaintiff shall not be entitled to more costs than if he had made such special indorsement and signed judgment upon non-appearance. (*c*) 19 Vic. c. 43, s. 61.

Costs.

At what time certain proceedings may be taken if defendant do not appear.

58. (*d*) All the proceedings which are mentioned in any Writ of Summons or *Capias*, or notice or warning thereto or thereon, issued, made or given by authority of this Act, may, (in default of a Defendant's appearance or putting in special bail) be had and taken at the expiration of ten days from the service or execution thereof, (*e*) whatever day the last of such ten days may be and whether in term or vacation; (*f*) but if the last of the ten days be Sunday, Christmas Day or Good Friday, then the following day, or the following Monday

Holy-days.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 28. Founded upon the first report of the Common Law Commissioners, section 15.

(*a*) As to which see section 15 and notes thereto.

(*b*) "*And costs.*" This does not mean costs indorsed on the writ, but costs of the cause to be taxed by the master.

(*c*) This is a penalty upon plaintiff's attorney for neglecting specially to indorse the writ in cases in which the same ought to be done. It is right to observe that the proviso allowing defendant to come in and defend (to be found in section 55) has not been repeated in the section under consideration.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 32. Substantially the same as former Prov. Stat. 12 Vic. cap. 63, s. 26, which was adopted from Eng. Stat. 2 Wm. IV. cap. 39, ss. 11 and 16.

(*e*) Defendant is by the writ commanded to appear "within ten days" after service, "inclusive of the day of such service" (Sch. A. No. 1). As to the computation of time see *Fano* v. *Coken*, 1 H. B. 9. The proceedings are prospective: *Hughes et al* v. *Lumley et al*, 4 El. & B. 358.

(*f*) Formerly writs of first process were made returnable in term. In some cases no proceedings could be effectually had on a writ of summons returnable within four days of the end of any term until the beginning of the ensuing term. Great and unnecessary delay was thereby created. To remedy it Stat. 2 Wm. IV. cap. 39, s. 11 (which was precisely the same as the above provision) was passed.

when Christmas Day falls on a Saturday, shall be considered as the last of such ten days. (*g*) 19 Vic. c. 43, s. 65.

Long vacation.

59. (*h*) If such Writ be served or executed on any day between the first day of July and the twenty-first day of August, special bail may be put in by the Defendant on bailable process, or appearance may be entered by the Defendant on process not bailable, at the expiration of such ten days. (*i*) 19 Vic. c. 43, s. 65.

Proceedings if some of the defendants appear and others do not, the Writ being specially indorsed.

60. (*j*) In any action brought against two or more Defendants when the Writ of Summons has been indorsed in the special form hereinbefore provided, (*k*) if one or more of such Defendants only appear and another or others of them do not appear, the Plaintiff may sign Judgment against such Defendant or Defendants only as have not appeared, (*l*) and before declaration against the other Defendant or Defendants, may issue execution upon such Judgment, in which case he shall be taken to have abandoned his action against the Defendant or Defendants who have appeared; (*m*) or the Plaintiff may, before such execution, declare against such Defendant or

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(*g*) The old rule was different. For many purposes the return day of the writ might be on Sunday or any other day: see *Fano* v. *Coken*, 1 H. Bl. 9. The provision here enacted is the same in principle as R. G. pr. 166.

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 32.

(*i*) *At the expiration of such ten days, i. e.*, ten days from the service or execution of the writ. But still the precise meaning of this section when taken in connection with other parts of the C. L. P. Act, is far from being clear. Defendant by the writ is *commanded* to appear "within ten days" after service; but *may* appear "at any time before judgment:" section 51. It can neither be the intention of the legislature to restrict defendant to an appearance within ten days or to any period after the expiration of that time. The object of the enactment appears to be to declare that special bail may be put in or an appearance entered at any time during the long vacation.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 33.

(*k*) *i. e.* by section 15 of this act.

(*l*) Form of such judgment, see Sch. A. No. 7, *bis*.

(*m*) Two modes of procedure are enacted by this section, and it is for the plaintiff to elect between them. If he sign judgment under the first part of the enactment, his judgment will be final as against defendants who have not appeared, and against whom he may issue execution without further delay. But if he adopt this course, he must abandon his action against the remaining defendants who have appeared: see *Morgan* v. *Edwards et al*, 6 Taunt. 398; *Hannay* v. *Smith et al*, 3 T. R. 662. The question of costs then becomes a consideration. The plaintiff as against defendants who have not appeared and against whom judgment is signed for default of appearance is clearly entitled to costs as much

Defendants as have appeared, stating by way of suggestion the Judgment obtained against the other Defendant or Defendants who have not appeared, in which case the Judgment so obtained against the Defendant or Defendants who have not appeared, shall operate and take effect in like manner as a Judgment by default obtained before the commencement of this Act against one or more of several Defendants in an action of debt. (*n*) 19 Vic. c. 43, s. 66.

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as if he had obtained a verdict: see section 55. It is equally clear that plaintiff abandoning his action against some defendants will be required to pay them their costs.

(*n*) If plaintiff, instead of proceeding under the first part of this section as pointed out in the previous note, elect to proceed under this latter part of the section, his judgment obtained against defendants who have not appeared, will be in effect interlocutory rather than final. What may be the result? This section only applies to cases where the writ is specially indorsed. The writ can only be so indorsed when the action is brought upon a contract express or implied: section 15. The contract whether express or implied, is taken to be entire, and plaintiff proceeding upon it against all the defendants must as a rule recover against all or none: *Morgan* v. *Edwards et al*, 6 Taunt. 398. If he fail upon the plea of one he loses the benefit that he might otherwise derive under the first part of this enactment against defendants who have not appeared: *Ib.* Besides, he may be held to lose all right to costs of the cause: *Ib.* And having signed judgment against one or more of several defendants, he is not in a position at the trial to ask for a nonsuit; a verdict must, if any one defendant succeed on his plea to the action, be given to all the defendants: *Hannay* v. *Smith et al*, 3 T.R. 662; *Weller* v. *Goyton et al*, 1 Burr. 358; *Harris* v. *Butterley et al*, Cowp. 483; *Sed qu.* see *Murphy* v. *Donlan et al*, 5 B. & C. 178; *Stuart* v. *Rogers et al*, 4 M. & W. 649; *Commercial Bank* v. *Hughes et al*, 4 U.C.Q.B. 167. The rule as regards nonsuit would be different if one of several defendants was in fact unable to contract (*i.e.* an infant, married woman, idiot, &c.) In this case it would be absurd for any purpose to hold that the contract was joint and entire: see *Boyle* v. *Webster et al*, 21 L.J. Q.B. 202. Then plaintiff has just this choice, either to be satisfied with his judgment against such defendants as have not appeared, or if dissatisfied therewith to proceed against all the defendants, including those who have appeared, and run the risk of losing whatever advantages he has gained by his judgment: see *Eliot* v. *Morgan*, 7 C. & P. 334, *per* Coleridge, J. It would seem that even after a declaration under the latter part of this section if plaintiff repent of his course he may, under section 68 of this act, apply at any time before trial to strike out the names of all defendants excepting those who did not appear, and against whom he has signed judgment. He may then issue execution with as much effect as if he had, in the first instance elected to abandon his suit against all defendants who had appeared. Indeed the late cases have gone further. In one case where in an action upon contract against two defendants, A. and B., of whom the former suffered judgment by default, and the latter pleaded "never indebted," and at the trial it appeared that A., against whom judgment by default was signed, was not at all liable, while B. who pleaded was solely liable. The judge, upon application, allowed A.'s name to be struck out of the record and directed a verdict against defendant B. The court confirmed the decision of the judge: *Greaves* v. *Humfries et al*, 4 El. & B. 851. If the name of a defendant against whom judgment by default is signed be struck out, the judgment is also thereby struck out: *Ib.* 854, *per* Campbell, C. J.

Proceedings to be carried on in office whence Writ issues, &c.

61. The service of all papers and proceedings subsequent to the service of the Writ, shall be made upon the Defendant or his Attorney, according to the established practice, unless special provision is otherwise made in this act, (*o*) and if the Attorney of either party do not reside or have not a duly authorized agent (*p*) residing in the county wherein the action has been commenced, then service may be made upon the Attorney wherever he resides, or upon his duly authorized agent in Toronto, (*q*) or if such Attorney have no duly authorized agent there, then service may be made by leaving a copy of the papers for him (*r*) in the office where the action was commenced, marked on the outside as copies left for such Attorney. (*s*) 19 Vic. c. 43, s. 9.

Service of papers, &c.

(*o*) See *Houghton et al* v. *Hudson*, 1 Prac. R. 160. Burns, J., speaking of the provisions of the Testatum Writ Act 8 Vic. cap. 36, s. 2 (now repealed) is reported at page 169, as follows: "The provision of the statute is only for the service of papers upon the defendant or his attorney. It would seem not to apply to service upon the *plaintiff's* attorney, * * * and it may be said in such cases that the defendant must serve his papers upon the plaintiff's attorney, *wherever he may reside.*" Such is precisely the enactment of the legislature in the subsequent part of this section, as applied to either party, whose attorney does not reside, or has not a duly authorized agent within the county in which the action was commenced.

(*p*) This contemplates, as applied to outer counties, the appointment of a special agent by the defendant's attorney. The agency at Toronto may be looked upon as a general agency, but the agency in outer counties is confined to actions commenced in the several counties in which the agents may be appointed: see *Smith* v. *Roe*, 1 U. C. L. J. N.S. 154. There is no rule making it imperative for a practitioner to appoint agents for the general transaction of agency business in outer counties. But as regards the appointment of an agent in Toronto, the rules in force are very decided. The old rule of M. T. 4 Geo. IV. (Draper's Rules 2) admitted the appointment of an agent in outer counties, but such were considered special agents: see remarks of Burns, J., at the conclusion of his judgment in *Houghton et al* v. *Hudson*, 1 Prac. R. 160. Papers may by arrangement between the parties be served by mail, and the paper mailed will in such case be entered at the risk of the attorney to whom sent: *Robson* v. *Arbuthnott*, 10 U.C. L.J. 186.

(*q*) See R. G. pr. 137.

(*r*) As the papers may be left *for him*, it is presumed that he (the attorney), upon demand, would be entitled to receive them at the hands of the clerk. This feature is new in our practice. The old practice was to put up the papers in the crown office, whence they were seldom if ever taken.

(*s*) Service of declaration on defendant after he appeared, by attorney, was held to be irregular: *Ryan et al* v. *Leonard*, 3 O. S. 307. It is irregular to serve papers by delivering them to a clerk, at a distance from the attorney's residence or place of business: *Tiffany* v. *Bullen*, 5 O. S. 137. Service of a notice on Good Friday is good service: *Clarke* v. *Fuller*, 2 U. C. Q.B. 99. Declaration served on an attorney who had not appeared, irregular: *Dobie* v. *McFarlane*, 2 O. S. 285. In this case the attorney when served did not deny that he was acting for defendant, and the court in consequence, though they set aside the proceedings with-

MISNOMER AND JOINDER OF PARTIES TO ACTIONS.

Misnomer not to be pleaded in abatement, but to be amended at costs of plaintiff upon Judge's summons.

62. (*t*) No plea in abatement for misnomer shall be allowed in any personal action, but in cases of misnomer, the Defendant may, upon a Judge's summons founded on an affidavit of the right name, cause the declaration to be amended at the costs of the Plaintiff, by inserting the right name; (*u*) and in case such summons be discharged, the Judge may order the party applying therefor, to pay the costs of the application. (*v*) 7 Wm. IV. c. 3, s. 8.

63. (*w*) The Court or a Judge may at any time before

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out costs, intimated that upon a proper application they would make the attorney pay them: *Ib.* Service of a notice of assessment on an attorney who had been in the habit of accepting service for defendant, good: *Rutledge* v. *Thompson*, 1 Prac. R. 275. Where declaration was served before it was filed, defendant, who allowed interlocutory judgment to be signed and notice of assessment given, was held to be too late to object: *Proctor* v. *Young*, H. T. 4 Vic. *MS.* R. & H. Digest, "Irregularity," 15. Service of a notice of assessment by throwing it over defendant's fence to defendant's son, who refused to have anything to do with it, irregular: *McGuin* v. *Benjamin*, 1 Cham. R. 142. If one of two defendants appear by attorney, it is irregular to serve papers for both on that attorney: *Huff* v. *McLean et al*, 5 O. S. 69. Notice of action—Proof of service by bailiff: *Gardener* v. *Burwell*, Tay. U.C. R. 64; *Byrnes* v. *Wild et al*, 7 U.C. Q.B. 104. Notice of trial—time of service: see section 201. Summons for attachment on sheriff—proof of service: *Hilton et al* v. *Macdonell et al*, 1 Cham. R. 207. Contradictory affidavits: *Harper* v. *Branton*, 1 Prac. R. 267. Services of all rules, orders, and notices, must be made before seven o'clock at night: R. G. pr. 135.

(*t*) Taken from our old statute 7 Wm. IV. cap. 3, s. 8, which was substantially the same as Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 11.

(*u*) If either plaintiff or defendant be misnamed defendants course, is as directed here to apply to amend the declaration of plaintiff's costs: see *Lindsay* v. *Wells*, 3 Bing. N. C. 777; *Rush* v. *Kennedy*, 7 Dowl. P. C. 199; *Murphy* v. *Bunt et al*, 2 U. C. Q. B. 284. And the application ought to be made within the time allowed for pleading: *Kitchen* v. *Brooks*, 5 M. & W. 522.

(*v*) "May order," &c. The costs are entirely in the discretion of the judge: see Con. Stat. U. C. cap. 2, s. 18, sub-s 2.

(*w*) The following sections are founded upon the first report of the Common Law Commissioners, section 19, and will be found in effect to conduce largely to the administration of substantial justice. To understand completely the nature of the changes made in the law, it will be proper to state shortly the old law. This may be done almost in the words of the Commissioners.

First. As to actions *ex contractu.* The *omission* of a party as *plaintiff* who ought to be joined or the *joinder* of a party who ought not to be joined was fatal: see *Jones* v. *Smith*, 1 Ex. 831; *Agacio* v. *Forbes et al*, 14 Moore, P. C. 160; *Chanler* v. *Leese et al*, 4 M. & W. 295. So the *joinder* of a person as *defendant* who ought not to be joined was likewise fatal: see *Robson* v. *Doyle et al*, 3 El. & B. 396; *Wickens* v. *Steel*, 2 C. B. N.S. 488. Whilst the *omission* of a party as defendant who ought to be joined could only be taken advantage of by a plea in abatement: *Rice* v. *Shute*, 5 Burr. 2613; *Crellin* v. *Calvert*, 14 M. & W. 11; *Joll et al* v. *Curzon*, 4 C. B. 249.

the trial of a cause, (*x*) order that any person or persons not joined as Plaintiff or Plaintiffs in such cause, shall be so joined, or that any person or persons originally joined as Plaintiff or Plaintiffs shall be struck out from such cause, (*a*) if it appears to such Court or Judge that injustice will not be

Court may, in certain cases, order any party not joined as a plaintiff, to be so joined, or any party

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Second. As to actions *ex delicto*. The *joinder* of a party who ought not to be a *plaintiff* was fatal; whilst the *omission* of a party who ought to be a co-plaintiff could only be taken advantage of by a plea in abatement: see *Addison* v. *Overend*, 6 T. R. 766; *Broadbent* v. *Ledward*, 11 A. & E. 209; *Phillips et al* v. *Claggett*, 10 M. & W. 102. In such actions the *joinder* of persons who were not liable as *defendants* only entitled them to an acquittal: see *Govett* v. *Radnidge et al*, 3 East, 62; *Bretherton et al* v. *Wood*, 3 B. & B. 54; *Pozzi* v. *Shipton et al*, 8 A. & E. 963; *Morrow* v. *Belcher et al*, 4 B. & C. 704. And the *omission* of persons jointly liable was of no consequence: see *Sutton* v. *Clarke*, 6 Taunt. 29; *Regina* v. *Brown*, 7 El. & B. 757.

So far as the law is here stated with respect to the joinder of parties it still remains; but the consequences of mistake or error are not so disastrous as here described. The proper parties to sue or be sued in an action either of contract or of tort must, as heretofore, be determined upon by the particular circumstances of the case and the due application of the existing laws that regulate the joinder of parties to an action. But if plaintiff's attorney mistake the number of parties to be joined either as plaintiff or defendant, the consequences of his mistake will now be less likely to be fatal than formerly: see *Bellingham et al* v. *Clarke*, 1 B. & S. 332. Powers of amendment to be exercised in a liberal spirit: see *Parry* v. *Fairhurst et al*, 2 C. M. & R. 196, *per* Alderson, B.; *Sainsbury* v. *Matthews*, 4 M. & W. 347, *per* Parke, B.; *Ward* v. *Pearson*, 5 M. & W. 18, *per* Parke, B.; *Evans* v. *Fryer*, 10 A. & E. 615, *per* Williams, J.; *Pacific Steam Navigation Co.* v. *Lewis*, 16 M. & W. 792, *per* Pollock, C. B.; *Smith* v. *Knowelden*, 2 M & G. 563, *per* Tindal, C. J., will go far to render substantial justice paramount to mere technicality, and so advance the remedy in a manner co-extensive at least with the mischief intended to be prevented. Statutes giving the power of amendment are most salutary remedial statutes, and ought to receive a liberal or at all events a fair construction: *Greaves* v. *Humfries et al*, 4 El. & B. 852, *per* Campbell, C. J. The *non*-joinder or *mis*-joinder of plaintiffs or defendants in any civil action may be remedied upon proper application to the court or a judge, to be made either before trial or at the trial, under the provisions of the enactment which here follows. If the amendment be either granted or refused at *nisi prius*, the party dissatisfied with the decision of the judge, cannot, it seems, appeal to the court *in banc*, or apply to that court for a review of the judge's decision, under section 222 of this act: see *Robson* v. *Doyle et al*, 3 El. & B 395. The only remedy in such case for an amendment thought to be improperly made or refused is to apply to the full court for a new trial.

The section under consideration is adopted from Eng. Stat. 15 & 16 Vic. cap. 76, s. 34. It applies to the *non*-joinder or *mis*-joinder of *plaintiffs* in actions both upon contract and for tort. The amendment, if desirable, must be applied for and made before trial

(*x*) Court or judge: see note *w* to section 48. Amendment at the trial may be made under and pursuant to section 65.

(*a*) See *Collins* v. *Johnson*, 16 C. B. 588. Does not authorize the striking out of all plaintiffs and substituting entirely new plaintiffs: *Robinson* v. *Bell*, 9 U. C. C. P. 21.

originally joined to be struck out, before trial.

done by such amendment, (*b*) and that the person or persons to be added as aforesaid, consent either in person or by writing under his or their hands to be so joined, (*c*) or that the person or persons to be struck out as aforesaid, were originally introduced without his or their consent, or that such person or persons consent in manner aforesaid to be struck out; and the amendment shall be made upon such terms as to the amendment of the pleadings if any, postponement of the trial, and otherwise, (*d*) as the Court or Judge making the amendment thinks proper. (*e*) 19 Vic. c. 43, s. 67.

Plaintiffs added subject to the same liability as original plaintiffs.

64. (*g*) When any such amendment is made, the liability of any person or persons added as co-Plaintiff or co-Plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in the cause. (*h*) 19 Vic. c. 43, s. 67.

65. (*i*) In case it appears in any action at the trial or assessment of damages therein, (*j*) that there has been a mis-

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(*b*) This is a vague expression and yet it is difficult to imagine a better, or one more in keeping with the spirit and intent of the act. It is incumbent upon the judge to whom application is made, before acceding to the application, to look well to the circumstances of the case as affecting the rights and liabilities of both parties to the suit: see *Cooke* v. *Stratford*, 13 M. & W. 387, *per* Rolfe, B.

(*c*) A judgment recovered against one of several joint debtors is a good plea in bar in an action against another of them on the joint liability: *King et al* v. *Hoare*, 13 M. & W. 494.

(*d*) The court or judge has a discretion as to the costs: *Wall* v. *Lyon*, 1 Dowl. P. C. 714. And may himself fix the amount of costs: *Collins* v. *Aaron*, 6 Dowl. P. C. 423.

(*e*) The court above will rarely interfere with the discretion of a judge exercised in chambers in a case within his jurisdiction: see *Tadman* v. *Wood*, 4 A. & E. 1011. Applications to the court above for a review of the judge's decision when allowable should be made during the term next after the decision: see *Orchard* v. *Moxey*, 21 L. J. Ex. 79 *n*: *Meredith* v. *Gittens*, 21 L.J. Q.B. 273; *Collins et al* v. *Johnson*, 16 C. B. 538; see further note *w* to section 48.

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 34.

(*h*) The object of this provision is for all purposes to give effect to the amendment made. The amendment when made must be in accordance with the established practice as respects parties to actions: see note *w* to section 63.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 35. This enactment is intended to apply to cases of *non*-joinder or *mis*-joinder of *plaintiffs*. The amendment when allowable is to be made at the trial.

(*j*) The application should it seems not only be made *at* the trial, but *before* verdict: see *Brashier* v. *Jackson*, 8 Dowl. P. C. 784. And at all events not after that: *Cowburn* v. *Wearing*, 9 Ex. 207: see also *Jones* v. *Hutchinson*, 10 C. B. 515; *Robson* v. *Doyle et al*, 3 El. & B. 396; *Wickens* v. *Steel et al*, 2 C. B. N.S. 488.

joinder of Plaintiffs, or that some person or persons not joined as Plaintiff or Plaintiffs ought to have been so joined, (*k*) and the Defendant has not at or before the time of pleading, given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, (*l*) and if it appears to the Court or Judge or other officer presiding at the trial, (*m*) that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, (*n*) and that the person or persons to be added as aforesaid, consent either in person or by writing under his or their hands to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his or their consent, or that such person or persons consent in manner aforesaid to be so struck out, (*o*) such mis-joinder or non-joinder may be amended as a variance at the trial or assessment by such Court or Judge, or other officer presiding at the trial or assessment, in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of the amendment of variances in the sections of this Act, numbered two hundred and sixteen to two hundred and twenty-two. (*p*) 19 Vic. c. 43, s. 68.

Proceedings for amendment if the mis-joinder of Plaintiffs; or an omission to join those who ought to be joined appear at the trial, the defendant not having given notice of objection.

(*k*) See note *w* to section 63.

(*l*) Proceedings in case this notice be given, see section 67.

(*m*) *i. e.* Judge or county judge or crown counsel acting for and in the absence of the judge of assize.

(*n*) See note *b*, section 63.

(*o*) Amendment at *nisi prius* by adding name of a partner as plaintiff: *Williams* v. *Groves*, 1 F. & F. 341. But no power to strike out names of all plaintiffs and add new plaintiffs: *Robinson* v. *Bell*, 9 U. C. C. P. 21.

(*p*) The amendment should be liberally made: *Smith* v. *Knowelden*, 2 M. & G. 565, *per* Maule, J. By consent an amendment was allowed, though applied for after verdict, but before it was recorded: *Roberts* v. *Snell*, 1 M. & G. 577. The court cannot control the discretion of the judge in *refusing* the amendment: *Doe d. Poole* v. *Errington*, 1 A. & E. 750; *Jenkins* v. *Phillips*, 9 C. & P. 768, *per* Coleridge, J.; *Whitwill* v. *Scheer*, 8 A. & E. 309, *per* Patteson, J.; also *Lucas* v. *Beale*, 10 C. B. 739. Nor will the court interfere where an amendment has been *allowed* to be made, unless upon clear proof that the judge was wrong: *Sainsbury* v. *Mathews*, 4 M. & W. 347, *per* Lord Abinger, C. B. In all cases if both parties consent, larger powers may be exercised either by the judge at *nisi prius*, or by the court above: *Parry* v. *Fairhurst et al*, 2 C M. & R. 190, noticed by Patteson, J., in *Guest* v. *Elwes*, 5 A. & E. 126; see also *Roberts* v. *Snell*, 1 M. & G. 577; *Brashier* v. *Jackson*, 6 M. & W. 558, *per* Lord Abinger, C. B.

Liability of persons ordered to be joined as plaintiffs.

66. (*r*) Every such amendment shall be made upon such terms as the Court or Judge, or other presiding officer by whom the amendment is made, thinks proper; (*s*) and when any such amendment has been made, the liability of any person who has been added as co-Plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in the action. (*t*) 19 Vic. c. 43, s. 68.

If such notice has been given by the defendant, or non-

67. (*u*) In case such notice has been given, (*v*) or where a plea in abatement may be pleaded, in case a plea in abatement of non-joinder of a person or persons as co-Plaintiff has been pleaded by the Defendant, (*w*) the Plaintiff, before plea

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(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 35.

(*s*) With respect to the "terms," it is difficult to lay down any distinct rule, as each case must in some degree depend upon its own circumstances; yet it may be advanced as a safe proposition, that the court will not allow any additional expense to be thrown upon the opposite party, by reason of any amendment: *Smith* v. *Brandram*, 2 M. & G. 250, *per* Tindal, C. J. The costs of the amendment must rest in the discretion of the court or the judge to whom application for amendment is made: see *Tomlinson* v. *Bollard*, 4 Q.B. 642; see also *Parks* v. *Edge*, 1 C. & M. 429; *Guest* v. *Elwes*, 5 A. & E. 118. The judge it seems may himself determine the *amount* of costs: *Ib.* If the court differ from him as to the propriety of the amount, still that will not avail as against his order: *Ib.* Where an amendment was allowed at the trial, subject to a motion for a non-suit, the court held that the defendant was entitled to the costs of moving to enter the same, as they were incident to the amendment: *Smith* v. *Brandram*, 9 Dowl. P.C. 430. If the amendment be granted upon payment of costs, the payment of costs would it is presumed be a condition precedent to the amendment: see *Levy* v. *Drew*, 5 D. & L. 307; *Gore District Mutual Fire Ins. Co.* v. *Webster*, 10 U. C. L.J. 190; *Lavis* v. *Baker*, 14 U. C. C. P. 336; *Brega* v. *Hodgson*, 4 Prac. R. 47.

(*t*) The same in effect as section 64.

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 36.

(*v*) *i. e.* The notice mentioned in section 65.

(*w*) A plea in abatement is one which shows some ground for abating or quashing the writ and declaration. It does not contain an answer to the cause of action, but shows that the plaintiff has committed *some informality*, and points out *how he ought to have proceeded*; in technical language, "gives him a better writ:" Smith, Action at Law, 10 ed. 81. The right of the defendant to plead a plea of abatement, cannot be better explained than by drawing a distinction between pleas in *bar* and pleas in *abatement*. Whenever the subject matter of the plea or defence is that the plaintiff cannot maintain *any* action at *any* time, whether present or future, in respect of the supposed cause of action, such defence may be pleaded in *bar*. But matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, may in general be pleaded in abatement. Pleas in abatement are of several kinds, of which non-joinder of a co-plaintiff is one. It is the only one to which reference is made by the section under consideration. It would appear that a plea in abatement of the coverture of defen-

or replication upon payment of the costs only of and occasioned by amending, (*x*) may, without any order, amend the writ and other proceedings by adding the name of the person named in such notice or plea in abatement, (*y*) and proceed in the action without any further appearance, and in case of such amendment after plea, the Defendant may plead *de novo*. (*z*) 19 Vic. c. 43, s. 69. Joinder be pleaded in abatement.

68. (*a*) In the case of the joinder of too many Defendants (*b*) in any action or (*c*) contract, (*d*) the Court or a

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dant, is not a plea of "non-joinder" within the meaning of this section: *Jones* v. *Smith*, 3 M. & W. 526. If a wife succeed on such a plea, she may sue out execution in her own name: *Wortley* v. *Raynor*, Doug. 637. As to when and in what manner pleas in abatement for non-joinder of plaintiffs, may or may not be pleaded: see *Robinson* v. *Marchant*, 7 Q. B. 918; *Guyard* v. *Sutton*, 3 C. B. 153; *Morgan* v. *Cubitt et al*, 3 Ex. 612; *Chantler et ux.* v. *Lindsey et ux.* 4 D. & L. 339. These pleas are discouraged by the courts, and four days only are allowed for pleading them: *Ryland* v. *Wormwald*, 5 Dowl. P. C. 581. The section of this act which allows eight days for pleading, applies only to pleas in *bar*: section 91. Of the four days allowed for pleas in abatement, the first has been held to be inclusive, and the last exclusive: see *Ryland* v. *Wormwald*, 5 Dowl. P.C. 581. But if the fourth day be a Sunday, a plea by defendant on the following Monday is sufficient: see *Lee* v. *Carlton*, 3 T. R. 642; also see R. G. pr. 166. It seems that section 76 of this act, and the other enactments relative to pleading in general, are applicable to pleas in abatement. The plea must be verified by affidavit: *Maybury* v. *Mudie*, 5 C. B. 283. Unless an extension of time be granted for the affidavit: *Johnson* v. *Popplewell*, 2 Tyr. 715. The affidavit must be full and precise: *Onslow* v. *Booth*, Str. 705. And if affidavit insufficient the plea may be treated as a nullity: *Bray* v. *Haller*, 2 Moore, 213; *Garrett* v. *Hooper*, 1 Dowl. P. C. 29; *Lovell* v. *Walker*, 8 M. & W. 299; see also *Wheatley* v. *Golney*, 9 Dowl. P. C. 1019; *Lambe* v. *Smythe*, 15 M. & W. 433; *Newton et al* v. *Stewart*, 4 D. & L. 89; *White* v. *Gascoyne et al*, 3 Ex. 36. The affidavit must be accurate in the names of the parties: *Poole* v. *Pembrey*, 1 Dowl. P.C. 693; *Fletcher* v. *Lechmere*, 2 Dowl. N.S. 848.

(*x*) The payment of costs under this provision will be, beyond doubt, a condition precedent to the amendment: *Levy* v. *Drew*, 5 D. & L. 307; *Waller* v. *Joy*, 16 M. & W. 60; see also *Johnson* v. *Sparrow*, 1 U. C. Q.B. 396; *Gass* v. *Cocleugh*, E. T. 3 Vic. *MS.* R. & H. Dig. "New Trial," ix. 1; *Wynn* v. *Palmer*, E. T 3 Vic. *MS.* R. & H. Dig. "New Trial," ix. 3; *Thompson* v. *Sewell*, 4 O. S. 16; *Reeves* v. *Myers*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "New Trial," ix. 6. The facilities given by this act for amendments both before and at the trial, will have the effect in a great measure of doing away with pleas in abatement.

(*y*) It is as necessary under this as under the preceding sections, that a consent in writing of the party to be added, should be filed: see R. G. pr. 6.

(*z*) Under and pursuant to section 117 of this act (which see).

(*a*) Taken from Eng Stat. 15 & 16 Vic. cap. 76, s. 37.

(*b*) See note *w* to section 63.

(*c*) "*Or*" should be "*on*."

(*d*) This enactment is for manifest reasons restricted to actions on contract. There is no necessity for the extension of the remedies here enacted to actions for

Mis-joinder of defendants discovered before trial in action on contract.

Judge, (*e*) if it appears that injustice will not be done thereby, (*f*) may, (*g*) at any time before trial or assessment of damages, (*h*) order the name or names of one or more of such Defendants to be struck out, (*i*) and the amendment shall be made upon such terms as the Court or Judge thinks proper; (*j*)

And at trial.

and in case it appears at the trial of any action on contract, (*k*) that there has been a mis-joinder of Defendants,

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torts; for in such actions plaintiff can at any time *before* trial enter a *nolle prosequi*. If he fail to do so, defendants sued but not liable, may notwithstanding, be acquitted *at* the trial; but the acquittal of *one* or more defendants in an action of tort, is not, as in actions of contract, a discharge of *all*. See note *w* to section 63.

(*e*) See note *w* to section 48.

(*f*) See note *b* to section 63.

(*g*) "May," permissive: Con. Stat. U. C. cap. 2, s. 18, sub-s. 2.

(*h*) The application may perhaps be made *at* the trial. But when deferred till the trial, the amendment can only be made as a *variance*. In view of this, it is preferable for plaintiff to make application at an earlier stage of the cause, and in doing so avail himself of the first part of this enactment. The right to amend a mis-joinder after the trial is questionable: *Wickens* v. *Steele et al*, 2 C. B. N.S. 488. It has been decided that one defendant in ejectment is not entitled at the trial to have his name struck out on disclaiming all right to possession, in order to be called as a witness for his co-defendants: *Grogan* v. *Adair et al*, 14 U.C. Q.B. 479. *Qu.* It is not necessary under this section for the party making application before trial, to file a consent similar to that mentioned in section 63: see *Burritt* v. *Hamilton et al*, 17 U. C. Q. B. 443.

(*i*) The court for the purpose of saving the Statute of Limitations, allowed a plaintiff to amend his declaration and all subsequent proceedings, by striking out the name of one of two defendants, the other being at liberty if so advised, to plead the non-joinder in abatement; and also, if necessary, to plead *de novo*. This was done, although it appeared that an action had been formerly brought for some portion of the same subject matter, against the same defendants, in which defendants obtained a verdict by reason of the plaintiff having failed to establish a joint liability: *Cowburn* v. *Wearing et al*, 9 Ex. 207. The court in *banc* confirmed the decision, and thought it reasonable that plaintiff should be allowed *before* trial to make the amendment and to try the question whether he could establish a case against one defendant alone (taking the risk of a plea in abatement) although he might believe the contract to be a joint one: *Ib. per cur.* An amendment similar to the above applied for *before* trial under the old practice and before the Common Law Procedure Act was allowed, defendant being at liberty to plead *de novo*: *Palmer* v. *Beale et al*, 9 Dowl. P. C. 529. So where the application was made even *after* a trial and a nonsuit: *Cranfurd* v. *Cocks et al*, 6 Ex. 287. Further as to amendments at trial by striking out names of co-defendants: see *Cooper* v. *Sanders*, 1 F. & F. 13.

(*j*) The costs of course are entirely in the discretion of the court or the judge to whom the application is made. But it is apprehended that plaintiff will seldom be allowed to strike out any defendants except upon payment of costs: see *Cowburn* v. *Wearing et al*, 9 Ex. 207; see also an important case upon this point, *Jackson et al* v. *Nunn et al*, 4 Q. B. 209.

(*k*) The amendment here intended must if made be made *at* the trial. It is not competent for plaintiff, who there refuses it, afterwards to apply for it to the

such mis-joinder may be amended as a variance at the trial in like manner as the mis-joinder of Plaintiffs has been hereinbefore directed to be amended, (*l*) and upon such terms as the Court or Judge, or other presiding officer by whom such amendment is made, thinks proper. (*m*) 19 Vic. c. 43, s. 70.

If the non-joinder of defendants

69. (*n*) In any action on contract (*o*) where the non-joinder of any person as co-Defendant has been pleaded in

court *in banc*: *Robson* v. *Doyle et al*, 3 El. & B. 396. The amendment if it could be at all made by the court *in banc* would be made pursuant to section 222; but *semble* that section does not apply to the case of a mis-joinder of plaintiffs or defendants: *Ib.*; but see *Wickens* v. *Steel et al*, 2 C. B. N.S. 488. The act evidently refers to the case where a defendant has been erroneously joined, and not to a case where the defendant has been joined not by mistake but for the purpose of trying his liability: *Ib.*

In an action of contract against two defendants, A. and B., the latter suffered judgment by default. The former pleaded "never indebted," upon which issue was joined. On the trial, it appeared by the evidence that B. the defendant who pleaded "never indebted" was solely liable. A. the defendant who had allowed judgment to go by default, not being a contracting party, B.'s counsel claimed a nonsuit. The judge ordered the record to be amended, by striking out the name of the defendant A., and directed a verdict against B., subject to leave to move to enter a nonsuit if the court should think that the amendment ought not to have been made. *Held, per cur.*, that the amendment was properly made: *Greaves* v. *Humfries et al*, 4 El. & B. 851.

A. sued B. C. D. E. F. G. and H. in an action on contract. H. suffered judgment by default, and the action failed as against F. and G. Held that it was competent to the judge at *nisi prius* to amend the record by striking out the names of F. and G.: *Johnson* v. *Goslett et al*, 18 C. B. 728. In a later case at *nisi prius*, Pollock, C. B., refused to allow the plaintiff to amend by striking out the name of one of two defendants, where the contract upon which the action was brought was proved to have been made by one only and not by both defendants. Pollock, C. B., "I will take no such step in a case where I think the parties might have known what their position was before bringing the action. I think the power of a judge to strike out a name should not be exercised in cases where persons enter into a sort of speculation by putting down a number of names, and then, when they find it does not succeed, ask the judge to strike them out." *Simmonds* v. *Hughes et al*, 29 Law Times, 6; see also *Wickens* v. *Steel et al*, 2 C. B. N.S. 488.

(*l*) *i. e.* By section 65 of this act.

(*m*) The name of one of two defendants was struck out of the record on the terms of plaintiff paying the costs of such defendants. Plaintiff obtained a verdict against the remaining defendants. *Held* that the defendant whose name was struck out was entitled to a moiety of the joint costs of both defendants, although both appeared and pleaded jointly by the same attorney: *Redway* v. *Webber et al*, 13 C. B. N. S. 254.

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 38. This section is applied solely to the case of non-joinder of *co-defendants*. With this exception it is similar to section 67.

(*o*) The section is confined in its operation to actions on contract. The reason of the restriction will be found explained in note *d* to the preceding section (68.) But notwithstanding the restrictions to "actions on contract," it is apprehended that the section will include actions which, though in form *ex delicto*, are not

be pleaded in abatement in such action.

abatement, (*p*) the Plaintiff may, without any order, amend the Writ of Summons and the declaration by adding the name of the person mentioned in such plea in abatement as a joint contractor, (*q*) and serve the amended Writ upon the person or persons so named in such plea in abatement, and proceed against the original Defendant or Defendants and the person so named in such plea in abatement; (*r*) but the date of such amendment (*s*) shall, as between the person so named in such plea of abatement and the Plaintiff, be considered for all purposes as the commencement of the action. (*t*) 19 Vic. c. 43, s. 71.

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maintainable without referring to some contract between the parties and laying a previous ground of action by showing such contract.

(*p*) The non-joinder of a joint contractor as a co-defendant can only be taken advantage of by a plea in abatement: see note *w* to section 63.

(*q*) The plea in abatement for non-joinder of a co-defendant must give "a better writ," *i. e.* state the names and places of residence of parties not joined. It is for plaintiff then either to amend or to commence a new action against the persons whose names are so given if in other respects the plea be legal and formal. He may either amend under this section, or he may drop his action and commence a new one under the old practice. A plaintiff upon a plea of abatement for non-joinder of a co-defendant may enter a *cassetur breve* without any order obtained for the purpose. This he is allowed to do without at the time paying any costs: see *Greenhill* v. *Sheppherd*, 12 Mod. 145; *Allen* v. *Maxey*, Barnes, 120; *Pocklington* v. *Peck*, 1 Str. 638. Neither party is entitled to costs on a plea in abatement, and it was even held that plaintiff was not entitled to ask for them on setting aside such a plea for irregularity: *Poole* v. *Pembrey et ux.* 1 Dowl. P.C. 693. *Sed. qu.* see *White* v. *Gascoigne*, 6 D. & L. 225. But the costs of the amendments if not paid at the time of the amendment, will abide the event of the action. The practice as to allowing amendments of writs by adding fresh parties when there is no plea in abatement is unsettled in England. The Queen's Bench and Exchequer differ, the former permitting the amendment, the latter refusing it. In a case in chambers, the practice of the Queen's Bench was held to be of doubtful propriety, and the judge in chambers instead of allowing the amendment, referred the applicant to the full court: *Gibson* v. *Varley et al*, 27 L. T. Rep. 234.

(*r*) The consequence as to costs, &c., may be ascertained upon reference to section 71.

(*s*) *Qu.* In what manner is the date of the amendment to be proved if disputed? There is no provision for a record of the amendment to be kept by the clerk of process or other officer. Power is given to plaintiff to amend his writ without any order. It is not stated that it shall be necessary to reseal the writ. It is simply enacted that plaintiff "may" amend the summons by adding the name of the person named in the plea of abatement. It is not enacted either that the amendment shall be made by the proper officer, or that the *præcipe* upon which the writ issued shall be amended by such officer. A rule of court is needed to supply these omissions. Possibly in the absence of a rule upon the subject it may be held that the amended declaration will be the best if not the only reliable index to "the date of the amendment."

(*t*) This provision is manifestly necessary for the protection of whatever rights defendants newly joined may be possessed. Not having had any knowledge of pre-

Non-joinder of obligors no ground to abate suit.

70. (*u*) In any action brought against any joint obligor or contractor, the action shall not abate (*v*) nor the Plaintiff be required to amend (*w*) on account of any other joint obligor or contractor not having been made a Defendant, (*x*) unless the party pleading such non-joinder (*y*) avers in his plea that such joint obligor or contractor (*z*) is living (*a*) within the limits of Upper Canada, (*b*) and states the

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vious proceedings, it would be unjust in any manner to hold them bound by such proceedings. If the writ first issued, when issued, could, as against these defendants, be held to be "the commencement of the action," then they might, without any knowledge of the process and without having been served with it, be prevented from availing themselves of the Statute of Limitations or other like statutable defence. If then, as the practice now stands, the right of action should be barred by effluxion of time at a period between the issue of the writ and its subsequent amendment by the addition of co-defendants, it appears clear that the Statute of Limitations would under such circumstances be a good defence. The person added may stay all further proceedings against himself by payment of the debt and of the costs of the writ within four days of service on him: *Measom* v. *Mountcastle et al*, 1 F. & F. 721.

(*u*) Substantially a re-enactment of Stat. 59 Geo. III. cap. 25, s. 1.

(*v*) The judgment for defendant on a plea in abatement is *quod breve* or *narratio cassetur*: see Sellon Pr. 273. This is in exact accordance with the prayer of the plea, "the defendant prays judgment of the said writ and declaration, and that the same may be *quashed*," &c. The plea must pray judgment both of the writ and declaration: *Davies* v. *Thomson*, 14 M. & W. 161; *Whitling* v. *Des Anges*, 3 C. B. 910.

(*w*) Under preceding section.

(*x*) Pleas in abatement for non-joinder of a co-defendant must be full, clear and certain: see *Heap et al* v. *Livingston et al*, 11 M. & W. 896; *Bleakley et al* v. *Jay*, 13 M. & W. 464. If the plea be bad to one count of a declaration containing several counts, it is bad as to all: *Phillips et al* v. *Claggett*, 10 M. & W. 102. Formal defects in such a plea have been held open to objection without a special demurrer. The statutes of Elizabeth and Anne respecting special demurrers have been held not to apply to such pleas: see *Esdaile et al* v. *Lund*, 12 M. & W. 613, *per* Parke, B.

(*y*) A plea of coverture is not, it seems, a plea of "non-joinder" within the meaning of this section: see *Jones* v. *Smith*, 3 M & W. 526.

(*z*) It will be insufficient to describe the parties not joined by initial letters of their christian names: *Hastings* v. *Champion et al*, M. T. 3 Vic. *MS.* R. & H. Dig. Abatement, 4. *Sed qu.* If defendant cannot by any means ascertain the true names, would it not be sufficient for him to describe the parties as best he could? The plea must mention *all* the co-contractors not joined: *Abbot* v. *Smith*, 2 W. Bl. 947; *Godson* v. *Good*, 6 Taunt. 587; *Hill* v. *White et al*, 8 Dowl. P.C. 13; *Crellin* v. *Brook*, 14 M. & W. 11.

(*a*) It does not appear to be necessary that the co-contractor should be actually and literally "*living* within the limits of Upper Canada," at the time of plea pleaded, if his *domicile* or residence be then within this province. A temporary absence on a tour for health or other similar cause is not a living *without* this province: see *Lambe* v. *Smythe*, 3 D. & L. 712.

(*b*) Defendant is bound in his plea to disclose a joint contract. In this province it has been held that he must do this, though upon the face of his plea it

place of his residence, (*c*) nor unless an affidavit of the

appear that some of the joint contractors are *without* the jurisdiction of the court: *McKnight* v. *Scott*, M. T. 3 Vic. *MS.* R. & H. Dig. Abatement, 6; upheld in *Corbitt* v. *Calvin et al*, 4 U. C. Q. B. 123. It was remarked by Robinson, C. J., in the latter case, that a defendant under such circumstances is not to be understood by his plea as pleading the non-joinder of the persons without the jurisdiction: *Ib.* The plea in *Calvin* v. *Cook et al*, upheld by the court, was to the effect that the supposed promises were made jointly by defendant with one Hiram Cook and one Timothy H. Dunn—that Cook was living and resident within the jurisdiction of the court—and that Dunn at the time the action was brought was and still is a resident of Lower Canada, *out* of the jurisdiction of the court. See a similar plea and authorities cited in support of it in note *a* to *Newton et al* v. *Stewart*, 4 D. & L. 89. But in England the law conflicts with that laid down by our courts upon this point, though the statute law in each country is much alike. In the first place, it has been held in England that in the case of joint contractors, where one is out of the jurisdiction of the court, the contract thereby becomes joint and several: see *Henry* v. *Goldney*, 15 M. & W. 497, *per* Alderson, B. In the second place, as a sequence to this reasoning, it has been held that no plea in abatement can be put upon the record for non-joinder of co-contractors where some at the time of plea pleaded are without the jurisdiction of the court: *Joll et al* v. *Curzon*, 4 C. B. 249; see also *Maybury* v. *Mudie*, 5 C. B. 283; s. c. 5 D. & L. 292. These cases being more recent than ours, may have the effect of shaking the authority of ours, at least to some extent. To apply ourselves to the reasoning of the English cases we find it said by Williams, J., in *Joll et al* v. *Curzon*, 4 C.B. 249, "that the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 8, which requires the plea to state that the co-contractor, the non-joinder of whom is complained of, is resident *within* the jurisdiction of the court, *ousts* the party of his plea in abatement if *all* the co-contractors are not *within* the jurisdiction of the court." This was the manner in which the case was argued, and is the reasoning upon which the decision depends.

(*c*) The *place* as well as residence must now be stated in the plea instead of in the affidavit as formerly. The plea must state the *true* place and abode of the party whose non-joinder is objected to: *Maybury* v. *Mudie*, 5 C.B. 291, *per* Maule, J. Whether it does so or not is a matter which formerly might be controverted and determined upon motion to set aside the plea: *Ib.* If the plea be *false*, it is apprehended that it may still be set aside on motion. But the meaning of the word "place" itself as used in this act is from its vagueness, open to much uncertainty. It is extremely doubtful whether in this province the like precision must be observed as in England. Our 7 Wm. IV. cap. 3, s. 6, required the place to be stated with "convenient certainty." These too are the words of the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 8. What then, is meant by stating a place with convenient certainty? The object of the requirement is unquestionably that the plaintiff may know not only who the co-contractors are, *but also* the place of their residence, in order that he may be enabled to serve process upon them: see *Newton et al* v. *Stewart*, 4 D. & L. 92, *per* Wightman, J. Now there can be no reason for holding greater preciseness to be necessary for that purpose under this section than under section 12, which requires a writ of summons to be indorsed with the name and "place of abode" of the attorney suing out the same. In this latter case it is presumed that the street or house will not be requisite. Between the expression "place of abode" and "place of residence" there can be no difference. A case has arisen in England under the section which corresponds to the one here annotated, and is worthy of mention. Two defendants whose non-joinder was pleaded, were stated to be resident, the one at "No. 20, Gower Street, Bedford Square," the other "High Street, Canterbury." The court on affidavit that inquiries were made at "these places," and that no such persons were there living, set aside both the plea and affidavit, although the defendant showed that

truth of such plea be filed therewith. (*e*) 19 Vic. c. 43, s. 73.

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the mistakes had been made accidentally, and that the one party was to be found at "No. 22" instead of "No. 20," and that his name was in the Post Office Directory and other similar works of reference as residing at No. 22, and that the other party was well known in Canterbury, and that he lived in a street *adjoining* to the one named: *Newton et al* v. *Stewart*, 4 D. & L. 89. It is scarcely possible that in this province, where the circumstances of the country are so different from those of England, that so much particularity will be needed in describing "the place of residence" of a contractor "living within the limits of Upper Canada," but not joined.

The *actual* residence must be stated. It is not sufficient to give the best statement of it that can be obtained: *Wheatley* v. *Golney*, 9 Dowl. P. C. 1010. The object of the provision is that plaintiff may without delay or difficulty be able to serve process upon the parties whose non-joinder is pleaded: *Newton et al* v. *Stewart*, 4 D. & L. 92, *per* Wightman, J. That benefit would not be secured to plaintiff unless the information stated in the plea should be correct: *Maybury* v. *Mudie*, 5 D. & L. 362, *per* Maule, J. If the plea do not state the place of residence it is a nullity: *Brewster* v. *Davy*, H. T. 2 Vic. *MS.* R. & H. Dig., Abatement, 3. A statement of the place of business would not be sufficient: *Maybury* v. *Mudie*, 5 D. & L. 360. The word *residence* is understood to mean home or domicile: *Lambe* v. *Smythe*, 3 D. & L. 712. The expression "place of residence" might be taken to mean dwelling-house. A man's *dwelling-house* is *prima facie* where his wife and family reside, and if he has a family dwelling in one place and he occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home is where his family reside: *Rex* v. *The Duke of Richmond*, 6 T. R. 560. There is not however any strict or definite rule for ascertaining what is a man's "place of residence." It is a question to be determined in each case according to its circumstances: *The Queen* v. *The Mayor of Exeter, Wescomb's case*, L. R. 4 Q.B. 110; see also *The Queen* v. *The Mayor of Exeter, Dipstale's case*, L. R. 4 Q.B. 114.

(*e*) *Nor unless an affidavit of the truth of such plea be filed therewith.* This is a very general provision. The specific allegations as to residence, &c., formerly necessary in the affidavit, must now be stated in the plea. It is apprehended that the affidavit for the future if annexed to the plea, for annexed it may be, will be in a very general form. The affidavit in use before the enactment, which made it necessary to state residence, &c., was to the effect that the plea was "true in substance and in fact:" see *Maybury* v. *Mudie*, 5 D. & L. 363, *per* Maule, J.; *Munden* v. *The Duke of Brunswick*, 4 C. B. 321. The origin of verification of pleas of abatement seems to be Stat. 4 Anne, cap. 16, s. 11. It is as follows: "No dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit *prove the truth thereof*," &c. It was held under this statute that the affidavit must prove the fact of the truth. "This is a true plea," instead of "This plea *is true*," was held to be insufficient: *Onslow* v. *Booth*, 2 Str. 705. If the affidavit be either false or insufficient, it is presumed that the plea may still be set aside on motion: see *Maybury* v. *Mudie*, 5 D. & L. 360. The affidavit may, it seems, be made either by defendant or a third party: see *King* v. *Lord Turner*, 1 Chit. R. 58 note *a*. And if sworn before declaration filed, it would appear that plaintiff may treat the plea as a nullity: *Bower* v. *Kemp*, 1 C. & J. 287; *Johnson* v. *Popplewell*, 2 C. & J. 544; but see *Lang* v. *Comber*, 4 East. 348. The affidavit when made must be filed with the plea. The annexing of the affidavit to the plea would be the most convenient mode, and in such case could verify the contents of the plea without entering into details. Besides, if annexed to a plea intitled in the cause, the affidavit need not be so intitled. An affidavit is intitled in order that it may be sufficiently certain in what cause it is made to admit, if necessary,

Costs of such plea in abatement.

71. (*f*) In all cases after a plea in abatement and amendment, (*g*) as aforesaid, if it appears upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original Defendant or Defendants, the original Defendant or Defendants shall be entitled as against the Plaintiff to the costs of such plea in abatement and amendment; (*h*) but if at such trial it appears that the original Defendant or any of the original Defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the Plaintiff shall nevertheless be entitled to Judgment against the Defendant or Defendants who appear to be liable, (*i*) and every Defendant who is not so liable shall have Judgment and shall be entitled to his costs as

Judgment as regards defendants liable or not liable respectively.

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an indictment for perjury. But if an affidavit refer to the "annexed plea," and the annexed plea is "intitled in the cause," and *verba relata videntur in esse*, therefore it amounts to the same thing as if the affidavit itself were intitled in the cause, and an indictment for perjury would lie on such an affidavit: *Prince et al* v. *Nicholson*, 5 Taunt. 337, *per* Heath, J.; *Richards et al* v. *Setree*, 3 Price, 201, *per* Thomson, C. B.; *Poole* v. *Pembrey et ux.* 1 Dowl. P. C. 694. It is usual notwithstanding and perhaps safer to intitle the affidavit though annexed. But if the affidavit be intitled at all it must be correctly intitled: *Poole* v. *Pembrey et ux*, 1 Dowl. P. C. 693; *Phillips* v. *Hutchinson et al*, 3 Dowl. P. C. 20; *Clark* v. *Martin*, *Ib.* 222; *Shrimpton* v. *Carter*, *Ib.* 648; *Bland* v. *Dax*, 15 L. J. N.S. Q. B. 1; *Fletcher* v. *Lechmere*, 2 Dowl. N. S. 848. The affidavit ought to state in the body of it the place of residence of the party not joined: *Petch et al* v. *Duggan*, 1 Cham. R. 141. No reference to a plea annexed will aid an affidavit if otherwise incorrectly intitled: *Poole* v. *Pembrey et ux.* 1 Dowl. P. C. 693. If the plea be filed without an affidavit, or with an affidavit so insufficient as to amount to no affidavit, plaintiff may treat the plea as a nullity and sign judgment. But it would seem that an affidavit though sworn before defendant's attorney, is not so far void as to entitle plaintiff to sign judgment, however warranted he might be in moving to set the plea aside: *Horsfall* v. *Matthewman*, 3 M. & S. 153.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 39. Substantially the same as our Stat. 7 Wm. IV. cap. 3, s. 7, which is a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 10.

(*g*) *i. e.* Under section 69.

(*h*) Section 69 is silent as to the costs of the amendment. It is presumed that they will, generally, be in abeyance until trial and verdict under this section. They will abide the event, and as such form part of the costs of the cause.

(*i*) This provision is intended to prevent the effect of that rule which decides that a plaintiff in an action of contract failing as to one defendant fails as to all the defendants sued. The joinder of a co-defendant by plaintiff under and in consequence of a plea of non-joinder by defendant is not so much the act of the plaintiff as of the original defendant. Therefore it is only reasonable to declare that plaintiff shall not be made to suffer from the act of others.

against the Plaintiff, (*j*) but the Plaintiff shall be allowed such costs, together with the other costs on the plea in abatement and amendment, as costs in the cause against the original Defendant or Defendants who so pleaded in abatement the non-joinder of such person; (*k*) but any such Defendant who so pleaded in abatement, may, on the trial, adduce evidence of the liability of the Defendants named by him in such plea. (*l*) 19 Vic. c. 43, s. 72.

Joint contract, &c., may be given in evidence

72. (*m*) The joint obligation, contract or promise may be given in evidence against any one or more of the joint obligors or contractors, (*n*) and shall have the same force and

(*j*) It is not declared in what manner defendant shall recover these costs from plaintiff. No doubt it would be proper to proceed by rule and attachment in case of non-payment. But the point as to whether defendant would be also entitled to an execution as against the plaintiff is not yet decided.

(*k*) An action was originally brought for a debt against M. alone, who pleaded the non-joinder of B. & G. The plaintiff amended accordingly, and went on in his action against the three. M. paid £230 into court, and as to the residue pleaded never indebted. The two others pleaded never indebted. The jury found a verdict for M. that only £230 was due, but against B. & G. that they were jointly indebted with M. to the amount of £212. Upon this state of things the master allowed M. his costs against the plaintiff, but allowed the plaintiff his costs against B. & G. His taxation was supported on the first point, but as to the second it was held that plaintiff was not entitled to costs against B. & G., neither under the Statute of Gloucester because he was not entitled to damages, nor under the Statute of Anne as it was not a case of double pleading: *Cazneau* v. *Morrice et al*, 25 L.J. Q.B. 120; see also *Bird* v. *Higginson*, 5 A. & E. 83; and *Partridge* v. *Gardner*, 6 Ex. 621. Plaintiff before paying the costs contemplated by this enactment, would act prudently in having defendant's bill taxed. Then having obtained the master's *allocatur* of the amount, plaintiff could without difficulty claim to have that sum allowed upon the taxation of the general costs of the cause.

(*l*) This provision is intended for the benefit of a defendant who pleads in abatement the non joinder of a co-defendant. From the time that he files and serves his plea he is bound to substantiate it or pay the costs incurred by plaintiff in consequence thereof. To substantiate his plea and so, if possible, prevent costs, it is only just that defendant should be allowed to prove his allegations. The allegations are in effect that certain persons not joined are with himself jointly liable to the plaintiff.

(*m*) Substantially a re-enactment of Stat. U. C. 59 Geo. III. cap. 25, s. 2. The object of the enactment is to carry out the principles involved in the preceding section. If an action be brought against one or more of several joint contractors, and there be no plea in abatement setting up the non-joinder of the others, the contract sued upon may, notwithstanding the non-joinder of the other co-contractors, be given in evidence against such as are made defendants. The practical effect of this will be to allow plaintiff to sue and recover his claim from such co-contractors as may be within the jurisdiction of the court, without at all endeavouring to proceed against those who may be without the jurisdiction.

(*n*) For well known reasons this section is confined to actions on contract. In actions for torts the non-joinder of wrong-doers is not attended with the same results as in actions on contracts. See note *d* to section 68.

against any one contractor.

effect for the recovery of Judgment thereon as if it were only the obligation, contract or promise of the Defendant or Defendants actually sued. (*o*) 19 Vic. c. 43, s. 74.

JOINDER OF CAUSES OF ACTION.

Several causes of action may be joined

73. (*p*) Causes of action of whatever kind, provided they be by and against the same parties and in the same rights, (*q*) may be joined (*r*) in the same suit, (*s*) but this shall not

(*o*) Formerly it was necessary for a plaintiff suing upon "joint contract," to proceed against all the contractors, whether within or without the jurisdiction. Those within the jurisdiction were served with process—those without were proceeded against to outlawry. The latter proceeding is now in this respect altogether dispensed with; but it is still necessary if all the joint-contractors be within the jurisdiction of the court that *all* be sued: *Corbett* v. *Calvin*, 4 U. C. Q. B. 123. If there be a non-joinder or mis-joinder of co-contractors, plaintiff cannot cure his proceedings either by a *nolle prosequi* or nonsuit as to some of the defendants. A nonsuit as to some is a nonsuit as to all. If plaintiff abandon his suit as to some he abandons it as to all: see *Commercial Bank* v. *Hughes et al*, 4 U. C. Q. B. 167, *per* Macaulay, J. *Contra* in actions for tort: see *Cleland* v. *Robinson et al*, 11 U. C. C. P. 416.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 41.

(*q*) *And in the same rights.* From this it is inferred that a plaintiff has no right now more than before the passing of this act to join a cause of action accruing to him in his individual capacity with one accruing to him in a representative character, as executor, &c.: see generally *Powley et al* v. *Newton*, 6 Taunt. 453; *Ashby* v. *Ashby et al*, 7 B. & C. 444; *Webb et ux.* v. *Cowdell*, 14 M. & W. 820; *Kitchenman* v. *Skeel et al*, 3 Ex. 49; *Bignell* v. *Harpur*, 4 Ex. 773; *Hawn et al* v. *Madden et al*, E. T. 2 Vic. *MS.* R. & H. Dig. "Executor, &c." ii. 1; *Walker* v. *Court*, H. T. 6 Wm. IV. *MS. Ib.* ii. 5; *Davis* v. *Davis*, T. T. 1 & 2 Vic. *MS. Ib.* ii. 6; *King et al* v. *Thom*, 1 T. R. 487; *Smith* v. *Barrow*, 2 T. R. 476; *Petrie et al* v. *Hannay*, 3 T. R. 659; *Jennings* v. *Newman*, 4 T. R. 347; *Ord* v. *Fenwick*, 3 East, 104; *Henshall* v. *Roberts et al*, 5 East. 150; *Cowell et ux.* v. *Watts*, 6 East. 405; *Court* v. *Partridge et ux*, 7 Price, 591.

(*r*) *May be joined, &c.* This is not compulsory upon plaintiff. He is enabled but not *compelled* to join in the same suit several causes, &c. A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may direct attention to the question whether he is entitled to the price of goods sold: see *Brockbank* v. *The Whitehaven Junction R. Co.* 31 L. J. Ex. 349.

(*s*) A plaintiff has not heretofore in actions brought by him been confined to one cause of action. It has always been understood that a declaration may consist of several counts, and that each count may state a separate cause of action. Thus it has been quite allowable for the first count of a declaration to be on a bill of exchange, a second on a promissory note, a third on an account stated, &c.: Smith's Action-at-law, 10 ed. 77. Indeed, it has been lately allowed that several causes of action might be joined in one and the same count. Thus it has been usual in one count to condense two or more of the following—goods sold, work done, money lent, money paid, money had and received, &c.: Steph. Pl. 7 ed. 326. But the rule allowing several causes to be joined in the same suit was subject to the express limitation, that demands only of a similar quality or character, *i.e. of the same kind*, could be joined: *Ib.* 325. Now the rule has been extended by the abrogation of the limitation, and causes of action *of whatever kind* may be joined, pro-

extend to replevin or ejectment, (*t*) or in the County Courts to causes of action which are local and arise in different Coun- subject to certain conditions.

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vided they be by and against the same parties and in the same rights, &c. The amendment made is only as to the *joinder of causes of action*. It does not affect the cause or gist of any *single action*. It neither makes that a cause which was not one before the act, nor renders that less a cause which has been held to be one. It does not affect the framing of declarations, except so far that each separate cause of action a separate count would seem to be desirable, and for causes of action not *ejusdem generis*, separate accounts would seem to be indispensable. If the counts can be stated shortly, as in the forms given in Schedule B. to this act, such or similar concise forms should be adopted. In cases where a plaintiff could or could not before the passing of this act declare on the common counts for his cause of action, it is apprehended the law is still the same: see *McKee* v. *Huron Dist. Council*, 1 U. C. Q.B. 368; *Todd* v. *The Gore Bank*, *Ib.* 40; *McMahon* v. *Coffee*, *Ib.* 110; *Aitkin* v. *Malcolm*, 2 U. C. Q. B. 134; *McGuffin* v. *Cayley*, *Ib.* 308; *Ducat* v. *Sweeney et al*, M. T. 3 Vic. *MS.* R. & H. Dig. "Money had and received," 4; *Ross et al* v. *Tait*, H. T. 7 Wm. IV. *MS. Ib.* "Assumpsit" i. 5; *Miller* v. *Munro*, 6 O. S. 166; *Armstrong* v. *Anderson et al*, 4 U. C. Q. B. 113; *Kitson* v. *Short*, *Ib.* 220; *Fisher* v. *Ferris*, 6 U. C. Q. B. 534; *Chapel* v. *Hickes*, 2 C. & M. 214; *Spencer* v. *Parry*, 3 A. & E. 331; *Baker* v. *Dewey*, 1 B. & C. 704; *Amos et al* v. *Temperley*, 8 M. & W. 798; *Paul* v. *Dod et al*, 2 C. B. 800; *Lamond et al* v. *Davall*, 9 Q.B. 1030; *Fewings* v. *Tisdal*, 1 Ex. 295; *Middleditch* v. *Ellis*, 2 Ex. 623; *Sweeting* v. *Asplin*, 7 M. & W. 165; *Garrard* v. *Cottrell*, 10 Q. B. 679; *Lewis* v. *Campbell*, 8 C. B. 541; *De Bernardy* v. *Harding*, 8 Ex. 822. Where there are two counts in a declaration for distinct causes of action, and substantial damages are given upon one and nominal damages upon the other, and the damages are entered up generally on the nisi prius record, parol evidence may be given to explain to what extent the damages were given on each count: *Preston* v. *Peeke*, 31 L.T. Rep. 162.

(*t*) Replevin and ejectment cannot be joined together, nor can either be joined with any other form of action. Where the first count of a declaration was in replevin and the second in trespass, a summons to strike out the second count was made absolute with costs: *The Great Western R. Co.* v. *Chadwick*, 3 U.C. L.J. 29. The remaining forms of action in common use may be joined. They are assumpsit, case, covenant, debt, detinue, trespass, and trover. It may not be amiss to refer to the authorities in which the boundaries between these forms of action have been defined and preserved. Although no longer necessary to be strictly observed, yet for many purposes the classifications and distinctions are important to be kept in view.

Assumpsit and Case—See *Ross et al* v. *Webster*, 5 U. C. Q. B. 570; *Quin* v. *School Trustees*, 7 U. C. Q. B. 130; *Woods* v. *Finnis et al*, 7 Ex. 363; *Boorman et al* v. *Brown*, 3 Q. B. 511; *Courtenay* v. *Earle*, 10 C. B. 73.

Assumpsit and Covenant—See *Schlencker et al* v. *Moxey*, 3 B. & C. 789; *Gwynne* v. *Davy et al*, 1 M. & G. 857; *Filmer* v. *Burnby*, 2 Scott, N. R. 689.

Assumpsit and Debt—See *Beebe* v. *Secord et al*, Tay. U C. R. 409.

Assumpsit and Trover—See *Land et al* v. *Woodward*, 5 U. C. Q. B. 190; *Orton* v. *Butler*, 5 B. & Al. 652.

Case and Debt—See *Miles* v. *Bough*, 3 Q. B. 845.

Case and Trespass — See *Savignac* v. *Roome*, 6 T. R. 125; *Reynolds* v. *Clarke*, 1 Str. 634; *Turner et al* v. *Hawkins et al*, 1 B. & P. 472; *Martinez et al* v. *Gerber*, 3 M. & G. 88; *Lear* v. *Caldecott*, 4 Q. B. 123; *Fay* v. *Prentice et al*, 1 C. B. 828; *Firmstone et al* v. *Wheeley et al*, 2 D. & L. 203.

Covenant and Debt—See *Harrison* v. *Matthews*, 2 Dowl. N. S. 318.

Debt and Detinue—might be joined together even before the C. L. P. Act: see Smith on Action, 76.

Trover and Detinue—*Mockford* v. *Taylor*, 19 C. B. N.S. 209.

ties; (*tt*) and where two or more of the causes of action so joined in cases in the Superior Courts are local and arise in different Counties, the venue may be laid in either of such Counties. (*u*) 19 Vic. c. 43, s. 75.

Court may order separate trial.

74. (*v*) Either of the Superior Courts or a Judge thereof, or the Judge of a County Court, (*w*) may prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case any such Court or Judge may order separate records to be made up and separate trials to be had; (*x*) but nothing herein contained shall restrict or diminish the obligation or right of a Plaintiff to include in one action all or any of the drawers, makers, endorsers, and acceptors of any Bill of Exchange or Promissory Note. (*y*) 19 Vic. c. 90, s. 9; 19 Vic. c. 43, s. 75.

Cases where a husband

75. (*z*) In any action brought by a man and his wife on any cause of action (*a*) accruing personally to the wife, (*b*) in

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(*tt*) This is necessarily the case owing to the fact that county courts, though having a general jurisdiction to limited amounts in transitory actions, are yet local courts and as regards locality independent of each other.

(*u*) See note *n* to section 7.

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 41.

(*w*) See note *w* to section 48.

(*x*) See *Ferean* v. *Watley*, 4 F. F. 1038; *Sherratt* v. *Webster*, 8 L. T. N.S. 254.

(*y*) This provision is new and not to be found in the Eng. Stat. from which the one here annotated is adopted. It pointedly relates to our Con. Stat. U. C. cap. 42, s. 23, authorizing the holder of a bill or note to sue all parties to it in one action, notwithstanding their several liability. If several actions should, notwithstanding this provision, be brought when one only would suffice, costs in one only shall be taxed: Con. Stat. U. C. cap. 42, s. 35.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 40. Founded upon the first report of the Common Law Commissioners, latter part of section 19. The reasons for the changes there recommended and here carried out are clearly stated. The report proceeds, "With respect to the joinder of a cause of action arising to a husband in his own right with one accruing to him in respect of his wife, as the judgment in the event of his recovering a verdict, and the fund to which the judgment would be applied, would be the same, we see no objection to permit the joinder, in order to prevent the necessity of bringing two actions in respect possibly of a cause of action arising out of the same transaction; as for instance where an injury has been done to the wife *and* the husband by the same wrongful act."

(*a*) *On any cause of action, &c.* It seems that these words are intended to have a very general operation. "*Any* cause of action" applies to *all* causes of action, whether *ex contractu* or *ex delicto*, without distinction.

(*b*) *Accruing personally to the wife, i. e. any* cause of action accruing personally to the wife. These expressions deviate widely from the provisions of the English

respect of which they are necessarily co-Plaintiffs, (*c*) the

and wife are co-plaintiffs.

act, whence our section is taken. The English act is restricted to actions brought by husband and wife, "*for an injury done to the wife*:" see argument of counsel in *Johnson et ux.* v. *Lucas*, 1 El. & B. 659, in which argument the court apparently acquiesced. In fact the language used in the English act admits of no doubt. The English section is confined exclusively to actions of *tort*. Ours clearly extends to actions on contract as well as tort. The example given by the Common Law Commissioners (note *z ante*) seems to favor the restriction made in the English act; but the course pursued by our legislature is evidently more in accordance with the *spirit* of that report.

(*c*) *In respect to which they are necessarily co-plaintiffs.* When and for what causes must husband and wife be "necessarily co-plaintiffs?" The law upon this subject conveniently divides itself into two heads corresponding to the two great divisions of actions under one or other of which every cause of action must be found, viz., actions upon contract and actions for torts.

Actions upon contract. In general the wife cannot join in any action upon a contract made *during* marriage for her work and labour, goods sold, or money lent by her during that time: *Bidgood* v. *Way et ux.* 2 W. Bl. 1236; *Buckley* v. *Collier*, 1 Salk. 114; Com. Dig. "Baron and Feme," W.; *Weller et al* v. *Baker*, 2 Wils. 414; *Chambers* v. *Donaldson et al*, 9 East. 471; *Murphy* v. *Bunt et al*, 2 U. C. Q. B. 284. For the husband is, in cases not falling within Con. Stat. U. C. cap. 73, entitled to her earnings, and they shall not survive to her but go to the personal representatives of her husband, and she could have no property in the money lent or the goods sold: *Abbot et ux.* v. *Blofield*, Cro. Jac. 644; *Weller et al* v. *Baker*, 2 Wils. 414; *Bidgood* v. *Way et ux.* 2 W. Bl. 1236; *Buckley et ux.* v. *Collier*, Carth. 251; *Crowhurst et ux.* v. *Laverack*, 8 Ex. 208; *Dengate et ux.* v *Gardiner*, 4 M. & W. 6, *per* Abinger, C. B. But when the wife can be considered as the *meritorious* cause of action, as if a bond or other contract under seal, or a promissory note be made to her separately or with her husband: *Howell* v. *Maine*, 3 Lev. 403; *Aleberry* v. *Walby*, 1 Str. 229; *Ankerstein* v. *Clarke et al*, 4 T. R. 616; Co. Lit. 351 *a*; *Philliskirk et ux.* v. *Pluckwell*, 2 M. & S. 393; *Harcourt et al* v. *Wyman*, 3 Ex. 817. Or if she bestow her personal labour or skill, on curing a wound, &c.: *Fountain* v. *Smith*, 2 Sid. 128; *Brashford* v. *Buckingham et ux.* Cro. Jac. 77; *Weller et ux.* v. *Baker*, 2 Wils. 424; Bac. Abr. "Baron and Feme," K. She may be joined with her husband, or he may sue alone. In general, wherever the cause of action would *survive* to the wife, she and her husband ought to be joined in the action: see *Gaters* v. *Madeley*, 6 M. & W. 423. Where the wife is joined in the action in any of these cases, the declaration must distinctly declare her *interest* and show in what respect she is the *meritorious* cause of action, and there can be no intendment to this effect: *Bidgood* v. *Way et ux.* 2 W. Bl. 1236; *Philliskirk et ux.* v. *Pluckwell*, 2 M. & S. 393; *Serres et ux.* v. *Dodd*, 2 B. & P. N.S. 405; *Hopkins et ux.* v. *Logan*, 7 Dowl. P.C. 360; *Shuberg et ux.* v. *Cornwall*, M. T. 5 Vic. *MS.* R. & H. Dig. "Arrest of Judgment," 6. But *after verdict* everything will be intended in support of the declaration: *Howe et ux.* v. *Thompson*, M. T. 6 Vic. *MS.* R. & H. Dig. "Arrest of Judgment," 13. Even since the English Common Law Procedure Act it has been held that a declaration by husband and wife on an account stated must show that the account was concerning matters over which the wife *had an interest*: *Johnson et ux.* v. *Lucas*, 1 El. & B. 659.

Actions for torts. Torts may be either to the person or the property personal or real of a party. The wife having no legal interest in the person or property of her husband, cannot in general join with him in any action for any injury to them. For injuries to the person or to the personal or real property of the wife committed *before* marriage when the cause of action would survive to the wife, as a general rule she must join in the action: *Milner et al* v. *Milnes et al*, 3 T. R.

husband may add thereto claims in his own right, (*d*) and separate actions brought in respect of such claims may be

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627; *Mitchinson* v. *Hewson*, 7 T. R. 348; Com. Dig. "Baron and Feme," V. Torts according to their nature may be divided in the manner above mentioned—

i. Injuries to the person of the wife.
ii. " to the personal property of the wife.
iii. " to the real property of the wife.

i. *Injuries to the person of the wife.* If committed *during* coverture by battery, slander, &c., both husband and wife must join: *Boggett* v. *Fvier, et al.* 11 East, 301; *Chambers* v. *Donaldson*, 9 East. 471. For words spoken of the wife not actionable of themselves but which occasion some special damage to the husband, he must sue alone: *Harwood et ux.* v. *Hardwick et ux.* 2 Keb. 387, pl. 63; *Coleman et ux.* v. *Harcourt*, 1 Lev. 140; *Russel et ux.* v. *Corne*, 1 Salk. 119; *Baldwin* v. *Flower*, 3 Mod. 120; Selwyn N. P. 12 edn. 345. If loss of special service be the damage alleged, the wife should not be joined. Whatever might be the nature of the wife's service the profits of it would accrue to the husband: *Dengate et ux.* v. *Gardiner*, 4 M. & W. 5.

ii. *Injuries to the personal property of the wife.* Wherever the cause of action had only its inception *before* the marriage but its completion *afterwards*, as in case of trover before marriage and conversion during marriage, or of rent due before marriage and a rescue afterwards, husband or wife may join or may sever in detinue trover or trespass: Bac. Abr. Detinue; Bul. N. P. 53, 2 Saund. 47 b; *Blackburn et ux.* v. *Greaves*, 2 Lev. 107; Com. Dig. "Baron and Feme," X; *Ayling et ux.* v. *Whicher*, 6 A. & E. 259. Where the cause of action has its inception as well as completion *after* marriage, the husband must sue alone—the legal interest in personalty being vested by the marriage in him: *Buckley* v. *Collier*, 1 Salk. 114; *Bidgood* v. *Way et ux.* 2 W. Bl. 1236; *Spooner* v. *Brewster*, 2 C. & P. 34.

iii. *Injuries to real property of wife* In real actions for the recovery of the land of the wife, both husband and wife must join: *Odill* v. *Tyrrell*, 1 Bulst. 21; Com. Dig. "Baron and Feme," V; Selwyn's N.P. 12 edn. 344. But under the old form of ejectment the husband alone might be lessor of the plaintiff: *Doe d. Eberts* v. *Montreuil*, 6 U.C. Q.B. 515; *Doe d. Peterson* v. *Cronk*, 5 U.C. Q.B. 135. The husband alone may, it seems, still be plaintiff: *Holmes* v. *Hennegan*, 28 L. T. Rep. 25. So it has been held that an action for damages to the realty though in the possession of the wife was properly brought in the name of the husband: *Jones* v. *Spence*, 1 U. C. Q. B. 367.

(*d*) *Claims in his own right.* This is as general and comprehensive an expression as could well be used. It includes all manner of claims, whether upon contract or for tort. One effect of the enactment will be to do away with the difficulty that presented itself to the court in *Dengate et ux.* v. *Gardiner*, 4 M. & W. 5. This was an action by husband and wife for slanderous words spoken of the wife. Special damage was laid for loss of service by the wife in consequence thereof. The court held that as the results of the service would belong only to the husband and not to the wife, he only could sue for such special damage. Thus it was decided in effect that for two causes of action closely united and arising out of one and the same transaction, two separate actions were necessary, one for the slander *per se*, in which action both husband and wife should join; the other for the consequence of the slander in loss of service, &c., in which action the husband alone could sue: see also *Russell et ux.* v. *Corne*, 1 Salk. 119; Com. Dig. Pleader 2, A. 1. Both these or similar causes of action might now be joined in the same action under the section here annotated: see *Heckle* v. *Reynolds*, 7 C. B. N.S. 114.

consolidated, if the Court or a Judge thinks fit; (*e*) but in case of the death of either Plaintiff, (*f*) such suit shall abate so far only as relates to the causes of action if any, which do not survive. (*g*) 19 Vic. c. 43, s. 76.

LANGUAGE AND FORM OF PLEADINGS IN GENERAL, AND OTHER PROVISIONS IN RESPECT THERETO. (*h*)

(*e*) Where a husband brought an action for a personal injury to himself and his trade by an explosion, and he and his wife brought a separate action for injuries sustained by her resulting from the same explosion, the two actions were consolidated: *Hemstead* v. *Phœnix Gas Light & Coke Co.* 3 H. & C. 745; see further *Morley* v. *The Midland R. Co.* 3 F. F. 961.

(*f*) I. *Contracts.* If the *husband survive*, there is a material distinction to be observed respecting chattels real and *choses in action.* The husband is entitled to the chattels real by survivorship and to all rents, &c., accruing during the coverture; he is also entitled to all chattels given to the wife during coverture in her own right, though not to her in *autre droit.* But mere *choses in action* or contracts made with the wife before coverture do not survive to the husband, and he must, to recover the same, sue as administrator of his wife.

If the *wife survive*, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his life time, and to arrears of rent, &c., which became due during the coverture upon her antecedent demise, or upon their joint demise during the coverture to which she assents after his death; and to all arrears of rent and other *choses in action* to which she was entitled before the coverture, and which the husband did not reduce into actual possession.

II. *Torts.* If the *husband survive*, he may maintain an action of trespass, &c., for any injury in respect to the person or property of the wife, for which he might have sued *alone* during coverture. Thus he might maintain an action after the wife's death for any battery or personal tort to her, which occasioned him a particular injury, as the loss of her society and assistance in domestic affairs, or a pecuniary expense, or for any injury to the land of the wife when living. If the wife die pending an action by her husband and herself for any tort committed either before or during coverture and to which action she is a necessary party, the suit will abate.

If the *wife survive*, any action for a tort committed to her personally, or to her goods, or real property before marriage, or to her personal or real property during coverture, will survive to her.

(*g*) The above proviso may occasion some difficulty in the taxation of costs. When the plaintiff or plaintiffs join several causes of action in the same suit, his or their declaration ought to contain several distinct counts, one at least for each cause of action. This, in the event of further proceedings, will in all probability give rise to several distinct issues. Then to apply section 110 of this act, "The costs of any issue either of fact or of law shall follow the finding or judgment on such issue, and be adjudged to the successful party, *whatever may be the result of the other issue or issues*:" see also R. G. pr. 51.

(*h*) The sections following, from 76 to 80 inclusive, are founded upon the first report of the Common Law Commissioners, section 20, *et seq.* All these sections with reference to the time when the act came into force apply to future pleadings not to past: *Pinhorn* v. *Souster*, 8 Ex. 144, *per* Parke, B.

The expressed intention is to simplify "the language and form of pleadings." What is understood by "pleadings?" In the words of the commissioners—they are written statements made by the plaintiff and defendant of their respective

Statements which need not be proved need not be made.

76. (*i*) All statements which need not be proved, (*j*) such as the statement of time, (*k*) quantity, quality and value (*l*) where these are immaterial, (*m*) the statement of

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grounds of action and defence. The object is to ascertain what are the matters really in controversy between the parties, so as to avoid all discussion and inquiry on those which are not so—thus simplifying the matter for the decision of the judge or jury, and saving the parties unnecessary expense and trouble. To accomplish this object the plaintiff in the first place is required to state the facts which constitute his cause of action. The defendant is required to answer, and in so doing is compelled at his option to take one of the following courses:—either he denies the statement of the plaintiff; or confessing it, avoids its effect by asserting some fresh fact; or admitting the facts alleged he denies the legal effect of them as contended for. In the second case, the plaintiff will be under the like necessity, and will have to reply to the fresh matter of fact alleged by the defendant, subject to the same rules. In like manner, if necessary, defendant rejoins; and so the parties proceed until it is ascertained that there is some fact asserted by the one side and denied by the other, or that there is some proposition of law affirmed on the one hand and denied on the other. The question so raised is called an issue in fact or in law, according to its nature.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 49. Founded upon the first report of the Common Law Commissioners, section 36. The words of the enactment are *verbatim* the same as those used by the commissioners in their report.

(*j*) The law recognizes the rule that mere formal allegations need not be proved. The term "formal allegations" comprises among other matters "all those averments of *place time, number, value, quality*, and the like, which are inserted in pleadings without being either essentially descriptive of the subject of the claim or charge, or otherwise rendered material by special circumstances.

(*k*) Time is seldom material unless when of the essence of the contract: see *Wimshurst* v. *Deeley et al*, 2 C.B. 253; or unless the precise time of the happening of an event is—with reference to the purpose for which it is alleged in pleading—of the essence of that event: *Nash* v. *Brown*, 6 C. B. 584. When time happens to form a material point in the merits of a case, if a traverse be taken, the time laid is of the substance of the issue and must be strictly proved. In the *indebitatus* counts, time, though not prefaced by a *videlicet*, has been held immaterial: *Southey et al* v. *Magan*, 10 Ir. L. R. 250. It was a general rule that to all traversable facts there should be time and place, though the want of them under certain circumstances might be cured by the Statutes of Jeofails: *Ring* v. *Roxborough*, 2 C. & J. 423, *per* Bayley, B. Dates may be assumed to be material upon demurrer when, if truly stated, they would support the plea demurred to: *Ryalls* v. *Bramall et al*, 5 D. & L. 755, *per* Parke, B.

(*l*) Quantity, quality and value, are in general material in actions for goods and chattels or their value: *Bertie* v. *Pickering et ux.* 4 Burr. 2455; *Holmes* v. *Hodgson*, 8 Moore, 379; *Scott et al* v. *Jones*, 4 Taunt. 865; *Phillips* v. *Jones*, in Error, 15 Q. B. 859. Unless the article in respect of which the party is stated to be indebted be of some *value*, there is no consideration for the subsequent promise: *Mayor of Reading* v. *Clarke*, 4 B. & Al. 271, *per cur.* *Sed qu.* see Forms of Pleading in Schedule B. to this act. Many of these objections could only be raised by special demurrer, and it is now enacted "that no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer:" section 123, of this act.

(*m*) It is only necessary for defendant to state the substance of his cause of action, whether upon contract or for tort: see forms as to both in Schedule B.,

losing and finding, and bailment in actions for goods or their value (*n*) — the statements of acts of trespass having been committed with force and arms and against the peace of our Lady the Queen (*o*)—the statement of promises which need not be proved, as promises in *indebitatus* counts and mutual promises to perform agreements, (*p*) and all statements of a like kind, (*q*) shall be omitted. (*r*) 19 Vic. c. 43, s. 98.

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and also see notes to sections 120, 122. Substantial words when used will include averments, without the averments commonly stated under a *videlicet*. An example may be given. Plaintiff declared on contract, alleging that defendant agreed to keep and employ his horses "for a certain space of time then agreed upon between the plaintiff and defendant, *to wit*, for the space of one year next ensuing, and to pay the plaintiff for the use thereof, certain hire and reward in that behalf, *to wit*, £50 a year for each of such horses, payable quarterly." *Held* that every thing following the *videlicets* might be safely rejected and the declaration read as alleging a contract to hire for a certain time for certain hire and reward: *Harris* v. *Phillips*, 10 C. B. 650; see also *Ward* v. *Harris*, 2 B. & P. 265.

(*n*) The actions usually brought for goods or their value before Prov. Stat. 14 & 15 Vic. cap. 64, were detinue and trover. The averments of losing and finding in trover have always been considered fictitious and immaterial. So of detinue, it has been adjudged that the gist of the action is the detainer, and that the bailment is altogether immaterial—in the sense of being traversable. It has been likened to the allegation of the loss in a count in trover: *Clossman* v. *White*, 7 C. B. 54, *per* Wilde, C. J.; see also *Gledstane* v. *Hewitt*, 1 C. & J. 565; *Walker* v. *Jones*, 2 C. & M. 672; *Whitehead* v. *Harrison*, 6 Q. B. 423; *Mason* v. *Farnell*, 12 M. & W. 674. The bailment is of course material in actions on contract: see *Ross* v. *Hill*, 2 C. B. 877.

(*o*) These averments have been held to be clearly immaterial, that is, not traversable: see *Harvey* v. *Brydges et al*, 14 M. & W. 437; s. c. in Error, 1 Ex. 261; but see *Spear* v. *Chapman*, in Error, 8 Ir. Law Rep. 461.

(*p*) A promise set forth as a mere inference of law arising upon a liability stated is not necessary to be proved, and therefore not traversable: see *Masson* v. *Hill et al*, 5 U. C. Q.B. 60; *Bank B. N. A.* v. *Jones et al*, 7 U. C. Q.B. 166; see also *Mountford et al* v. *Horton*, 2 N.R. 62; *Wade* v. *Simeon*, 2 C. B. 548; but where the promise of plaintiff is the consideration of a contract, it is material: see *Sutherland* v. *Pratt et al*, 11 M. & W. 296. In an action against the maker and indorsers of a note, a *joint* and *several* liability need not, since the C. L. P. Act, be alleged: *Gladstone et al* v. *Boucher et al*, 4 U. C. L. J. 20.

(*q*) Where the declaration was on the common counts for board, &c., found for defendant's illegitimate child at defendant's *request*, the request was held to be immaterial and not traversable: *Flaherty* v. *Mairs*, 1 U. C. Q.B. 221. The omission of a special request, even when necessary, has been held to be matter of form only: *McLeod* v. *Jackson*, 5 O. S. 318. Since the C. L. P. Act, a declaration on an executory contract has been held good, although the contract was not averred to be under seal, and there was no allegation of mutual promises: *Ancil* v. *Briker*, Chambers, March 10, 1857, Robinson, C. J.

(*r*) *Shall be omitted.* These words are compulsory: *Moberly* v. *Baines*, 2 U. C. L. J. 234. The only penalty is an order of a judge to strike out the unnecessary averments on the application of the opposite party. Reasoning by analogy, it may be mentioned that our old rule No. 29 E. T. 5 Vic. ordered that "every

Entering, dating and recording pleadings.

77. (*s*) Every declaration or other pleading (*t*) shall be entitled of the proper Court, (*u*) and of the day of the month and year when the same is filed, (*uu*) and shall also be entered on the record made up for trial, and on the Judgment Roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, (*v*) unless otherwise specially ordered

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declaration shall in future....commence," &c., and that it was copied from Eng. R. G. 3 Wm. IV. No. 33, under which it was held that averments made unnecessary by that rule might be struck out as surplusage: *Alderson* v. *Johnson*, 5 Dowl. P. C. 294; see also *Dod* v. *Grant*, 4 A. & E. 485. Statements which need not be proved are needless averments, and needless averments may be struck out on application to the court or a judge: *Ward* v. *Graystock*, 4 Dowl. P. C. 717. The application for such a purpose ought to be made by defendant before plea: *Thomas* v. *Jackson*, 2 Bing. 453. An amendment without doubt would be allowed in every such case under section 222 of this act; but probably only upon payment of costs: see *Lawrence* v. *Stephens*, 3 Dowl. P. C. 777. It is not likely that the court would set aside a pleading pleaded in contravention of this section: see *Bacon* v. *Ashton*, 5 Dowl. P. C. 94. An unnecessary allegation would not now, it is apprehended, be demurrable: *Bodenham et al* v. *Hill*, 7 M. & W. 274; *Hart* v. *Meyers*, 7 U. C. Q. B. 416. In one case since the C. L. P. Act, upon an application by defendant to a judge in chambers to strike out superfluous matter in the declaration, the judge referred the declaration to the master, with instructions to do so with costs: *Patton* v. *Provincial Ins. Co.* 3 U. C. L. J. 113.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 54. Substantially a re-enactment of old rule 29 of E. T. 5 Vic., which was copied from Eng. R. G. 1, of H. T. 4 Wm. IV.: Jervis N. R. 115. The origin of the latter rule is Eng. rule 15 of M. T. 8 Wm. IV.: Jervis N. R. 98.

(*t*) "*Or other pleading*"—clearly embraces replication, rejoinder, &c., but apparently not a *similiter* added as of course by plaintiff for defendant where the pleading of the latter concludes to the country: see *Shackel* v. *Ranger*, 3 M. & W. 409; *Eddin* v. *Ward*, 8 Dowl. P. C. 725. The *similiter* when added by plaintiff for himself has been held to be a pleading, and ought to be intitled: see *Middleton* v. *Hughes*, 8 Dowl. P. C. 170. *Contra: Blue* v. *Toronto Gas Co.* 1 Cham. R. 7. The *similiter* under this act is in effect a traverse and so a pleading in the cause: see section 108.

(*u*) The court must be stated in the body of the pleading—intitling on the back of it is not sufficient: *Ripling* v. *Watts*, 4 Dowl. P. C. 290.

(*uu*) Both the day of the month *and* year must be given. It would be irregular to omit the words, "in the year of our Lord:" *Holland et al* v. *Tealdi*, 8 Dowl. P. C. 320. The officer should not receive the pleadings at any place except the office of the court: *Martin et al* v. *Smyth et al*, 11 Ir. L. Rep. 67.

(*v*) A pleading dated on a day other than that on which it is filed, is an irregularity only—not a nullity: see *Hodson* v. *Pennell*, 4 M. & W. 373. The copy of a pleading wrongly dated is an irregularity: *Commercial Bank* v. *Boulton*, 1 Cham. R. 15. And an application may be made to amend: see *Ikin* v. *Plevin et al*, 5 Dowl. P. C. 594; *Whipple* v. *Manley*, 5 Dowl. P. C. 100; *Hough* v. *Bond*, 1 M. & W. 314; see further *Day* v. *Wright*, 5 Ir. L. R. 240; *Crotty* v. *Snagg*, 8 Ir. L. R. 8; *Hinds* v. *Shannons*, 10 Ir. L. R. 458. The irregularity, if not promptly moved against, may be waived: *Newnham* v. *Hanny et al*, 5 Dowl.

by the Court or a Judge. (*w*) 19 Vic. c. 43, s. 103.

78. (*x*) It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; (*y*) and, if profert be made, it shall not entitle the oppo- Profert, Oyer, &c., unnecessary.

P. C. 259. A demurrer to a pleading filed on the ground that the pleading was wrongly intitled has been set aside with costs: *Neal* v. *Richardson*, 2 Dowl. P. C. 89. An added plea should bear the same date as the original pleas: *Short* v. *Simpson et al*, L. R. 1 C. P. 250 n.

The omission to state the date of a pleading in the issue or record is clearly such an irregularity as may be moved against. Where, in the issue, the dates were omitted, but correctly given in the record, held a variance of which the defendant was entitled to avail himself even after trial: *Worthington* v. *Wigley*, 5 Dowl. 209; see also *Ball* v. *Hamlet*, 3 Dowl. P. C. 188. And where in a writ of trial, the date was incorrectly given, the court upon application after verdict, set aside the verdict and subsequent proceedings: *Wright* v. *Perrers*, 5 Dowl. P. C. 463; see *White* v. *Farrar*, 2 M. & W. 288. But any such irregularity may be waived if defendant appear at the trial and enter upon his defence: *Percival* v. *Connell*, 6 Dowl. P. C. 68; see also *Whipple* v. *Manley*, 1 M. & W. 432; *Farwig* v. *Cockerton*, 3 M. & W. 169. It will make no difference though defendant's counsel protest against the trial so long as he allow it to proceed: *Blissett* v. *Tennant*, 6 Dowl. P. C. 436. Defendant should apply to have the record amended at the expense of plaintiff: *Whipple* v. *Manley*, 5 Dowl. P. C 100.

(*w*) *Court or judge.* Relative powers: see note *w* to section 48.

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 55. Founded on the first report of the Common Law Commissioners, section 41. "To prevent needless length," the commissioners "proposed to do away with profert and oyer." This section carries their proposal into effect. When pleadings were oral, a party founding his claim upon a deed was bound to make profert, that is, to offer to produce it to the court. Profert when made entitled defendant to demand oyer, that is, to have the deed read. Thereupon the deed was read aloud by an officer of the court. When written were substituted for oral pleadings the same forms were observed, with this exception, the defendant who demanded oyer was entitled to a *verbatim* copy of the deed mentioned in plaintiff's declaration, which he (defendant) usually set out at length in his plea, and which for the purposes of pleading was taken to be part of plaintiff's declaration. Such a proceeding caused endless prolixity, and in many cases useless expense. Hence the change introduced by this act. It may be mentioned that the law as to profert extended only to written instruments under seal: see *Smith* v. *Yeomans*, 1 Wms. Saund. 317; *Turquand et al* v. *Hennet*, 7 C. B. 179.

(*y*) In some cases the omission of profert without a corresponding substitute may have the effect of placing a defendant in difficulty. One such case has actually arisen. An executor suing as such is not bound to produce probate until the trial of the cause, though formerly bound to make profert of it. As the law now stands, it might be held that he is neither bound to produce probate nor to set it out upon oyer. The consequence would be this. Defendant is sued by a person who assumes to act as executor for a demand which he is not disposed to dispute. If he pay the demand to plaintiff, he may be paying money to a person who is really not executor. If he do not pay he is put to the expense of a suit. The court in one such case, considering "the peculiarity of the case and the anomalous position in which defendant was placed by an oversight of the legislature" in the exercise of a common law jurisdiction to prevent the abuse of its process upon

site party to crave oyer of, or to set out upon oyer, such deed or other document. (*z*) 19 Vic. c. 43, s. 104.

But may be set out in plea.

79. (*a*) A party pleading in answer to any pleading in which any document is mentioned or referred to, may set out the whole or any part thereof which is material, (*b*) and the matter so set out shall be taken to be part of the pleading in which it is set out. (*c*) 19 Vic. c. 43, s. 105.

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application of defendant, stayed proceedings until probate should be taken out and reasonable notice thereof given to defendant: *Webb* v. *Adkins*, 14 C. B. 401. When a party in pleading sets out partially and relies on a document not under seal, the court may, since the C. L. P. Act, treat such document as if set out in extenso and give judgment accordingly: *Segrave* v. *Barber*, 5 Ir. C. L. R. 67; *Armstrong* v. *Turquand*, 9 Ir. C. L. R. 32; *Fitzpatrick* v. *Pine*, 13 Ir. C. L. R. 32. But this rule only applies to documents of which oyer was demandable before the C. L. P. Act: *Ib.*

(*z*) Defendant may notwithstanding, if necessary to support his defence, set out the agreement sued upon: see *Wood* v. *The Cooper's Miners Co.* 14 C. B. 428; also *Smart* v. *Hyde*, 1 Dowl. N. S. 60; *Nash* v. *Breeze*, 2 Dowl. N.S. 1015; *Sieveking et al* v. *Dutton*, 3 C. B. 331; *Heath et al* v. *Durant*, 1 D. & L. 571; *Sharland* v. *Liefchild*, 4 C. B. 521; *Weedon* v. *Woodbridge*, 18 L. J. Q.B. 158; *Friar* v. *Grey et al*, 15 Q. B. 891. But the agreement so set out will be part of defendant's plea and not of plaintiff's declaration: section 79. Defendant therefore cannot, relying upon his plea, demur to plaintiff's declaration: see *Sim* v. *Edmands*, 15 C. B. 240; see also *Maher* v. *Purcell*, 13 Ir. C. L. R. 133.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 56.

(*b*) Even before this act, the party who set up a document as a ground of action was not bound to set out in his pleading more than was material for his case; but if the document was an instrument under seal it was necessary for him to make profert which entitled his adversary to demand oyer. In this way the whole of the instrument was at length set out upon the record. As both profert and oyer are abolished, a party adverse to a pleading which mentions and relies upon any document must, in order to obtain a copy of it, make application for leave to inspect. If he succeed, he will then be in a position to set out "the whole or any part thereof that may be material" for his defence or action as the case may be. This a party to a suit has always been entitled to do, and only prevented from doing when unable to obtain a copy of the document in question. This section applies to any document, whether under seal or not: *The Penarth Harbour, Dock and R. Co.* v. *The Cardiff Water Works Co.* 29 L. J. C. P. 234, *per* Willes, J. There is nothing at present to hinder either party setting out a whole document in his pleading when it is expedient to do so in order to a correct understanding of its intent and meaning: see *Morrison et al* v. *Trenchard*, 4 M. & G. 709; see further note *z* to section 78.

(*c*) Under the old system of pleading, the party pleading set out the document on oyer, making it a part of the *previous* pleading; but by section 78 of this act profert and oyer are abolished; and by section 79, here annotated, the document when set out "shall be taken to be part of the pleading in which it is set out." It is a rule that a defendant cannot demur to a declaration upon the ground that *his* plea shows something which makes the declaration untenable. Wherefore, since the C. L. P. Act, a plaintiff declared for money payable to him under an award, and defendant pleaded setting out the award *in hæc verba*, and concluded

80. (*d*) **The Plaintiff or Defendant in any action may aver performance of conditions precedent generally,** (*e*) **but the opposite party shall not deny such performance generally, and shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest.** (*f*) 19 Vic. c. 43, s. 106.

As to averment of performance or non-performance of a condition precedent.

"that the said declaration is not sufficient in law," the plea was held bad: *Sim* v. *Edmands*, 15 C. B. 240. It would also appear where under this act a party sets out any part of a document pleaded by his opponent that the latter is not called upon to traverse or make any answer to it: *Regina* v. *Sadlers' Co.* 22 L. J. Q. B. 451.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 57. Founded upon the first report of the Common Law Commissioners, section 42. The object of this enactment, and indeed of all these enactments relative to pleading, is at once to "curtail unnecessary prolixity," and to "cause actions to be defended on their merits:" Common Law Commissioners. The effect of the enactment seems to be that a defendant, instead of denying every allegation of performance contained in the declaration, will be confined to the denial of the performance of some condition "which he really believes has not been performed": *Ib.*

(*e*) This is a return to the ancient system of pleading: see *Thorpe* v. *Thorpe*, 1 Ld. Rayd. 662; see also *Manby* v. *Cremonini*, 6 Ex. 808. General averments of the performance of conditions precedent have before this act been held good on general demurrer, and only objectionable upon special demurrer: see *Varley* v. *Manton*, 9 Bing. 364, *per* Tindal, C. J.; *Proctor* v. *Sargent*, 2 M. & G. 20; *De Medina* v. *Norman*, 9 M. & W. 820; see also *Roakes* v. *Manser et al*, 1 C.B. 531; *Kemble* v. *Mills*, 1 M. & G. 757; *Cort et al* v. *Ambergate R. Co.* 20 L.J. Q.B. N.S. 465; *Caines* v. *Smith*, 15 M. & W. 189; *Kepp et al* v. *Wiggett et al*, 6 C. B. 280. Special demurrers having been abolished, such general averments would consequently stand good and unassailable: see *Chambers* v. *Soden*, 1 Ir. Jur. N. S. 79. The Commissioners, though sensible of this result, thought it had better be "substantially enacted." The form of a general averment of conditions precedent given in the schedule should be observed. It is on a charter party as follows: "that the plaintiff *did all things necessary on his part to entitle him to have* the agreed cargo loaded on board the said schooner at Hamilton," &c.: Schedule B. No. 18. In a declaration for the non-delivery of goods purchased, plaintiff, after admitting the delivery of part, averred "the performance of all conditions precedent on the part of the plaintiff to be performed, and that all things had been done and happened to *entitle plaintiff to have* the residue delivered to him," &c., *held* sufficient without an averment of readiness and willingness to pay: *Bentley* v. *Dawes et al*, 9 Ex. 666; see further *Graves* v. *Legg et al*, 9 Ex. 715, *per* Parke, B.; *Rust* v. *Nottidge*, 1 El. & B. 99; *Bamberger et al* v. *The Commercial Credit Mutual Assurance Society*, 15 C. B. 676; *Wheeler et al* v. *Bavidge*, 9 Ex. 668; *Phelps* v. *Prothero et al*, 16 C. B. 370; *Gether* v. *Capper*, 15 C. B. 39; *Roberts* v. *Brett*, 6 C. B. N. S. 611, 633; *Grey et al* v. *Friar* in Error, 15 Q. B. 901; *Behn* v. *Burness*, 3 B. & S. 751; *Tetley* v. *Wanless*, L. R. 2 Ex. 21.

(*f*) The principle in pleading that to a general averment there should be a particular issue has long been acknowledged. The reason of it is that the question to be tried may be brought to some degree of certainty, and notice given of what is to be agitated at the trial: *Sayre et al* v. *Minns*, Cowp. 578, *per* Lord Mansfield. This principle has, in a modern case, been fully canvassed and confirmed: *Grey et al* v. *Friar*, in Error, 15 Q. B. 901.

TIME AND MANNER OF DECLARING. (*g*)

(*g*) The first step in pleading is the declaration, in which plaintiff sets forth the cause of his complaint particularly, and thereby explains his writ. Where plaintiff has several causes of complaint he is allowed to pursue them cumulatively in the same suit, provided they be against the same parties and in the same rights: section 73 of this act. Such different complaints constitute different parts or sections of the declaration, and are known in pleading by the description of counts. It is a singular fact that this act is silent as to the allowance or disallowance of several counts, though provision is made for several pleas and other subsequent pleadings: section 110. The law, therefore, in this respect, in this province, remains much the same as before the act. The use of several counts in the same declaration has always been permitted under certain restrictions: *Onslow* v. *Horne*, 3 Wils. 185; *Smith et al* v. *Milles*, 1 T.R. 475. A restriction in England was to the effect that they should not be allowed "unless a distinct subject matter of complaint was intended to be established in respect of each:" Eng. rule 5 H. T. 4 Wm. IV.; Jerv. N. R. 116. A restriction in this province, almost in similar words, was held, from the peculiar phraseology of the rule, to have reference to costs only: Rule 32, E. T. 5 Vic. Cam. R. 37; and see *Johnson* v. *Hunter*, 1 U. C. Q. B. 280. Notwithstanding, the power of the courts to strike out such counts of a declaration as are double and vexatious has never been doubted. For example, where a declaration contained ninety-eight counts upon as many notes for £1 each, the court ordered all to be struck out but one: *Cunnack* v. *Gundry*, 1 Chit. R. 709; see further *Nelson* v. *Griffiths*, 2 Bing. 412; *Lane* v. *Smith*, 3 Smith, 113; *Meeke* v. *Oxlade et al*, 1 N. R. 289; *Gabell* v. *Shaw*, 1 D. & R. 171; *Newby* v. *Mason*, *Ib.* 508. It is now provided by the new rules of pleading that upon any application to strike out counts the court or a judge may allow "such counts upon the same cause of action as may appear to such court or judge to be proper for determining the real question between the parties on its merits:" N. R. Pl. 2. The power to strike out some of several counts founded on the same cause of action is, it will be noticed, by this rule taken for granted. The courts have a general jurisdiction in such matters, which has never been taken away or altered by the rules, though in the exercise of it the courts have always been governed by such rules: *James* v. *Bourne*, 4 Bing. N. C. 423, *per* Tindal, C. J. It has been held in many cases that if there be a distinct contract in respect of the same subject matter, a count on each contract may be allowed: *Ib. per* Tindal, C. J. A count on a promise to carry goods from Dublin to London, and a count on a promise to carry the same goods from the wharf at London to plaintiff's place of business have therefore been permitted in the same declaration: *Ib.* 420; see also *Vaughan* v. *Glenn*, 5 M. & W. 577; *Rex* v. *Archbishop of York et al*, 1 A. & E. 394; *Dueer* v. *Triebuer*, 3 Dowl. P. C. 133; *Wilkinson* v. *Small*, *Ib.* 564; *Bleaden* v. *Rupallo*, 9 Dowl. P. C. 857; *Cahoon* v. *Burford*, 2 D. & L. 234; *Lucas* v. *Beale*, 2 L. M. & P. 47; *Hernod* v. *Wilkin et al*, 11 Q. B. 1. The common counts for the purposes of pleading and costs have been held to be separate counts: see *Jourdain* v. *Johnson*, 4 Dowl. P. C. 534; *Fergusson* v. *Mitchell*, 4 Dowl. P. C. 513; *Spyer* v. *Thelwell*, 4 Dowl. P. C. 509; *Ring* v. *Roxbrough*, 2 C. & J. 418. Where a declaration contained eighteen counts, nine for malicious prosecution and nine for slander, to which defendant pleaded the general issue, and at the trial the jury found for plaintiff on the tenth, eleventh and twelfth counts, and for defendants on the residue of the declaration: Held that a distinct issue was raised on each count by the general issue pleaded without restriction, and therefore that defendant was equally entitled to a deduction from plaintiff's costs in respect of counts found for him, as if issue had been joined on these counts by pleading separately to each: *Cox* v. *Thomason*, 2 C. & J. 498. From what has been already said, it may be laid down that if counts are on the face of them founded on the same subject matter of complaint, the court or a judge may, upon application, strike them out: *Hernod* v. *Wilkin et al*, 11 Q. B. 1; *Ramsden*

81. (*h*) A Plaintiff shall be deemed out of Court unless he declares (*i*) within one year (*j*) after the Writ of Sum- Plaintiff must declare within a year.

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v. *Gray et al*, 7 C. B. 961. In pleading several counts by the insertion of the word "other," counts are made to represent different subject matters: see *Hart* v. *Longfield*, 7 Mod. 148. Thus, a declaration upon an agreement contained two counts. The first averred that plaintiff agreed to let and defendant to take certain premises specified, subject to an undertaking that defendant should keep the same in repair. The second count stated in consideration that the defendant had become and was tenant of a certain *other* messuage, he promised, &c. At the trial of this case one contract of demise only applying to one house only was proved: *held*, that plaintiff was not entitled to recover damages in respect of the breaches alleged in *both* counts: *Holford* v. *Dunnett*, 7 M. & W. 348. From this it appears that where there are several counts apparently founded upon different subject matters of complaint, but in fact the same, though allowed to stand together, plaintiff runs the risk of failing upon all except one at the trial. This strengthens the general rule that several counts giving different versions of the *same* subject matter will not be allowed: see *Cholmondeley* v. *Payne et al*, 3 Bing. N. C. 708; *Jenkins* v. *Treloar*, 4 Dowl. P. C. 690; *Lawrence* v. *Stephens*, 3 Dowl. P.C. 777; *Thornton* v. *Whitehead*, 4 Dowl. P.C. 747; *Weeton et al* v. *Woodcock et al*, 5 M. & W. 143; *Roy* v. *Bristow*, 5 Dowl. P. C. 452; *Temperley* v. *Brown*, 1 Dowl. N.S. 310; *Mathewson* v. *Ray*, 16 M. & W. 329; *Grissell et al* v. *James*, 4 C. B. 768; *Fagan* v. *Harrison*, 4 C. B. 909; *Boozey* v. *Tolkien*, 5 C. B. 476; *Smith* v. *Thompson*, 5 C. B. 486; *Hoare* v. *Lee*, 5 C. B. 754; *Arden* v. *Pullen*, 1 Dowl. N. S. 612; *Gilbert* v. *Hales*, 2 D. & L. 227; *Ramsden* v. *Gray et al*, 7 C. B. 961; *Bulmer* v. *Bousfield*, 9 Q. B. 986; *Simpson* v. *Rand*, 1 Ex. 688. The application to strike out counts ought to be made to a judge in chambers, in the first instance, and if a doubt arise the parties may apply to the court: *Ward* v. *Graystock*, 4 Dowl. P. C. 718, *per* Parke, B. The summons or rule ought to be drawn up on reading the declaration or an affidavit of the identity of the counts: *Roy* v. *Bristow*, 5 Dowl. P. C. 452.

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 58. A re-enactment of our Rule 19 H. T. 13 Vic., which was copied from Eng. Rule 35 H. T. 2 Wm. IV.: Jervis, N. R. 68. Inapplicable in an action of ejectment: *Scope* v. *Paddison*, 6 H. & N. 641. Held not to apply to a case where the plaintiff was prevented from declaring by an order obtained by defendant to stay proceedings until security for costs: *Ross* v. *Green*, 10 Ex. 891. Also held that where plaintiff's proceedings were stayed by rule which expired on a certain day, that plaintiff was bound to declare within a year from the expiration of that rule: *Unite* v. *Humphrey et al*, 3 Dowl. P. C. 532; see also *Horne* v. *Tooke*, 2 Dowl. P. C. 776; *Johns* v. *Saunders*, 5 D. & L. 49; *Ross* v. *Green*, 10 Ex. 891. These rules were based upon an acknowledged rule of practice that a plaintiff must declare within twelve months after the return of first process: *Worley* v. *Lee*, 2 T. R. 112; see also *Penny* v. *Harvey*, 3 T. R. 123; *Cooper* v. *Nias*, 3 B. & Al. 271.

(*i*) Plaintiff to declare, within the meaning of this enactment, must serve as well as file his declaration within the year: *Eadon* v. *Roberts*, 9 Ex. 227; see further *Wallace* v. *Frazer*, 2 U. C. L. J. 184. If served after the expiration of a year the declaration may be set aside upon application of defendant: see *Barnes* v. *Jackson et al*, 1 Bing. N. C. 545. Provided the application be made within a reasonable time: *McKenzie et al* v. *McNaughton et al*, 3 Prac. R. 35.

(*j*) *i. e.* Within twelve calendar months: see *Bishop of Peterborough* v. *Catesby*, Cro. Jac. 166. "Within one year" and "within four terms," are not synonymous expressions: *Chaplin et al* v. *Showler*, 6 D. & L. 227. The days between 1st July and 21st August—the long vacation—will be calculated as part of the year. It

mons or *Capias* is returnable. (*k*) 19 Vic. c. 43, s. 107.

Notice instead of rule

82. (*l*) A notice (*m*) requiring the opposite party to declare, or to declare peremptorily (*n*) within eight

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has been held where a cause was removed from an inferior court, that plaintiff could not be considered out of court until a year after the return of the writ by which the suit was removed: *Norrish* v. *Richards*, 3 A. & E. 733; see also *Pierce* v. *Street*, 3 B. & Ad. 397. Plaintiff after removal by defendant is not bound to proceed in the superior court: *Garton* v. *The Great Western R. Co.* 1 E. & E. 258.

(*k*) The summons is returnable immediately after service: *Conroy* v. *Pearson*, 4 Prac. R. 201; *Hodgson et al* v. *Mee*, 3 A. & E. 765. Wherefore it would seem that the year should be reckoned from the date of service: see *Barnes* v. *Jackson et al*, 3 Dowl. P. C. 404. It is not to be understood from this section that plaintiff cannot be *compelled* to declare before the expiration of a year. Plaintiff has of right until the expiration of the term next following the date of appearance within which to declare. If within that time he neglect to do so, defendant can by notice require him to declare within eight days, otherwise judgment of *non pros.*: 13 Car. II. St. 2, cap. 2, s. 3, and section 82 of this act. But if the appearance be entered in term, plaintiff may have the whole of the term next after the term in which the appearance is entered: *Foster* v. *Pryme*, 8 M. & W. 664.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 53. Substantially a re-enactment of rule 2 E. T. 11 Geo. IV. (Cam. Rules 12), and old rule 10 E. T. 5 Vic. (*Ib.* 22.)

(*m*) It was a demand under the old rules 4 E. T. 11 Geo. IV. (Cam. Rules 9), 10 E. T. 5 Vic.: *Ib.* 22. Between a demand of plea and notice there is a distinction. The latter is by this act expressly substituted for the former: section 92.

(*n*) There is no time limited within which these notices must be given. They are not so much compulsory as optional; but in order to force either party to proceed with his action or defence, as the case may be, the notice is necessary. For instance, a notice to declare given by defendant to plaintiff "otherwise judgment," entitles defendant if his notice be unheeded to sign judgment of *non pros.* But plaintiff has, it would seem, the whole of the term next following appearance within which to declare: *Foster* v. *Pryme*, 9 Dowl. P. C. 749. And if after that time defendant omit to serve a notice to declare, plaintiff will have twelve months within which to declare: *Chaplin* v. *Showler et al*, 18 L. J. Ex. 34. Even if notice to declare has been given, it is still in the power of plaintiff to apply for further time to the court or a judge: *Beazley* v. *Bailey*, 4 D. & L. 271; *Crutchley* v. *The London & Birmingham R. Co.* 2 D. & L. 102. If defendant sign judgment before the time for shewing cause, the judgment will be set aside: *Beazley* v. *Bailey*, 16 M. & W. 58. If the pleading be delivered before judgment, though after time limited for the pleading, the judgment will be set aside: *Gray* v. *Pennell*, 1 Dowl. P. C. 120. If the time granted be allowed to expire without declaring, defendant may sign judgment without a fresh notice: *Leulon* v. *Gant*, 5 Dowl. P. C. 153. In any event, if plaintiff do not declare within one year after the writ is returnable, he will be deemed out of court: section 81. So if no notice to plead be given by plaintiff to defendant, or notice to reply by defendant to plaintiff, either party will for that purpose have whatever time he thinks proper. After the expiration of four terms from the last proceeding by plaintiff, it has been held that no future proceeding can be taken without a term's notice: see *Lord* v. *Hilliard*, 9 B. & C. 621; *Lumley* v. *Thompson*, 3 M. & W. 632; also see *Metcalf et al* v. *Hetherington*, 3 H. & N. 755. It is ordered by the English new rules that in such cases a calendar month's notice shall be given: R. G. H. T. 1853, No. 176; but this rule 176

days, (*o*) shall be sufficient without any rule or other demand. (*oo*) 19 Vic. c. 43, s. 102. to declare, &c.

83. No declaration, or pleading after declaration, shall be filed or served between the first day of July and the twenty-first day of August in any year, and the parties respectively in any case shall be entitled to the same number of days after the twenty-first day of August to plead to or answer any pleading filed or delivered before the first day of July, to which they would have been entitled had this provision not been made. 12 Vic. c. 66, s. 8; 19 Vic. c. 43, s. 65. (*p*) Declaration or pleading not to be filed or served in the long vacation.

84. Unless otherwise provided by Statute or rule of Court, declarations and other pleadings and notices required to be served in any action whether in the Superior Declarations and other pleadings may be

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has not been adopted by our courts. One of several defendants, who alone appeared, has been held not to be entitled to sign judgment of *non pros.* though he demanded a declaration: see *Hamlet* v. *Breedon et al*, 4 M. & G. 909; *Shore et ux.* v. *Bradley et al*, T. T. 4 & 5 Vic. *M.S.* R. & H. Dig. "Judgment of non pros." I. This section has been held inapplicable to causes removed by *certiorari*: *Garton* v. *The Great Western R. Co.* 1 E. & E. 258.

(*o*) "*Within four days,*" in Eng. C. L. P. Act: see *Medway* v. *Gilbert*, 32 L. J. Ex. 30. A notice here giving less time than eight days would be irregular, and judgment signed within the regular time set aside: *Braty* v. *Baldock*, Barnes, 302.

(*oo*) *Shall be sufficient* "unless otherwise ordered by the court or a judge," in old rule 10 E. T. Vic. The omission of these words in the section under consideration cannot be of much importance, as the courts have unlimited power over process and pleadings. Further time to declare, plead, reply, &c., may still, as much as ever, be obtained upon proper application to the court or a judge. A defendant, having two days before the ordinary time for pleading had expired, obtained an order granting him a week's further time to plead, it was held that the further time to plead was to be computed from the expiration of the ordinary time for pleading, and not from the date of the order: *Brady* v. *Pickering*, 5 U.C. L. J. N. S. 25.

(*p*) This in effect preserves to Ontario the vacation first introduced by Provincial Statute 12 Vic. cap. 63, section 63: see also R. G. pr. 9. The corresponding vacation in England is from August 10th to October 24th: see Eng. Stat 2 Wm. IV. cap. 39, section 11. A plea filed or served during vacation is a nullity: *Mills* v. *Brown*, 9 Dowl. P. C. 151. If the time for pleading expire *before* 1st July, plaintiff is at liberty to sign judgment at any time between 1st July and 21st August: *Morris* v. *Hancock*, 1 Dowl. N. S. 320; see also *Sharp* v. *Fox*, 1 H. & N. 496. If the time for pleading expire *on* 1st July, judgment cannot be signed till the expiration of the time limited for pleading after 21st August: *Severin* v. *Leicester*, 12 Q. B. 949; and this practice applies where time to plead has been given: *Wilson et al* v. *Bradslocke*, 2 Dowl. P. C. 416; *Solomonson et al* v. *Parker et al*, 2 Dowl. P. C. 405. A defendant who has a day's time to plead after the happening of an event, has the whole of the day following that on which the event happens: *Connelly* v. *Bremner*, L. R. 1 C. P. 557; see further as to computation of time, *Liffin* v. *Pitcher*, 1 Dowl. N.S. 767; *Dunn* v. *Hodson*, 1 D. & L. 204.

served in any County. or County Courts may be served in any County. (*q*) 13 & 14 Vic. c. 52, s. 2.

Commencement of declaration. **85.** (*r*) Every declaration shall commence as follows, or to the like effect: (*s*)

(*Venue.*) (*t*) A. B., by E. F., his Attorney (*or* in person, (*u*)

(*q*) This flows from the general territorial jurisdiction of the courts in all parts of this province, and so far as the section is concerned, it is as much applicable to suits instituted in county courts as in the superior courts.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 59. The commencement of the form of a declaration here given is much the same as that prescribed by rule 13 H. T., 13 Vic., which was taken from Eng. R. G. 15, M. T., 3 Wm. IV.

(*s*) It should be remembered that the declaration must be intitled of the proper court and of the true day of the month and year of pleading the same: see section 77. And if it be intitled in a particular court, the action cannot afterwards be transferred to a court of co-ordinate jurisdiction, unless the crown be concerned: *Attorney-General* v. *Hallett*, 15 M. & W. 97.

(*t*) For the law as to venue see note *n* to section 7; see also *Peacock* v. *Bell et al*, 1 Wms. Saunders 73. If several causes of action, in themselves local, but which arose in different counties, are joined together, the venue may be laid in either of the counties: see section 73. No venue need be stated in a declaration except the one alleged in the margin: see *Baydell et al* v. *Harkness*, 4 D. & L. 178; also R. G. pl. 4. But *local* description, whenever requisite, must still be given in the body of the declaration: *Mayor of Berwick-upon-Tweed* v. *Shanks*, 3 Bing. 459; *Simmons* v. *Lillystone*, 8 Ex. 431; *Clayton* v. *Best*, 8 L. T. N. S. 502; *Richardson* v. *Locklin*, 6 B. & S. 777. Where wrong venue in a local action, and not apparent on face of declaration, see *Boyes* v. *Hewetson*, 2 Bing. N. C. 575; *Richards* v. *Easto*, 15 M. & W. 244; *Hitchins* v. *Hollingsworth*, 7 Moore P. C. 228.

(*u*) If the declaration omit to show whether plaintiff sue in person or by attorney, it will be irregular, and may be set aside: *White* v. *Feltham*, 3 C. B. 658; *Monck* v. *Northwood*, 2 U. C. L. J. N.S. 268; *Kelly* v. *Carroll*, 1 Ir. C. L. R. 192. The application to set it aside should be made to a judge in chambers: see *White* v. *Feltham*, 3 C.B. 658. Such an omission before this act was, however, held to be no ground of special demurrer: *Murphy* v. *Burnham*, 2 U. C. Q. B. 261. Where the plaintiff in the commencement of his declaration, declares without stating that he does so by attorney, the court may consider that he is suing in person: *Ib.* If the signature of an attorney be appended to the declaration, that shows that plaintiff sues by attorney, and is not a repugnance of one part of the declaration to another: *Ib.* If the attorney's name be stated in the commencement of the declaration, it is not necessary that it should be also subscribed: *Crooks* v. *Davis et al*, 5 O. S. 141. But if the declaration be drawn up in a slovenly manner, the court will direct an amendment: *Murphy* v. *Burnham*, 2 U.C.Q.B. 261. It seems if a declaration be ordered to be amended in the name of the attorney, that is sufficient to amend the declaration filed without filing an amended copy: *Hart et al* v. *Boyle*, 6 O. S. 168. All persons, excepting married women, infants and idiots, can sue and declare by attorney. Married women must sue with their husbands, infants by *prochein amy*, and idiots in person. No attorney can be changed without the order of a judge: R. G. pr. 4. The order may be granted without an affidavit: *In re Glasse* v. *Glasse*, 2 U. C. L. J. 213. In case of the attorney dying, no order is necessary: *Ryland* v. *Noakes*, 1 Taunt. 342. But notice of the appointment of a new attorney should be given to the opposite party before any proceedings taken by such new attorney: *Ib.*

as the case may be,) (*v*) sues (*w*) C. D., (*x*) who has been summoned (*or* arrested) (*y*) by virtue of a Writ issued on the ——— day of ———, A.D. one thousand eight hundred and (*z*) ———, for (*here state cause of action*): And shall conclude as follows, or to the like effect: Form.

And the Plaintiff claims (*a*) ———, (*or if the action is brought to recover specific goods,*) (*b*) the Plaintiff claims a return of the said goods or their value, and ——— for their detention. 19 Vic. c. 43, s. 108. Conclusion of declaration.

86. (*c*) If after a plea in abatement of the non-joinder of another person as Defendant, the Plaintiff, without having Commencement after

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(*v*) An infant can only sue by *prochein amy*: St. Westminster II. cap. 15. An authority to sue from the infant to the *prochein amy* is unnecessary: *Morgan* v. *Thorne*, 9 Dowl. P. C. 228; see also *Nunn* v. *Curtis*, 4 Dowl. P. C. 729; *Leech* v. *Clubburn*, 2 L. M. & P. 614. The latter is an officer appointed by the court: Fitz. Natura Brevium, p. 26. The distinction between a guardian proper and *prochein amy*, is pointed out in *Simpson et al* v. *Jackson*, Cro. Jac. 640. The declaration in any action by an infant may be as follows: "*Venue.*—A. B. by E. F. who is admitted by the court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., sues C. D., who has been summoned, &c.

(*w*) "Complains of C. D." were the words used in the Rule H. T. 13 Vic. and Eng. R. G. 15, M. T. 3 Wm. IV.

(*x*) Misnomer is no longer a ground for a plea in abatement: section 62. Parties may sue or be sued in a representative capacity as executors, &c.: see cases collected in 1 Dowl. P. C. 98. As to the proper mode of declaring either when defendant sued by a wrong name, appears by that name or otherwise by his right name, see note *d* to section 53. If the name mistaken be *idem sonans* with the true name, there can be no objection: *Webb* v. *Lawrence*, 1 C. & M. 806.

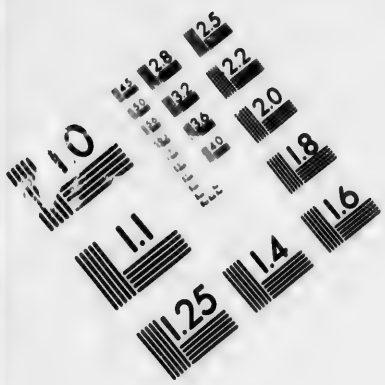
(*y*) To describe defendant as summoned when he was in reality arrested, is irregular: *Tory* v. *Stevens*, 6 Dowl. P. C. 275.

(*z*) Every writ of summons and capias must bear date on the day when issued: section 24.

(*a*) The sum to be here inserted must be sufficient to cover all that plaintiff expects to obtain. The jury cannot exceed the damages so limited: *Cheveley* v. *Morris*, 2 W. Bl. 1300; *Pickwood* v. *Wright*, 1 H. Bl. 643. It has been held where a jury did give larger damages than the declaration authorized, that an amendment might be made: *Tebbs* v. *Barron*, 5 Scott, N. R. 837. If interest be claimed by plaintiff as damages, it should be also included: see *Watkins* v. *Morgan*, 6 C. & P. 661; *Baker* v. *Brown*, 2 M. & W. 199. The sum to be awarded by the judgment may be awarded without any distinction as to debt or damages: section 240.

(*b*) As to execution for the specific delivery of chattels: see section 300.

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 60. Substantially a re-enactment of rule 38 E. T. 5 Vic., which was copied from Eng. rule 20 H. T. 4 Wm. IV: Jervis N. R. 125.



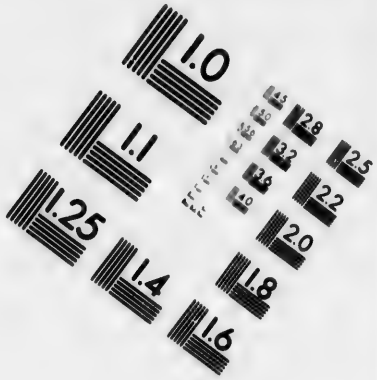
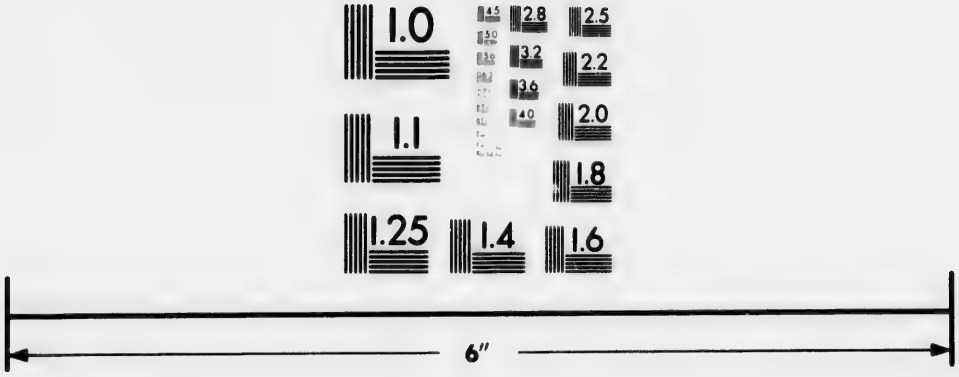
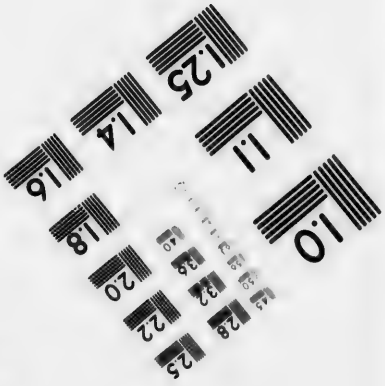


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abatement for non-joinder.

proceeded to trial on an issue thereon, amends by adding the omitted Defendant or Defendants or commences another action against the Defendant or Defendants and the person or persons named in such plea as joint contractors, (*d*) the commencement of the declaration shall be in the following form, or to the like effect:

Form.

(*Venue.*) (*e*) A. B., by E. F., his Attorney, (*or* in his own proper person,) (*f*) sues (*g*) C. D. (*k*) (*the Defendant originally named in the Summons*) who has been summoned (*or* arrested) (*i*) by virtue of a Writ issued on the ——— day of ——— A.D one thousand eight hundred and (*j*) ———, and G. H. [illegible] non-joinder of which G. H. the said C. D. has heretofore pleaded in abatement, for, &c. (*k*) 19 Vic. c. 43, s. 100

Forms of pleading B, if observed in substance to be sufficient.

87. (*l*) The forms contained under letter (B) shall be sufficient, and these and the like forms may be used with such modifications as may be necessary to meet the facts of the case, (*m*) but a departure from such forms shall not

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(*d*) This plaintiff might have done before the C. L. P. Act, and may do still. He will by so doing avoid payment of costs: see note *q* to section 69.

(*e*) See note *t* to preceding section.

(*f*) See note *u* to preceding section.

(*g*) "Complains of C. D." in rule 88 E. T. 5 Vic. and Eng. rule 20 H. T. 4 Wm. IV.

(*h*) See note *x* to preceding section.

(*i*) See note *y* to preceding section.

(*j*) See note *z* to preceding section.

(*k*) As to when such pleas may be pleaded, see notes to section 69.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 91.

(*m*) The forms given in the schedule are intended only as *examples* and not as binding and invariable precedents. These forms state in the fewest words all that is necessary to show a cause of action or ground of defence. They provide for almost every case that usually occurs in practice, but may of course be modified to meet the special circumstances of any particular case: see *Lowe* v. *Steele*, 15 M. & W. 380; also *Padwick* v. *Turner*, 11 Q. B. 124. When the legislature or the judges draw up stated forms of pleading, parties to suits ought to follow as far as practicable the forms given: see *Bailey et al* v. *Sweeting*, 12 M. & W. 616. The courts in England have more than once been constrained to call the attention of the profession to the carelessness with which the forms given by the English C. L. P. Acts are followed: see *Wilkinson* v. *Snarland*, 10 Ex. 724. The act no doubt affords great latitude in pleading, but it has not removed the necessity for stating a consideration for an agreement: *Fremlin* v. *Hamilton et al*, 8 Ex. 308. The

render the pleading erroneous or irregular so long as the substance is expressed without prolixity. (*n*) 19 Vic. c. 43, s. 140.

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true construction to put on the act is to ascertain whether the pleading would have been good on general demurrer before the act: *Richards* v. *Bowie*, 2 C. L. R. 675, *per* Campbell, C. J. When a party complains of the violation of duty it is not sufficient to charge generally a violation of duty; the facts from which the duty flows must be averred: *Potts* v. *Plunkett*, 9 Ir. C. L. R. 290. If the pleading contains an averment of some act which it is not necessary to aver, in order to sustain the action proof of such averment is unnecessary: *Davis* v. *O'Hara*, 5 Ir. L. R. 337; see also *Cavanagh et al* v. *Morrison*, 1 Fox & Sm. 75.

(*n*) Prolixity seems to have been dreaded by the legislature when framing this enactment. Nothing concise is bad if it indicate substance. No deviation from the forms given shall be injurious so long as the substance is preserved: *Fagg* v. *Nudd*, 3 El. & B. 650, *per* Campbell, C. J. "If the act had prescribed forms which was to be followed in all cases it might be that any deviation from it would hurt; but here the legislature has carefully provided that no deviation from the forms shall be erroneous or irregular, 'so long as the substance is expressed without prolixity:'" *Ib.*, *per* Wightman, J. The forms are not obligatory: *Leslie* v. *Johnstone*, 10 Ir. C. L. R. 83; see also *Norton* v. *Johnson*, 7 Ir. Jur. O. S. 126. And yet it is right to observe that inasmuch as the act gives forms, it is only proper though not compulsory that such forms should be observed. If the deviation be one of substance the pleading in which it occurs will certainly be bad. Thus a declaration in an action for freight, stating "that defendants are indebted to plaintiffs for freight" for the conveyance of goods, &c., has been held bad for not following the form given in the schedule which contains the words "for money payable by defendant to plaintiffs," and for not showing any debt due *in præsenti*: *Place* v. *Potts et al*, 8 Ex. 705. The defect held to be demurrable in this case is one that might be cured by pleading over: *Wilkinson v. Sharland*, 10 Ex. 724. But a deviation not calculated to mislead is clearly not demurrable or otherwise open to objection. Such has been held to be a count for money found to be due from defendant to plaintiff on an account stated between them, though the words "for money payable by defendant to the plaintiff for" contained in the form given in the schedule were omitted: *Fagg* v. *Nudd*, 3 El. & B. 650. This case proceeded upon the supposition that the defendant had as much information from the form adopted as from the form in the act, and that the omission to state that "the money is payable" was immaterial, because the law implied as much from its being stated to be *due* on an *account stated*. In other words it was held that the allegation of the money being due on an account stated was equivalent to an allegation of the money claimed being payable, and consequently of a debt due *in præsenti*. Though the decision may be sustainable as to an *account stated* it does not follow that a count framed for a money demand other than on an account stated would be good without the words omitted in this case. On an account stated the law raises a promise to pay on request, and no other can be substituted or superadded: see *Hopkins et ux.* v. *Logan*, 5 M. & W. 241; *Lattimore* v. *Garrard*, 1 Ex. 809; *Roscorla* v. *Thomas*, 3 Q. B. 234; *Kaye* v. *Dutton*, 7 M. & G. 807; *Elderton* v. *Emmens*, 6 C. B. 174; *Belcher* v. *Cook*, 4 U. C. Q. B. 401. There may be a debt due *in præsenti* with a *solvendum in futuro*. And consistently with the form used in *Fagg* v. *Nudd*, 3 El. & B. 650, if not on an account stated, plaintiff might sue for a debt *not* payable at the time of the commencement of the suit. In reference to this decision a learned judge in a more recent case remarked that "there ought to be no equivalent," for an allegation such as was there omitted, "for the act expressly says 'these words money payable, &c., shall precede money counts:'" *Wilkinson* v. *Sharland*, 10 Ex. 724, *per*

Declaration in County Courts not invalid because of the Counts exceeding the jurisdiction.

88. (*o*) In case the damages laid at the conclusion of any declaration in a County Court do not exceed the jurisdiction of such Court, but the sums mentioned or claimed in the different counts of such declaration do in the aggregate exceed the jurisdiction of such Court, the declaration or any subsequent pleading shall not on that ground be subject to any objection either by demurrer or otherwise, if the sum laid in each count respectively be within the jurisdiction. (*p*) 12 Vic. cap. 66, s. 8.

Alderson, B.: of the same opinion was Parke, B. Though a pleading stating in substance all that the forms to the act contain may be good, yet it is difficult to conceive how any pleading can be framed that will in *fewer* words state what is necessary either to show a cause of action or ground of defence. The omission of a request to a count for work and labour renders the count bad: *Corah* v. *Young*, 6 Ir. C. L. R. 138; *Gason* v. *O'Ryan*, 7 Ir. Jur. O. S. 272. A plaintiff declared thus: "R. D. by E. F. his attorney, sues D. M., who has been summoned, &c." (stating the process, as usual) "for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant. Plaintiff then added a second count on an account stated, and concluded, "and the plaintiff claims £125." The defendant demurred upon the ground that it was not stated that the goods were sold by plaintiff to defendant at his request, nor that the defendant was indebted to plaintiff, nor in what amount, nor that the defendant owed plaintiff any thing for the said goods and chattels. *Held*, declaration sufficient and demurrer frivolous: *Davies* v. *Muckle*, 3 U. C. L. J. 115. A general allegation that a party conveyed or assigned, held sufficient without stating the mode of conveyance: *Sloane* v. *Flood*, 5 Ir. C. L. R. 75. In a writ of revivor sufficient to describe plaintiff as assignee of the judgment without showing how he became assignee: *Stapleton* v. *Bergin*, 4 Ir. C. L. R. 421.

(*o*) This provision relates exclusively to county courts, the jurisdiction of which as to amount is limited: Con. Stat. U. C. cap. 15, section 17.

(*p*) While plaintiff at the time the jurisdiction of a county court (district court as it was then called) was only £25 in causes relating to debt, covenant, or contract, and £50 in causes of debt or contract, on the common counts, where the amount was ascertained by the signature of the defendant, declared in assumpsit upon three counts: 1st, upon a special agreement for £25; 2nd, work and labour, £25; 3rd, account stated, £25; and concluded, "and thereupon the defendant, in consideration of the premises respectively, promised to pay the said several sums of money to the plaintiff, yet hath not paid any of the said monies, or any part thereof, to the plaintiff's damage, of £49;" and defendant having pleaded to the merits, and plaintiff had a verdict for £27. *Held*, upon a motion in arrest of judgment, that though upon the face of the declaration the aggregate amount of the sums claimed in the three counts exceeded the jurisdiction of the court, yet that the court was not thereby necessarily ousted of its jurisdiction: *Jordan* v. *Marr*, 4 U. C. Q. B. 53. It was also held that the statement of damage to £49, without an averment that the claim was liquidated by the signature of the defendant was sufficient after verdict, and that though the verdict was in truth for £27 upon an unliquidated claim, the plaintiff might still retain his verdict by remitting the £2 then excess of jurisdiction: *Ib.* Whenever a verdict has been taken in a county court for a sum beyond its jurisdiction, the plaintiff may cure the defect by entering on the record a remittur for all damages beyond the pecuniary jurisdiction of

CHANGE OF VENUE.

89. (*e*) The *venue* (*f*) in any action in the Superior Courts (*g*) may be changed according to the practice now in force, (*h*) and notwithstanding a change of the *venue*, the

Provision if the venue changed.

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the court: *Thomas* v. *Hilmer*, 4 U. C. Q. B. 527. A declaration such as that in *Jordan* v. *Marr*, 4 U. C. Q. B. 53, would now, it is apprehended, be clearly good under the operation of the section here annotated as against any objection by way of demurrer or in arrest of judgment.

(*e*) This section is a combination of our statute 7 Wm. IV. cap. 3, s. 14, and C. L. P. Act 1853, s. 8.

(*f*) See note *n* to s. 7.

(*g*) Of course, as county courts are local courts, there can be no change of venue so long as the cause remains in the local court. But a writ of certiorari is sometimes issued with a view to the removal of the cause into a superior court, with a view to a change of venue, where there are special grounds for the change. The judge granting the writ has no power by the order for the writ to change the venue; for the application for change of venue must be a substantive motion: *Patterson* v. *Smith*, 14 U. C. C. P. 525.

(*h*) The plaintiff is *dominus litis*, and, subject to the remarks hereinafter made, is entitled to lay the venue in a transitory action where he pleases: *Kelly* v. *Cavendish*, 3 Law Rec. N. S. 67. The court will not deprive him of the right to lay it where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to be changed: *Helliwell* v. *Hobson et al.*, 3 C. B. N.S. 761. In *Dane* v. *Hopwood*, 7 C. B. N. S. 837, Willes, J., referring to *Helliwell* v. *Hobson*, said, "When the question arises again, perhaps that case may require some consideration." But the rule laid down in *Helliwell* v. *Hobson* does not appear to have been successfully impeached in subsequent cases: see *Moor* v. *Boyd et al.*, 1 U. C. L. J. N.S. 184. The change of venue must in general be regulated by the peculiar circumstances of each case: *Gray* v. *Dill*, 2 Ir. Jur. N.S. 52. If it be made to appear that there will be a great waste of costs in the trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue, the judge is at liberty to exercise his discretion in the matter, and may make the order if he sees fit: see *Smith* v. *O'Brien*, 26 L. J. Ex. 90; *Grace* v. *Wilmer*, 26 L. J. Q. B. 1; *Moor* v. *Boyd et al*, 1 U.C. L.J. N.S. 184; *Reid* v. *Mangan*, 1 Ir. Jur. N.S. 132; *Allen* v. *The Cork & Bandon R. Co.* 1 Ir. Jur. N.S. 139; *Sufferin* v. *Dunbar*, 1 Ir. Jur. N.S. 188; *Channon* v. *Parkhouse*, 18 C. B. N. S. 341. The venue as laid by plaintiff ought not to be disturbed merely because the cause of action arose elsewhere while the balance of convenience cannot be determined: *O'Neill* v. *The Trustees of the Limerick Butter Market*, 6 Ir. Jur. N.S. 134; *Bumford* v. *Greuler*, 6 Ir. Jur. N. S. 392; *Enright* v. *The Promoter Ins. Co.* 7 Ir. Jur. N. S. 153. Twenty-five witnesses and a horse on one side against ten witnesses on the other was held not to be such a preponderance as to induce the court to bring back the venue from the place where the cause of action arose: *Blackman et al* v. *Bainton*, 15 C. B. N.S. 432; see also *Bumford* v. *Greuler*, 6 Ir. Jur. N.S. 392. The court in considering the question of convenience will not lose sight of the modern facilities of railway travel: *Doyle* v. *Hammond*, 6 Ir. Jur. O.S. 306. The venue will not in general be changed when the plaintiff is solvent and undertakes to bear any additional expense that may be occasioned by reason of its being retained: *Banks* v. *O'Sullivan*, 2 Ir. Jur. N.S. 99. It is in the discretion of the judge either to change it or not as he may think conducive to justice on what are called ordinary grounds, *i. e.* that the cause of action if any arose in the county to which the change is sought, and not in the

proceedings shall continue to be carried on in the office from

county where the venue is laid: *Crump* v. *Crew*, 4 U. C. L. J. 20. Plaintiff in answer to an application for change on the ordinary grounds may shew special grounds for its retention at the place where laid: *Ib.* The venue may be changed in a penal action: *Greenhow et al* v. *Parker*, 31 L. J. Ex. 4; and also in an information in the nature of a *quo warranto*: *Clark* v. *Regina*, 3 E. & E. 147; but not where the crown is a party directly interested, without consent of the attorney general: *The Queen* v. *Shipman*, 6 U. C. L. J. 19; see also *Attorney-General to the Prince of Wales* v. *Crossman*, L. R. 1 Ex. 381. An application for change of venue before appearance is irregular: *Hood* v. *Cronkrite*, 4 Prac. R. 279; may be made by defendant at any time after declaration and before plea on the common affidavit: see *Kennedy* v. *Lynch*, 10 Ir. C. L. R. *App.* xliv; and should, if on common affidavit, be made before issue joined: *De Rothschild* v. *Shilston*, 8 Ex. 503. If *after* issue joined, special affidavits are necessary: see *Youde* v. *Youde*, 4 Dowl. P. C. 32; *Hodge* v. *Churchward*, 5 C. B. 495; *White* v. *Neeld*, 30 L. & Eq. 504, C. P. 1855; *Lewis* v. *Walters*, 1 Ir. C. L. R. 486; *Corah* v. *Ward et al*, 13 Ir. C. L. R. *App.* xlii. Application to change on special grounds should not be before plea pleaded: *Stewart* v. *Johnstone*, 4 U. C. L. J. 21. The common affidavit alleges "that the cause of action, if any wholly arose" in the county to which defendant desires a change: *De Rothschild* v. *Shilston*, 8 Ex. 503. The common affidavit to change the venue should be made by the defendant and not by his attorney, unless a sufficient excuse be shewn for not producing an affidavit by the defendant: *O'Reilly* v. *Bond*, 8 Ir. L. R. 118. When defendant is under terms to plead "on the usual terms," or to take "short notice of trial, if necessary," the venue will not be changed on common affidavit: *Brettargh et al* v. *Dearden*, McC. & Y. 106; *Clute* v. *Bradley*, 13 C. B. 604; *Jackson* v. *Kidd*, 8 C. B. N.S. 354. Venue not changed at instance of defendant, in an action on a bond where application made on the common affidavit: *Lossing* v. *Horned*, Tay. U. C. R. 83. Not changed on common affidavit, in an action against carriers: *Ham* v. *McPherson et al*, M. T. 5 Vic.; *MS.* R. & H. Dig. "Venue" 8. But changed on the common affidavit in an action of replevin brought for the recovery of goods and chattels detained for a cause other than a distress: *Vance et al* v. *Wray*, 3 U. C. L. J. 69. So in an action for use and occupation: *Smith* v. *O'Brien*, 26 L. J. Ex. 30. It is a good answer to the common affidavit that the cause may be more conveniently tried in the county where the venue is laid: *Carruthers* v. *Dickey*, 2 U.C.L.J. 185; *Vance et al* v. *Wray*, 3 U. C. L. J. 69; *Smith* v. *O'Brien*, 26 L. J. Ex. 30. When the common affidavit is answered by the plaintiff on special matter, the court will exercise its discretion on the whole cause before it: *Ross et al* v. *Napier*, 30 L. J. Ex. 2. Not changed from A. to B. on application of defendants, who were more numerous than plaintiffs, and intended to be witnesses upon their own behalf: *Rose* v. *Cook et al*, 2 Cham. R. 204. It is no ground for changing, that a person required as a witness at one assize will be an associate at another, and that from the distance he cannot attend both: *Smith* v. *Jackson*, M. T. 1 Vic. *MS.* R. & H. Dig. "cases omitted, Venue." The mere fact of newspaper discussions, or of the existence of political feeling or prejudice, is no reason for a change of venue. "It is not an uncommon thing for parties to have an exaggerated notion of the attention paid to their own cases, or for newspaper editors to attach an over estimate to the effect produced by their own paragraphs:" *Seely* v. *Ellison*, 6 Bing. N. C. 231, *per* Maule, J.; see further *Dowling* v. *Sadleir*, 3 Ir. C. L. R. 603; *Walker* v. *Brogden*, 17 C. B. N.S. 571. If the case be one requiring a larger amount of intelligence and a more careful solution than is usually possessed by a common jury, the defendant's course is to obtain a special jury: *Moor* v. *Boyd et al*, 1 U. C. L. J. N. S. 187, *per* Richards, C. J. When the venue was changed on the usual affidavit, a motion to retain it on the grounds of the partiality of the jury, and that the defendant might exercise undue influence over the jurors, was refused: *O'Shaughnessy* v. *Lambert et al*, 1 Ir. L. R. 104. In an action for libel, the court refused to change the venue on the

ground that the plaintiff was a county surveyor, and was on that account possessed of considerable influence with persons likely to be on the jury: *Hall* v. *McKernan*, 2 Ir. L. R. 359. In an action for libel, the court refused to change the venue to the county in which the action had wholly arisen, although all the witnesses on both sides resided there, the plaintiff having sworn to the prevalence of excitement on the subject there, and although he did not deny but that an impartial trial might be had there: *Gallaher* v. *Cavendish*, 3 Ir. L. R. 375. Where on a motion to change the venue from Dublin to Galway in an action for a libel published in a Galway newspaper, and it appeared on the eve of the trial letters calculated to excite a prejudice in the plaintiff's favour were published in a Dublin newspaper, and on the other hand that a report of certain proceedings reflecting injuriously on the plaintiff's character, published in the Galway newspaper, had been read from the altars of many chapels in Galway, the court, under all the circumstances, made an order changing the venue to a third county: *Ryder* v. *Burke*, 10 Ir. L. R. 474. The venue was changed from the county of the city of Cork to the county of Cork, upon the grounds that the plaintiff had considerable local influence in the city of Cork, and that the case had been very much talked of amongst those likely to be impannelled as jurors: *Carmichael* v. *The Waterford and Limerick R. Co.* 13 Ir. L. R. 322. Where an application by defendant to change the venue had failed, and plaintiff published a garbled account of the application in a local newspaper, with the intention of prejudicing the jury, the court, on a second application on renewed materials, made an order for the change of venue: *O'Shaughnessy* v. *The West of England Ins. Co.* 2 Ir. Jur. O. S. 144. Venue changed on an affidavit of the assignee of plaintiff, stating that he had been very actively engaged in a late election for the county of Louth, and that a strong feeling existed in the county, and *three* juries had been already unable to agree in the cause: *Dowdall* v. *Dowdall*, 1 Law Rec. O. S. 355. So venue changed where two abortive trials in an action of ejectment had taken place, and it was shown that great excitement and prejudice prevailed against some of the parties: *Keon* v. *Keon*, 3 Law Rec. N. S. 137. But in such a case it must clearly appear that the adverse verdicts are attributable solely to such excitement and prejudice: *Jackson* v. *Lodge*, 1 Ir. L. R. 161. In an action of debt for tithe composition, the court refused to change the venue, it appearing that from the state of political excitement in the county to which the defendant sought to remove the case a fair trial could not be had: *Anon*, 4 Law Rec. N. S. 62. Venue changed in an action for assault against a magistrate, the alleged assault being an attempt to suppress an Orange procession, under the Yearly Processions Act: *Stewart* v. *Lynar*, 1 Ir. L. R. 199. Where, in an action for false imprisonment, the venue had been changed on the application of the defendants, the court, on the application of plaintiff, ordered the venue to be brought back to where it had been originally laid, there having been two abortive trials in the place to which it had been changed, and there being good reasons to suppose that a satisfactory trial could not be had in that place: *Kelly* v. *The Londonderry and Enniskillen R. Co.* 3 Ir. Jur. N. S. 392 The circumstance that the defendant was a wealthy trader and director of a local bank, and as such possessed great influence among those persons who served as jurors, held not sufficient cause for a change of venue: *Reynolds* v. *Power*, Smythe, 139. So in an action for libel, a change of venue was refused on the ground that the plaintiff was a county surveyor, and was on that account possessed of influence with jurors: *Hall* v. *McKernan*, 2 Ir. L. R. 359. The venue was changed in an action on a fire policy upon an affidavit of the materiality of a view of the premises burnt: *McDonnell* v. *Carr et al*, Hayes, 375. Venue not changed from the county of the city of Dublin, upon the ground that the attendance of the treasurer of the county to which it was sought to change the venue was necessary: *Cronin* v. *Purcell*, 1 Ir. Jur. N. S. 10. Where the plaintiff resisted an application to change the venue, and stated in her affidavit that one of the witnesses had made himself busy in influencing jurors, and boasted that the plaintiff had no chance of success, the court refused to listen to such statements, and changed the venue on terms: *Crooks*

v. *Rice*, 6 Ir. Jur. N. S. 398. Refused where defendant was proprietor of a local newspaper having considerable influence in the county, and had since commencement of action evinced a disposition to exercise his influence to the prejudice of plaintiff: *Walker* v. *Brogdin*, 17 C. B. N.S. 571; *contra*, *Kelly* v. *Cavendish*, 3 Law Rec. N. S. 67. But the court intimated that it would interfere if defendant should, before the trial, publish anything in relation to the matter of the action reflecting on plaintiff: *Ib.* Held a good ground for change that the attorney for defendant was under sheriff for the county where the venue was laid, and had made it a special jury case: *Hilton* v. *Green*, 10 W. R. 627; see also *McLoughlen* v. *The Royal Exchange Ass. Co.* 9 Ir. L. R. 510. So where defendant was county judge of the county: *Anon*, 4 Prac. R. 310. Not sufficient that the question to be tried was the alleged insolvency of a member of parliament of considerable influence in the county where the venue was laid: *Salter* v. *McLeod*, 10 U. C. L. J. 76. No ground for change that either party has retained the most eminent counsel on the circuit, unless done oppressively: *Curtis* v. *Lewis*, 12 W. R. 951. Nor the fact that counsel retained by one of the parties speaks the Gælic language, which is the mother tongue of many of the jurors: *Moor* v. *Boyd et al.* 1 U. C. L. J. N. S. 187. The frequency of sittings of *nisi prius* in London has been held not to be a sufficient ground for change of venue: *Cole* v. *The Hull Dock Co.* 11 W. R. 284; see also *Benham* v. *Wetherel*, 11 W. R. 66. In applying to change the venue it is not necessary for defendant to swear to merits: *McDermott* v. *Jameson*, 1 Ir. Jur. N. S. 51. But the venue will not be changed unless the party seeking to change it states explicitly in his affidavit that he intends to examine witnesses and that their testimony is material: *Donnelly* v. *Darcy*, 2 Ir. Jur. N. S. 187. The number of witnesses should be given in the affidavit: *Busteed* v. *Raymond*, 7 Ir. Jur. O.S. 22; *Harnett* v. *Torrens*, 1 Ir. L. R. 116. And if possible the names: *Blest* v. *Neil*, 12 Ir. L. R. 518; and place of residence: *Diamond* v. *Gray et al*, 5 Prac. R. 33. It is in general a good answer to show that plaintiff has witnesses in the county where the venue is laid: *Watson* v. *Kennelly*, 3 Ir. L. R. 214; *Doyle* v. *Hammond*, 6 Ir. Jur. O. S. 306. If all the witnesses for defendant be shown to reside in the county to which the change is sought, and none for the plaintiff in the county in which it is laid, and no ground for believing that there cannot be a fair trial in the county where the witnesses reside, the venue will be changed: *Lorimer* v. *McElrath*, 5 Ir. L. R. 588; *Wilson* v. *Thompson*, 1 Ir. Jur. N. S. 187. An application to change the venue to a county in which all the witnesses resided, except one of plaintiff's witnesses, granted, the defendant undertaking to pay the additional expense of the latter witness to the place of trial: *Blacker* v. *Hanlon*, 5 Ir. Jur. O. S. 39. The refusal of the judge appointed to hold the assizes to try the same is good ground: *McDonell* v. *Provincial Ins. Co.* 5 U. C. L. J. 186; *Ham et uz.* v. *Lasher et al.* 10 U. C. L.J. 74. So where defendants, sued by the municipal corporation of the county of Ontario, applied for a change of venue to the county of York, upon the grounds that as the municipal corporation of Ontario were plaintiffs all the inhabitants of that county were interested, the change was granted upon payment of costs, and upon the understanding that the defendants would pay the extra expense of mileage incurred for plaintiff's witnesses in consequence of the change, and in the event of defendants succeeding undertaking that they would not tax against plaintiffs such extra mileage of their own witnesses: *The Municipal Council of Ontario* v. *Cumberland et al*, 3 U. C. L. J. 11. The same terms were expressed in a case where the change was ordered in consequence of the refusal of a judge upon good grounds to try the cause: *Ham et uz.* v. *Lasher et al*, 10 U.C.L.J. 74. The costs of the application to change the venue when successful are often made costs in the cause: *Geary* v. *Warren*, 5 Ir. L. R. 425. Where the motion at instance of defendant failed the costs were made costs in the cause to the plaintiff, but in no event to defendant: *Shaw* v. *Harris*, 7 Ir. Jur. O. S. 111; *Prosser* v. *Cuddy*, 1 Ir. Jur. N.S. 105; and in one case wholly refused to plaintiff though successful in his resistance to the application, because of unnecessary and improper statements in

which the first process in the action issued; (*i*) but the Court or any Judge (*j*) may, (*k*) on application of either party, order the issue to be tried or damages to be assessed in any other County than that in which the *venue* has been laid, and for that purpose may order a suggestion to be entered on the Record, that the trial may be more conveniently had or damages assessed in the County where the same is ordered to take place. (*l*) 19 Vic. c. 43, s. 8; 7 Wm. IV. c. 3, s. 14.

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his affidavits: *Lynch* v. *Connolly*, 6 Ir. Jur. O. S. 245. The court will seldom interfere with the discretionary power exercised by a judge in chambers, where the affidavits before him are special: *Begg* v. *Forbes et al*, 13 C. B. 614; *Cartwright* v. *Frost*, 3 H. & N. 278; *Schuster et al* v. *Wheelwright*, 8 C. B. N.S. 383; *Penhallow et al* v. *The Mersey Dock & Harbour Co.* 29 L. J. Ex. 21; *Scoble* v. *Henson*, 9 U.C. L.J. 131. The better course appears to be to apply at chambers to bring back the venue upon fresh affidavits: *Brown* v. *Clifton*, 10 W. R. 86. The plaintiff will not in general be allowed to change his own venue to a county in which he might in the first instance have laid it: *Burton et al* v. *Nowlan*, 4 U. C. L. J. 20. Nor will he be allowed to change in order to avoid the consequences of his own delay or laches: *Crooks* v. *House*, 3 O. S. 308; *Smith* v. *Cotton*, 1 U. C. Q. B. 397. In order to expedite the trial of a cause where plaintiff swore that otherwise he would probably lose his debt, a change was order : *Mercer* v. *Voght et al*, 4 U.C.L.J. 47; *Bleakley* v. *Easton*, 9 U.C.L.J. 23; see also *Frazer* v. *Edwards*, 5 Ir. C.L.R. 540. So where the venue was by mistake laid in the wrong county: *Richardson* v. *Daniels et al*, 3 U.C.L.J. 205. Plaintiff's application should be properly an application to amend his declaration: *Crawford* v. *Ritchie*, Tay. U. C. R. 84; *Doe d. Crooks* v. *Cumming*, 3 U.C. Q.B. 65; *Ward et al* v. *Sezemith*, 1 Prac. R. 382; but see *Vaughan* v. *Hubbs et al*, 1 Cham. R. 76. Affidavit, by whom to be made, in such cases: *Williams* v. *Higgs*, 6 M. & W. 133. When change of venue is sought by plaintiff, he should pay the costs of the application: *Hewitt* v. *Hewitt*, 3 Ir. C. L. R. 222; *Comerford* v. *Daly*, 11 Ir. C. L. R. 62. No venue can be changed unless upon consent of parties without an order of the court or a judge, after a rule to shew cause or judge's summons: R. G. pr. 19. However simple and common the affidavit may be, if an order be made in pursuance of a rule or summons upon which the opposite party may be or has been heard, it is a special order within the meaning of the rule: *Begg* v. *Forbes et al*, 13 C. B. 616, *per* Maule, J. The object being to obviate the necessity of resorting to the clumsy expedient of bringing back the venue upon an undertaking to give material evidence in the county where the venue was originally laid: *Clulee* v. *Bradley*, 13 C. B. 608, *per* Maule, J. Venue not changed by rule of court, judge's order, and service alone. It must be in fact altered: *Hornby* v. *Hornby*, 3 U. C. Q. B. 274. But plaintiff is bound by service of order, and if change necessary he must make it: *Cleghorn* v. *Carroll*, 14 U. C. Q. B. 480.

(*i*) All proceedings as a rule must be carried on in that office from which first process issued.

(*j*) *Court or judge.* Relative powers: see note *w* to section 48.

(*k*) *May*—discretionary: Con. Stat. U. C. cap. 2, s. 18, sub-s. 2.

(*l*) This is the practice in local actions: *Ham et ux.* v. *Lasher et al*, 10 U.C.L.J. 74. It is one that has for a long time prevailed in criminal cases: see Arch. Crown Practice, 66. The form of suggestion may be the same *mutatis mutandis* as that followed in criminal cases: see *The King* v. *Hunt et al*, 3 B. & Al. 444. In a local action it is not obligatory to order the trial in the next adjoining county if on

PLEAS AND SUBSEQUENT PLEADINGS. (*m*)

Signature of Counsel not required.

90. (*n*) The signature of Counsel shall not be required to any pleading, (*o*) nor shall any wager of law be allowed. (*oo*) 19 Vic. c. 43, s. 134; 7 Wm. IV. c. 3, s. 10.

Time for pleading in bar when

91. (*p*) In cases where the Defendant is within the jurisdiction, (*q*) the time for pleading in bar, (*r*) unless extended

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view of all the circumstances of the case a change to a county more remote be deemed more convenient or desirable: *Ham et ux.* v. *Lasher et al*, 10 U.C. L.J. 71.

(*m*) The essential rules of pleading are in no wise changed by the act: see *Holmes* v. *Bagge*, 22 L. J. Q. B. 301; *Metzner* v. *Bolton*, 9 Ex. 518. And though the courts have liberal powers of amendment under section 222, yet it is doubtful whether these powers can be so far exercised as to enable a defendant to put a defence upon the record differing from that by him first pleaded: see *Mitchell et ux.* v. *Crassweller et al*, 22 L.J. C.P. 100. The pleas upon the record must show a good "*ground* of defence," or they will be open to demurrer: section 120. The facts necessary to sustain the defence must be stated in a clear and distinct manner. It has been held that if defendant sued by a corporation plead over and take no exception to the declaration that the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity: *Bank of British N. A.* v. *Sherwood*, 6 U. C. Q.B. 213. Pleas on the face of them not identified with the cause, by being intitled, &c., have been held defective: *Shore* v. *Shore*, 3 O. S. 176, note *a*. Now they must be pleaded according to the directions laid down in section 96 of this act. Pleas, if filed, though not served, will be sufficient to prevent plaintiff signing judgment: *Mackinnon* v. *Johnson*, 3 O. S. 169. And though pleaded by a person who is not an attorney, it seems they are not upon that account null: *Hill* v. *Mills*, 2 Dowl. P. C. 696.

(*n*) First part taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 85. Substantially a re-enactment of our rule 13 E. T. 5 Vic.: Cam. Rules 23. It has not at any time been the practice in this province to have pleadings signed by counsel. They have been always signed by the attorney in the cause or party in person as the case might require.

(*o*) In England the court in one case allowed a *special case* to be set down for argument, which though signed by the counsel for defendant was not signed by the counsel for plaintiff, who intended himself to argue the case in person: *Udney* v. *East India Co.* 13 C. B. 742. The signature of counsel to *motions in court* is of course still necessary.

(*oo*) *Wager of law.* So called because the defendant put in his sureties that at such a day he would make his law, that is, take the benefit which the law allowed him: 3 Back. Com. 341. It was obsolete even in the time of Blackstone, but was attempted in a modern case: *King* v. *Williams*, 2 B. & C. 538; and is now by above statute expressly abolished.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 63. Substantially a re-enactment of rule 10 E. T. 5 Vic. and U. C. Stat. 2 Geo. IV. cap. 1, s. 5.

(*q*) As to defendant without the jurisdiction, plaintiff after service of summons is at liberty to proceed in such manner and subject to such conditions as to the court or a judge shall seem fit: see sections 43, 44, 45.

(*r*) A plea in bar may be defined as one which shows some ground for barring or defeating plaintiff's action. It is, in short, a substantial and conclusive answer to the action.

by the Court or a Judge, (*s*) shall be eight days, (*t*) and a notice requiring the Defendant to plead in eight days, otherwise judgment, (*u*) may be indorsed on the copy of the declaration served or be delivered separately, (*v*) and in cases

defendant is within the jurisdiction.

(*s*) The courts have always had power, upon motion, to grant a defendant longer time to put in his plea than that limited by the practice of the court. The powers are now usually entrusted to a judge in chambers: see note *w* to section 48. In one case a twelve months time was granted: *Hunt* v. *Barclay*, 3 Dowl. P. C. 646. The application for further time to plead should be made before the time when plaintiff would be entitled to sign judgment: *Ottiwell* v. *D'Aeth*, Barnes, 254; *Barnett* v. *Newton*, 1 Chit. R. 689; *Calze* v. *Lord Lyttelton*, 2 W. Bl. R. 954; *Cumberleye et al* v. *Carter*, 6 M. & G. 748. But if the summons be returnable before judgment signed, judgment signed while the parties are attending the judge would be irregular: *Abernethy* v. *Paton*, 6 Scott, 586; see also *Wells* v. *Secret*, 2 Dowl. P. C. 447; *Spenceley* v. *Shoule*, 5 Dowl. P. C. 562; *Barton* v. *Warren*, 14 L.J. Q.B. 312; *Daley* v. *Arnold*, 1 Dowl. N. S. 938; *Glen* v. *Lewis*, 8 Ex. 132. The application may be made though previously a "peremptory" order for further time had been obtained by consent: *Beazley* v. *Bailey*, 4 D. & L. 271. Where an order was for four days' time to plead, omitting the word "further," *held* that the time should be computed from the date of the order and not from the expiration of the original time to plead: *Lane* v. *Parsons*, 5 Dowl. P. C. 359. If defendant's summons be dismissed and the time for pleading have expired, defendant will not be entitled to more time for pleading than the rest of the day on which the summons was dismissed: *Mengens* v. *Perry*, 15 M. & W. 537, confirmed in *Evans* v. *Senior*, 4 Ex. 818.

(*t*) It has been held that defendant is entitled to eight days to plead to a new assignment: *Unger* v. *Crosby*, 3 O. S. 175. And that after a demand of replication plaintiff has eight days to reply: *Robinson* v. *McGrath*, H. T. 2 Vic. *M.S.* R. & H. Dig. "Practice," I. 10. Sunday, though a *dies non*, if neither the first nor last of the eight days, is counted: *Shoebridge* v. *Irwin*, 6 Dowl. P. C. 126. In computing the eight days allowed to plead, the first and last days are inclusive unless the last day be a *dies non*: *Moore* v. *the Grand Trunk Railway Co.* 4 U. C. L. J. 20. The day of service of the declaration is reckoned as one of the eight days for pleading: *Ib.* When defendant obtains a rule or summons which stays the plaintiff's proceedings, he is entitled to have a reasonable time allowed him for the purpose of taking his next proceeding: *Hughes* v. *Walden*, 5 B. & C. 770, note, *per* Abbott, C. J. And the whole of the day on which the rule or summons was disposed of is no more than a reasonable time: *Ib.* But where defendant, having obtained an order for time to plead, took out a summons for particulars which were dismissed after the expiration of the time given for pleading, he was held only entitled to the remainder of the same day for pleading: *Mengens* v. *Perry*, 15 M. & W. 537; *Evans* v. *Senior*, 4 Ex. 818. A defendant obtained a judge's order for leave to plead several matters, but at the time the order was obtained was not enabled to draw up the rule, the rule office being closed, *held* that the time for pleading having been obtained, and no extension of time having been obtained, judgment signed on the morning of the following day was regular: *Glen* v. *Lewis*, 8 Ex. 132. Judgment signed for want of a plea *on the day* that a summons for security for costs was discharged, and summons to plead several pleas made absolute, was set aside as irregular though the time for pleading had expired: *Dean* v. *Thompson*, 4 Prac. R. 301.

(*u*) Judgment cannot, it is apprehended, be signed if the pleas are in the office and filed, though not served.

(*v*) The notice to plead, if not delivered with the declaration, may be delivered any time after the declaration: *Anon*, 2 Wils. 137; see also *West* v. *Rudford*, Burr. 1452.

in the County Courts the declaration, and all pleadings and notices requiring to be served, may be served in any County. (*w*) 19 Vic. c. 43, s. 112.

Notice to plead sufficient.

92. (*x*) A notice requiring the opposite party to plead, reply, rejoin, or otherwise, as the case may be, within eight days, otherwise judgment, shall be sufficient without any rule (*y*) or other demand; (*z*) and such notice may be delivered separately or be indorsed on any pleading which the other party is required to answer. (*a*) 19 Vic. c. 43, s. 111.

(*w*) The county courts, though local so far as the place of holding the courts are concerned, and though restricted as to pecuniary amount of jurisdiction, are for service of papers, &c., territorially co-extensive with the superior courts of law.

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 62. Founded upon the first report of the Common Law Commissioners, section 60.

(*y*) Rules to plead were made unnecessary by old rule 4 E. T. 11 Geo. IV. and rule 10 E. T. 5 Vic., and demands of plea were thereby substituted.

(*z*) Demands of plea are now made unnecessary, and notices to plead substituted. The notice, if indorsed, may be in the following form: "The defendant is to plead, reply, &c., hereto in eight days, otherwise judgment." If not indorsed the notice may be in the same words, but intitled in the court and cause, and both dated and signed by the attorney serving the same. A notice thus: "To plead in ——— days has been held to be a notice to plead according to the practice of the court and within the time limited by the rules of the court: *Hifferman* v. *Langelle*, 2 B. & P. 363; see also *Collins* v. *Rose*, 5 M. & W. 194; *Ramm* v. *Duncomb*, 2 D. & L. 88. It is doubtful whether such a notice would not now be set aside as irregular or amended at the costs of the party who served it. Where the time limited in the notice to plead was less than that allowed by the practice of the court, judgment signed by plaintiff for want of a plea, though signed after the time limited by the court, was set aside: *Braty* v. *Baldock*, Barnes, 302. But where the time given was greater than that allowed by the court, defendant was held entitled to the whole of the time so given: *Solomonson et al* v. *Parker et al*, 2 Dowl. P.C. 405. These cases it is apprehended will apply to replication, &c., and other pleadings subsequent to plea: *Winterbottom* v. *Lees*, 2 Ex. 325. No pleading can be filed during vacation: see section 83. An irregularity in a notice to plead may be waived by defendant taking out a summons for further time to plead: *Pope* v. *Mann*, 2 M. & W. 881. Indeed the want of a notice may, it seems, be waived by defendant's conduct, for instance—if he obtain an order for time to plead: *Pearson* v. *Reynolds*, 4 East. 571; see also *Nias* v. *Spratley*, 4 B. & C. 386. Even a summons for time to plead, obtained by defendant, may be held to be such a waiver: *Bolton* v. *Manning*, 5 Dowl. P. C. 769, *sed qu*; see *Decker* v. *Shedden*, 3 B. & P. 180. But a summons obtained by one of two defendants who appear by separate attorneys will clearly not affect the rights of the remaining defendant: *Showler* v. *Stoakes et al*, 2 D. & L. 3. No judgment for want of a plea can be signed as a general rule without a notice to plead: see *Heath* v. *Rose*, 2 B. & P. N.R. 223; *Fenton* v. *Austice*, 5 Dowl. P.C. 113. It has been held that a demand of plea cannot be served before declaration filed, however short the time may be: *Read* v. *Johnson*, Tay. U. C. R. 489.

(*a*) If not delivered with the declaration, may be delivered at any time within twelve months after declaration: see note *v* to section 91.

93. (*b*) Express colour (*c*) shall not be necessary in any pleading. (*d*) 19 Vic. c. 43, s. 113. Express colour unnecessary.

94. (*e*) Special traverses (*f*) shall not be necessary in any pleading. (*g*) 19 Vic. c. 43, s. 114. And special traverses.

95. (*h*) In a plea or subsequent pleading, it shall not be necessary to use any allegation of *actionem non* or *actionem ulterius non*, or to the like effect, or any prayer of judgment; Certain allegations and prayers not required

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(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 64. Founded upon the first report of the Common Law Commissioners: section 39.

(*c*) Before this act it was a rule that pleadings should not be argumentative. This gave rise to what was called express colour. Thus, if to a declaration stating that plaintiff was possessed of a house, the defendant was in his plea to state that the house was his, the plea would have been held bad as being an argumentative and indirect denial of the statement in the declaration that the house was the house of the plaintiff; but if the defendant were to state and show that he had a good title to the house, and admit the plaintiff's possession in fact, but surmise that the plaintiff was in possession by some bad title, the plea would be good, as giving *express colour* to the plaintiff's alleged possession. This form of pleading is now more a matter of history than of practice.

(*d*) The "express colour" declared to be unnecessary by this section is o course that *fiction* in pleading of which an example is given in the previous note a proceeding characterized by the Common Law Commissioners as being, "ho ever ingenious, too subtle and ought to be abolished." Indeed its express abol tion by this section is almost a work of supererogation. The want of "expres colour," technically so called, has always been a defect of form, which could only be objected to on special demurrer, and it has been enacted "that no pleading shall be deemed insufficient which could heretofore only be objected to on special demurrer:" section 123. But by the operation of this act, independently of the section under consideration, the omission of such a fiction is not only unobjectionable but actually commanded, for an allegation or "statement that need not be proved," should be omitted: section 76.

(*e*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 65. Founded upon the first report of the Common Law Commissioners, section 44.

(*f*) The form of a special traverse comprised *first* an inducement or statemen of new matter which was required to be an indirect denial of the fact intended to be traversed, and, *secondly*, the conclusion or traverse, which was in these words, "without thus, that, &c." (denying directly the fact intended to be disputed). If the inducement stood alone the plea would have been open to objection for argumentativeness, because it would only show by inference or indirectly that the allegation intended to be denied could not be true. The direct or "*special* traverse," therefore, was added to avoid such an objection. Of it, as of express colour, it may be said now only to be interesting in an historical point of view.

(*g*) The abolition of special traverses by express enactment may be also said to be a work of supererogation, and for the reasons mentioned in note *d* to the preceding section.

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 66. Substantially a re-enactment of rule 41 E. T. 5 Vic., which was copied from Eng. R. G. 9 H. T. 4 Wm. IV: Jervis N. R. 122. These rules were expressed to be applicable only to a

nor shall it be necessary in any replication or subsequent pleading to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment. (*i*) 19 Vic. c. 43, s. 115.

Commencement of plea.

96. (*j*) No formal defence shall be required in a plea, avowry or cognizance, (*k*) and it shall commence as follows, or to the like effect: (*l*)

The Defendant, by E. F., (*m*) his Attorney, (*n*) (*or* in person, *as the case may be*) says that (*o*) (*here state first defence*). (*p*)

And it shall not be necessary to state in a second or other plea, or avowry or cognizance, that it is pleaded by leave of the Court or a Judge, (*q*) or according to the form of the

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plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, as distinguished from pleas, to the further maintenance thereof only, a restriction which does not prevail as regards this section.

(*i*) It was held under our rule 11 E. T. 5 Vic., that it was a good ground of special demurrer to a replication that it improperly concluded with a prayer for relief: *Rees* v. *Dick*, 7 U. C. Q. B. 496. Such an objection would not now be entertained on demurrer: section 123. It is apprehended if any pleading contain matter by this section declared to be unnecessary, that the proper course would be to strike out such matter, under section 76.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 67. Substantially a re-enactment of our rule 10 E. T. 5 Vic., which was copied from Eng. R. G. 10 H. T. 4 Wm. IV: Jervis N. R. 128.

(*k*) Though a formal defence be used the plea would not upon that account be set aside: *Bacon* v. *Ashton*, 5 Dowl. P. C. 94.

(*l*) The plea must be intitled of the proper court, &c.: see section 77.

(*m*) An infant can only plead by guardian. The commencement of a plea in such case may be as follows: "E. F. admitted by the said court here as guardian of the defendant to defend for him, he being an infant within the age of twenty-one years, &c."

(*n*) A plea for another by a person who is not an attorney is not a nullity: *Hill* v. *Mills*, 2 Dowl. P. C. 696.

(*o*) The court will consider every plea as pleaded to the whole declaration, which is not in the introduction limited in terms as a defence to part only: *Poulton* v. *Dolmage*, 6 U. C. Q. B. 277; see also *Putney* v. *Swann*, 2 M. & W. 72. If a plea professing to answer the whole declaration answer only part, plaintiff may demur: *Eddison* v. *Pigram*, 16 M. & W. 137; *Chappell et al* v. *Davidson*, 18 C. B. 194. If professing to answer only part answer the whole, plaintiff's course is to make application to have it amended under section 119. Special demurrer was formerly open to plaintiff in such case: *Gray* v. *Pindar*, 2 B. & P. 427.

(*p*) If the defence be an equitable one the plea must begin thus, "For defence on equitable grounds, &c.": see section 124.

(*q*) *i. e.* Obtained under section 110.

statute, (*r*) or to that effect, but every such plea, avowry or cognizance, shall be written in a separate paragraph and be numbered, (*s*) and shall commence as follows, or to the like effect:

And for a second (&c.) plea to (*stating to what it is pleaded*) (*t*) the Defendant says that, &c. Second plea.

And no formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading. (*u*) 19 Vic. c. 43, s. 116. Formal conclusions unnecessary

97. (*v*) Any defence arising after the commencement of any action shall be pleaded according to the fact (*w*) without Defence arising after

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(*r*) *i. e.* The statute authorizing double pleading or some particular statute in which power to plead a defence in a special form is conferred.

(*s*) A defendant may in one plea refer to allegations in another, in the same manner as in separate counts of a declaration: *Beaton* v. *McKenzie*, T. T. 1 & 2 Vic. *M. S.* R. & H. Dig. "Pleading," XI. 1; see also *Date* v. *The Gore Dist. Mutual Fire Ins. Co.* 14 U. C. C. P. 548.

(*t*) See note *o*, *supra*.

(*u*) Prayer of judgment; &c., is declared to be unnecessary by the preceding section (95).

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 68.

(*w*) Between pleas contemplated by this section and pleas *puis darrein continuance* contemplated by the section following, there is a difference. The latter must express the ground of defence to have arisen since the last *plea*; but the pleas here intended may express the ground of defence as arising after the *commencement of the action*, which may be at any time after writ issued and before plea pleaded. It is enough if the plea disclose on the face of it matter which arose since the commencement of the action: *Brooks* v. *Jennings*, L. R. 1 C.P. 476; *Gresty* v. *Gibson*, L. R. 1 Ex. 112. But if pleaded to the whole cause of action it will be bad if it leave any part of the cause of action unanswered: *Ash et al* v. *Pouppeville*, L. R. 3 Q.B. 86. Plaintiff may confess the plea and sign judgment for his costs: *Barnett* v. *The London & N. W. R. Co.* 5 H. & N. 604; *Plummer* v. *Hedgs*, 24 L.J. Q.B. 24; *Cook* v. *Hopewell*, 11 Ex. 555; *Morgan et al* v. *Harding et al*, 11 W. R. 65; *Hill* v. *Howell*, Law Times, May 26, 1860, p. 130, Q. B. It was held before this act that no such plea could be pleaded in bar to the action, though it might be to the further maintenance. A ground of defence arising after action brought was looked upon as something collateral, admitting the action to be well brought, but alleging that by reason of the new matter, plaintiff ought not *further* to maintain his action. It was considered that a cause of action at the time of the commencement of the suit was thereby acknowledged, whereas a plea in bar must deny any cause of action to have ever existed: *LeBret* v. *Papillon*, 4 East. 502. The following may be given as an example of such a plea. To an action on the case by plaintiff as owner of a steamship, against defendants as owners of another steamship, for injuries caused to plaintiff's vessel by collision; defendant pleaded amongst other pleas a release after action, by a certain person jointly entitled with the plaintiff to the ship and to the cause of action and damages in the declaration mentioned: *Suckling* v. *Wilson et al*, 4 D. & L. 167. Such a plea having

action, how pleaded.

any formal commencement or conclusion, (*x*) and any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action. (*y*) 19 Vic. c. 43, s. 117.

Or after the last pleading, affidavit required.

98. (*a*) In cases in which a plea *puis darrein continuance* (*b*) was formerly pleadable (*c*) in Banc or at *Nisi Prius*, (*d*) the same defence may be pleaded with an allega-

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been held to be one in bar of the further maintenance of the action, and not in bar of the action generally, has been held to be inconsistent with and not pleadable with pleas in bar: *Ib.*, but now see R. G. pl. 22. And yet before this act it was held that though such a plea was improperly framed in bar to the whole action, instead of its further maintenance, that the court after verdict was bound to pronounce judgment that the action be not further maintained: *Cobbett* v. *Grey et al.* 4 Ex. 729; see also *Allen* v. *Hopkins*, 13 M. & W. 94. It has also been held in England, owing to the peculiar wording of the statute 2 Geo. II. cap. 22, s. 13, that a debt which arises after action brought cannot be the subject of a set-off: *Richards* v. *James*, 2 Ex. 471.

(*x*) It is therefore apprehended that whether the plea be to the further maintenance or otherwise, the court will be bound to give judgment according to the very right and justice of the matter in dispute. The plea if improperly framed was objectionable only upon special demurrer, which by this act is abolished. section 123.

(*y*) Matters of defence which arose before action must be pleaded in chief: *Vaughan* v. *Browne*, Andr. 328; see also *Wilson* v. *Wymonsold*, Say. 268.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 69. Substantially a re-enactment of our old rule 23 E. T. 5 Vic., which was copied from Eng. rule 5 H. T. 4 Wm. IV.: Jervis, N. R. 115.

(*b*) *Plea puis darrein continuance.* This term is applied to a well-known form of pleading, though the reason for the name no longer exists. By an ancient rule of practice, when adjournments of proceedings took place for certain purposes from one day or one term to another, there was always an entry made on the record expressing the ground of the adjournment and requiring the parties to re-appear at the given day, which entries were called *continuances*. In the intervals between such continuances and the day appointed, the parties were, for the purposes of pleading, *out of court*, and consequently not in a situation to plead. But it sometimes happened that after a *plea* had been pleaded, and while the parties were so out of court in consequence of the continuance, a new matter of defence arose, which did not exist and which the defendant consequently had no opportunity to plead *before* the last continuance. This new defence he was therefore entitled (at the day given for his re-appearance), to plead as a matter that had happened *after* the last continuance—*puis darrein continuance*. No entry of continuances shall be made on any record or roll whatever or in the pleadings: R. G. pl. 25. But pleas *puis darrein continuance* are preserved by the section here annotated.

(*c*) Conviction of plaintiff of a felony after action: *Barnett* v. *The London & N. W. R. Co.* 5 H. & N. 604. Plaintiff having become an alien enemy by a declaration of war after action: *Alcinous* v. *Nigren*, 4 El. & B. 217, are examples of the plea.

(*d*) *Pleadable in banc or at nisi prius.* Between these two there is a distinction. The former has been held to be pleadable by attorney and the latter by counsel only. The former may be filed and delivered to the opposite party, but the

tion that the matter arose after the last pleading; (*e*) but unless the Court or a Judge otherwise orders, (*f*) such plea

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latter can only, it seems, be delivered to the judge at nisi prius: *Payne* v. *Shenstone*, 4 D. & L. 396; and both require to be verified by affidavit. If these distinctions are still to be observed, the effect of this section will be that if the plea be pleaded *before* the sittings at *nisi prius*, it must be pleaded *in banc*, filed and served, as other ordinary pleadings; but if *after* the commencement of the *nisi prius* sittings, it must be pleaded at *nisi prius* and given to the judge. The object of these rules of practice is to prevent the inconvenience that might arise if a cause were for trial in one place and a plea filed and served in another: *Payne* v. *Shenstone*, 4 D. & L. 398, *per* Patteson, J. It would also seem that the plea may be pleaded at *nisi prius* though there was time to plead it *in banc*: *Prince et al* v. *Nicholson*, 5 Taunt. 333. If pleaded at *nisi prius* it must be before verdict; but will be in time though the jury have left the bar, provided there be no actual rendering of their verdict: Bull N. P. 310; *Todd* v. *Emly et al*, 9 M. & W. 606. Certainly it would be too late after the discharge of the jury: *Anon*, Cro. Car. 232. When pleaded at *nisi prius* it should be transcribed by the proper officer on the record: *Myers* v. *Taylor*, 2 C. & P. 306. And the presiding judge must certify it as part of the record: *Abbot* v. *Rugeley*, 2 Mod. 307; *Townsend* v. *Smith*, 1 C. & K. 160. If good in point of form and in other respects regular, it has been held that the judge though of opinion that the plea is pleaded for delay only has no discretion to refuse it: *The Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537. The authority of this case since the C. L. P. Act is much shaken: see section 119. The plea though bad may, it seems, be amended: *Holroyd et al* v. *Reed et al*, 5 Q.B. 594; but see Bull N. P. 309; *Moore* v. *Hawkins*, Yelv. 180. It has also been held that a judge at *nisi prius* cannot receive from plaintiff a replication or even a confession of the plea: *Pascall* v. *Horsley et al.*, 3 C. & P. 372; but see R. G. pl. 22 and 23. The judge's only power has been held to be to return the plea as parcel of the record: *Moore* v. *Hawkins*, Yelv. 180. And it has been held that he had no authority to reject or set aside the plea, though insufficient in point of law: *Paris* v. *Salkeld*, 2 Wils. 137; *Fitch* v. *Toulmin*, 1 Stark. 62.

(*e*) A plea *puis darrien continuance* has been held in England to operate as a withdrawal of pleas in chief, so as to entitle plaintiff to discontinue without costs: *Wollen* v. *Smith*, 9 A. & E. 505. And so as to prevent defendant if successful recovering the costs of such prior pleadings: *Lyttleton* v. *Cross et al*, 4 B. & C. 117. The prior pleas have been held to be so far waived by a plea *puis darrein continuance* that if the latter turn out to be defective defendant cannot avail himself of his former pleas: *Barber* v. *Palmer*, 1 Ld. Rayd. 693. The only reason why the defendant on pleading *puis darrein continuance* must withdraw or be held to have withdrawn his former pleas, is that otherwise he would plead double: see *Gordon et al* v. *Robinson*, 3 Prac. R. 366. And the practice with respect to this was settled before the statute of 4 Anne, cap. 16, which first allowed double pleading: *Wagner* v. *Imbrie*, 2 L. M. & P. 334, *per* Parke, B.; but see R. G. pl. 23. Defendant can only plead one plea *puis darrein continuance*: Bull N. P. 311. It would appear that if any issue remain to be tried, it may be pleaded, though plaintiff has obtained a verdict on other issues: *Wagner* v. *Imbrie*, 2 L. M. & P. 333; see also *Wright* v. *Burroughes et al*, 3 C. B. 344; *Gordon et al* v. *Robinson*, 3 Prac. R. 366. After judgment by default no such plea will be allowed: *Shaw* v. *Shaw*, M.T. 6 Vic. *M.S.* R. & H. Dig. "Puis darrein continuance," 1. An attorney cannot proceed for his costs after this plea, unless he establish a clear case of fraud: *White* v. *Boulton*, E. T. 2 Vic. *M.S.* R. & H. Dig. "Attorney," &c., III. 9. Judgment upon a plea *puis darrein continuance* is peremptory: *Beaton* v. *Forrest*, Aleyn, 66.

(*f*) The party has a certain time within which to plead as of right. It is discretionary with the court or a judge to allow him to plead after that time upon

shall not be allowed (*g*) unless accompanied by an affidavit (*h*) that the matter thereof arose within eight days next before the pleading of the plea. (*i*) 19 Vic. c. 43, s. 118.

99. (*j*) Except (*k*) in actions for assault and bat-

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proper grounds being laid for it. But the plaintiff has a right to come and contest the defendant's reasons for not proceeding according to the strict course and practice of the court, and to take the opinion of the court or a judge thereon. And that opinion if in favor of defendant will, as a general rule, be only upon payment of costs: *Dunn* v. *Loftus*, 8 C. B. 76.

(*g*) *Qu.* Would it be void or irregular only if pleaded contrary to this enactment? The expression "shall be allowed" refers to some authority vested with power to allow or disallow, and implies reference to that authority to decide. If a plea were void in its inception a reference would be absurd. The want of an affidavit would for this reason appear to be an irregularity only: see *Gordon et al* v. *Robinson*, 3 Prac. R. 366.

(*h*) Generally the affidavit states the plea to be true in substance and matter of fact: *Minshall* v. *Evans*, 4 C. & P. 555, *per* Patteson, J. If the affidavit refer to the plea and the plea be intitled in the cause, the affidavit will be sufficient though not specially intitled: *Prince et al* v. *Nicholson*, 5 Taunt. 333. It would seem to be necessary that the affidavit if made during the *nisi prius* sittings should be sworn before the presiding judge: *Bartlett* v. *Leighton*, 3 C. & P. 408. The affidavit may be dispensed with if the subject matter of the plea arose at the trial and before the judge: *Todd* v. *Emly*, 1 Dowl. N.S. 598. And in other cases also in the discretion of the court or the judge: *Dunn* v. *Loftus*, 8 C. B. 76; *Warren* v. *Kirby*, M. T. 3 Vic. *M.S.* R. & H. Dig. "Abatement," 5; but see *Powell* v. *Duncan*, 5 Dowl. P. C. 550. A copy of the affidavit should be served with the copy of plea, or if affidavit dispensed with, copy of order dispensing with it should be served: *Gordon et al* v. *Robinson*, 3 Prac. R. 366.

(*i*) If the last of the eight days fall on Sunday a plea on Monday would be good: *Dudden* v. *Triquet*, 4 M. & W. 676; see also R. G. pr. 166. And if the last day expire during the *nisi prius* sittings the plea ought to be delivered to the judge within the eight days, though the case may be low down on the docket: *Townsend* v. *Smith*, 1 C. & K. 160. But if the last of the eight days fall between the 1st July and 21st August, when shall the plea be filed and served? Between these dates, as a general rule, no pleading can be filed: see section 83, and notes. In the English act, whence ours has been taken, it is provided that "such plea may when necessary be pleaded at *nisi prius* between the tenth day of August and twenty-first day of October." However, in this province, no court of *nisi prius* sits until long after the vacation.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 70. Substantially the same as our old U. C. Stat. 7 Wm. IV. cap. 3, s. 13, which was copied from Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 21. Both our statute of Wm. and the English statute of which it is a transcript concluded in substance as follows—"to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges or a majority of them as aforesaid, by any rules or orders by them to be from time to time made, shall order and direct." In this province, pursuant to this statute, rules 17 and 18 of E. T. 5 Vic. were passed. In England, R. G. of H. T. 2 Wm. IV. Nos. 55 and 56, of H. T. 4 Wm. IV. Nos. 17, 18, 19, and T. T. 1 Vic.

(*k*) This is a general law with respect to payment of money into court. In the

tery, (*l*) false imprisonment, (*m*) libel, slander when not within the fifth Section of the Act to amend the law relating to libel and slander, (*n*) malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant, (*o*) a sole Defendant (*p*) in any ac-

Defendant may pay money into Court, except in certain cases.

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cases excepted defendant can only have a right to pay money into court if he act in some character or under some special circumstance which entitles him by act of parliament to pay money into court, for instance, as a justice of the peace, &c.: see *Aston* v. *Perkes et al*, 15 M. & W. 385; *Key* v. *Thimbleby*, 6 Ex. 692; *Thompson* v. *Sheppard*, 4 El. & B. 53. And it has been held since the C. L. P. Act that it is not now any more necessary than formerly for one party to state and the other to deny the special character or circumstances which give the right to pay money into court contrary to the usual rule of law in such cases: *Ib.*

(*l*) *Assault and battery.* Similar words in the Eng. Stat. of Wm. were held to be used only with reference to the persons of plaintiff and his wife, and not to that of his son or servant. Plaintiff, for instance, suing for an assault upon his son would be subject to a plea of payment into court: *Newton* v. *Holford et al*, 6 Q. B. 921; see also *Aston* v. *Perkes et al*, 15 M. & W. 385; *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*m*) *False imprisonment.* As to magistrates and others sued for something done in an official capacity, see note *k ante*.

(*n*) *Libel.* The exception is as regards libels printed in a newspaper or periodical publication by Con. Stat. U. C. cap. 103, s. 5, as to which see *O'Brien* v. *Clement*, 15 M & W. 435; *Chadwick* v. *Herapath*, 3 C. B. 885; *Lafone* v. *Smith et al*, 3 H. & N. 735; s. c. 4 H. & N. 158; *Jones* v. *Mackie*, L. R. 3 Ex. 1.

(*o*) *Debauching of plaintiff's daughter or servant.* This particular kind of injury having been expressly excepted, it would seem to show according to the rule *expressio unius*, &c., that *other* cases of injuries to members of plaintiff's family are not excepted: *Newton* v. *Holford et al*, 6 Q. B. 926, *per* Tindal, C. J. Such for instance as enticing away plaintiff's daughter or servant: *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*p*) To entitle a sole defendant to pay money into court no order is necessary; but in the case of one or more of several defendants the law is different (section here annotated). An order when necessary may be obtained at any time before plea. It may be immediately after writ issued, but then it must be done in such a way as not to prejudice the plaintiff, and so as not to deprive him of any costs to which he would be otherwise entitled: *Edwards* v. *Price et al*, 6 Dowl. P. C. 489, *per* Patteson, J. Though the summons be taken out before declaration, the payment into court must be afterwards pleaded to the declaration: *Molson* v. *Munro*, 1 Cham. R. 97. The money may be paid in respect of one or more of several counts: *Fullweil* v. *Hall*, 2 W. Bl. 837; *Hallet et al* v. *East India Co.* 2 Burr. 1120; and not necessary to show how much is paid in respect of one count and how much to another: *Marshall* v. *Whiteside et ux.* 4 Dowl. P.C. 766; except when there are counts on a bill or note: *Jourdain* v. *Johnson*, 2 C. M. & R. 564; *Tattersall* v. *Parkinson*, 16 M. & W. 752. No other plea will be allowed to that part of the declaration to which the plea of payment into court is pleaded: *Thompson* v. *Jackson*, 8 Dowl. P. C. 591; *Hart* v. *Denny*, 1 H. & N. 609. In one case, where money was by mistake paid into court it was allowed to be withdrawn: *Webster* v. *Emery*, 10 Ex. 901. The plea may be amended and a further sum be paid in: *Domett et al* v. *Young et al*, Car. & M. 465. The effect of the plea is to admit a cause of action and damages in respect thereof to the amount paid in: *Story* v. *Finnis et al*, 6 Ex. 127;

tion, (*q*) without rule or Judge's order, or one or more of several Defendants (by leave of the Court or a Judge (*r*) upon such terms as the Court or Judge thinks fit), (*s*) may pay into Court a sum of money by way of compensation or amends. (*t*) 8 Vic. c. 13, s. 36; 13, 14 Vic. c. 60; 2 Geo. IV. c. 1, s. 25; 19 Vic. c. 43, ss. 119, 121.

100. (*u*) The money shall be paid to the proper officer of the Court (*v*) who, for receiving the same, may exact a sum

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but not necessarily the cause of action in the declaration alleged: *Schreger* v. *Carden*, 11 C. B. 851; *Perren* v. *Monmouthshire R. & Canal Co.* 11 C. B. 855. Where the declaration comprises several causes of action and money is paid in generally, the court will not order particulars as to what items of plaintiff's claim the money is paid into court: *The Thames Iron Works and Ship Building Co.* v. *The Royal Mail Steam Packet Co.* 10 C. B. N.S. 375; but see *Bazendale et al* v. *Great Western R. Co.* 6 H. & N. 95; see further section 101 and notes thereto.

(*q*) *In actions.* The present section extends to damages in detinue: *Phillips* v. *Hayward*, 3 Dowl. P. C. 362; *Crossfield et ux.* v. *Such*, 8 Ex. 159; but see *Allen* v. *Dunn*, 28 L. T. Rep. 257; and in trover: *Peacock* v. *Nichols*, 3 Dowl. P. C. 367; *Key* v. *Thimbleby*, 6 Ex. 692; and to trespass by one tenant in common against another for destruction of the common property: *Cresswell* v. *Hedges*, 1 H. & C. 421. A defendant is not entitled to pay money into court in a case where the plaintiff assigns several breaches in his declaration under Stat. 8 & 9 Wm. III. cap. 11, and where the judgment obtained by plaintiff is to stand as a security for any future breaches of covenant of which the defendant may be guilty: *Bishop of London* v. *McNeil*, 9 Ex. 490; *England et al* v. *Watson*, 9 M. & W. 333. The Stat. 8 & 9 Wm. III. cap. 11, is expressly excepted out of the operation of this act: see section 148. The court sustained a plea of payment into court as against a demurrer to it in an action on a replevin bond: *Thompson* v. *Kaye et al*, 13 U. C. C. P. 251. But replevin bonds are not within the operation of the statute of Wm.: *Bletcher* v. *Burn*, 24 U. C. Q. B. 259. Bonds within the statute of Wm. clearly do not come under the operation of this section: *Lowe* v. *Morice*, 19 U. C. C. P. 123.

(*r*) The words "by leave of the court or a judge" must be taken exclusively to refer to an application by one or more of several defendants to be allowed to pay money into court. The practice as to these latter was first introduced by the discretionary power of the court. It is still made subject to its discretion, and may be subjected to terms: *Kay* v. *Panchiman et al*, 2 W. Bl. 1029, *per* De Grey, C. J.

(*s*) *Court or judge.* Relative powers: see note *w* to section 48.

(*t*) Justices of the peace and other public officers when sued either for an act done within their jurisdiction or in excess of jurisdiction, may pay money into court: Con. Stat. U. C. cap. 126, s. 13.

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 72. Substantially the same as English rule 18 of H. T. 4 Wm. IV., which was never in force in this province.

(*v*) *Proper officer—Qu.* Is it intended where an action has been commenced in the office of a deputy clerk of the crown, that money may be paid to such deputy as the "proper officer," and as being the officer with whom the plea is filed? It is apprehended, not.

not exceeding one per cent. on the sum so paid in, (*w*) and who shall sign a receipt for the amount in the margin of the plea, (*x*) for signing which receipt he shall be entitled to twenty cents, (*y*) and the sum so paid in shall on demand be paid out to the Plaintiff, (*z*) or to his Attorney upon a written authority from the Plaintiff. (*a*) 2 Geo. IV. c. 1, s. 26; 19 Vic. c. 43, s. 121.

Officer to receive one per cent. on moneys pat into court.

101. (*b*) Payment of money into Court (*c*) shall be pleaded (*d*) in all cases as nearly as may be in the following

Such payment, how pleaded.

(*w*) The per centage is not to be charged except where the money is paid into court under a plea: *Carrall* v. *Potter*, 3 Prac. R. 11. Where money was paid in under a judge's order to abide the result of another suit, it was held that the only charge allowable to the clerk was 20s. under the tariff of costs: *Ib.*

(*x*) No receipt on the margin of the plea was required under our old practice: *Miles* v. *Harwood*, 1 U. C. Q. B. 515. The omission of the receipt may now be held to render the plea irregular, and entitle the opposite party to move to set it aside: *Harsant* v. *Busk*, 6 Jur. 1110. Taking the money out of court is a waiver of any irregularity in paying it in: *Griffiths* v. *Williams*, 1 T. R. 710.

(*y*) This fee obviously is only chargeable where the money is paid into court under a plea: see note *w supra.*

(*z*) Plaintiff will be entitled to the money, whatever may be the result of the action. If he die, then his legal representatives only will be entitled to it: *Palmer* v. *Reiffenstein*, 1 M. & G. 94. And on the other hand, money paid into court by a defendant who afterwards dies, will, as against the same plaintiff, avail defendant's executors, if sued for the same cause of action: *Carey* v. *Choate et al*, M. T. 6 Vic. *MS.* R. & H. Dig. "Payment into Court," 2.

(*a*) Plaintiff's signature to the written authority, when produced by the attorney, need not be verified on affidavit, unless so required by the master: R. G. pr. 11.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 71. Substantially a re-enactment of our rule 17 of E. T. 5 Vic., which was copied from Eng. rule T. T. 1 Vic.

(*c*) As to when and in what cases money may be paid into court, see section 99 and notes thereto.

(*d*) As a general rule, the money should be in truth paid into court before plea: *Gurney* v. *Elkins*, 3 M. & W. 216; *Clark* v. *Dann*, 3 D. & L. 513. But there may be cases in which the court will presume that it has been done, though it has not in fact been done: see *Rendel et al.* v. *Malleson*, 16 M. & W. 828. The old mode of payment into court was by a rule to strike the sum paid into court out of the declaration, which rule it was always necessary to produce at the trial. The plea of payment, which, being upon the record, proves itself, is considered a less expensive course, and is therefore substituted for the old mode: *Key* v. *Thimbleby*, 6 Ex. 692. If plaintiff's claim be composed of several demands, to some of which he has a defence and to others none, and he wish to plead payment into court, his proper course is to plead to the demands which he disputes separately, and then plead payment into court as to the residue: see *Coates et al* v. *Stevens*, 3 Dowl. P. C. 784; *Sharman* v. *Stevenson*, 3 Dowl. P. C. 709. The effect of a plea of payment into court depends much upon the form of action in which it is pleaded. In an action of assumpsit on a special contract, the plea admits that contract: *Seaton* v. *Benedict*,

form, *mutatis mutandis*: (*e*)

Form. The Defendant, by E. F. (*f*) his Attorney, (*g*) (*or* in person, &c.,) (*h*) (*if pleaded to part*, (*i*) *say*, as to ——,

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5 Bing. 32, *per* Gaselee, J.; *Drake* v. *Lewin*, 4 Tyr. 730; *Speck* v. *Phillips*, 5 M. & W. 279; *Archer* v. *English et al*, 1 M. & G. 873; and the breaches of it as alleged: *Wright* v. *Goddard et al*, 8 A. & E. 144; but not the amount of damages claimed by plaintiff in respect thereof: see *Attwood* v. *Taylor et al*, 1 M. & G. 279; *Cooper* v. *Blick*, 2 Q. B. 915; see also *Turner* v. *Diaper*, 2 M. & G. 241; *Mondel* v. *Steel*, 8 M. & W. 858; *Robinson* v. *Harman*, 18 L. J. Ex. 202; *Twyman* v. *Knowles*, 22 L. J. C. P. 143; but where, as in *indebitatus* assumpsit, the demand is made up of several items, the plea admits nothing more than that the sum paid is due in respect of some cause of action: *Seaton* v. *Benedict*, 5 Bing. 28; *Hingham et al* v. *Robins*, 7 Dowl. P. C. 352; *Archer* v. *English et al*, 1 M. & G. 873; *Goff* v. *Harris*, 5 M. & G. 573. Particulars, where several causes of action, as to intended application of the payment refused: *Thames Iron Works & Ship-Building Co.* v. *Royal Mail Steam Packet Co.* 10 C. B. N.S. 375; but see *Bazendale* v. *The Great Western R. Co.*, 6 H. & N. 95. The admission by payment into court in an action of tort is something analogous to the admission by payment into court in *indebitatus* assumpsit. The effect is this, the defendant says he will not dispute what is alleged against him in the declaration, to the extent of £——, leaving the plaintiff all his rights, *intra* the £—— pleaded, and not prejudicing himself in his defence *ultra* that sum: *Story* v. *Finnis et al*, 6 Ex. 123; *Schreger* v. *Carden et al*, 11 C. B. 851; *Perrin* v. *The Monmouthshire R. & Canal Co.* 11 C. B. 855. See also *Knight* v. *Egerton et al*, 7 Ex. 407; *Leyland* v. *Tancred et al*, 16 Q. B. 664. In England defendants have been refused permission to plead with payment into court, a plea denying the whole cause of action alleged in the declaration: *Thompson* v. *Jackson*, 8 Dowl. P. C. 591; *Dearle* v. *Barrett*, 2 A. & E. 82; *O'Brien* v. *Clement*, 15 M. & W. 435; see also *Thomas* v. *Hawkes et al*, 8 M. & W. 140. Where, in an action on a bill of exchange for £40, defendant paid £41 8s. into court, it was held that evidence of payment of part before action brought was inadmissible: *Adams* v. *Palk*, 3 Q. B. 2. If the payment be made and pleaded in an action when it should not be made, plaintiff's course is to move to strike out the plea under this act. As to the effect of inconsistent pleas when allowed to stand, see *Fischer* v. *Aidé*, 2 Dowl. P. C. 594; *Twemlow et al* v. *Askey et al*, *Ib.* 597.

(*e*) The form given by this act must be adopted "as near as may be" in all cases. It is not necessary, in the special cases of justices of the peace and particular officers entitled to pay money into court by different statutes, that the character of the defendant should be stated in the plea. The provision that the plea shall be "*as near as may be*" in the form given, "*mutatis mutandis*," is only to authorize such alterations as may be necessary in order to adapt the plea to the names of the parties, cause of action, sum paid, and the like: *Thompson* v. *Sheppard*, 4 El. & B. 53; *Aston* v. *Perkes et al*, 15 M. & W. 385; *Lowe* v. *Steele*, *Ib.* 380.

(*f*) See note *m* to section 96.

(*g*) A plea for another by a person not an attorney is not a nullity, but may be set aside on motion: see note *n* to section 96.

(*h*) The plea ought to show whether defendant pleads in person or by attorney: see note *u* to section 85.

(*i*) Money may be paid into court and pleaded as to one or more of several counts: *Fullwell* v. *Hall*, 2 W. Bl. 837; *Hall et al* v. *East India Co.* 2 Burr. 1120. It has been held that payment made jointly upon two breaches in covenant is good, without showing how it is intended to be applied to each: *Marshall* v. *Whiteside et ux.* 4 Dowl. P. C. 766. But where, among other counts, there was one on a bill of

parcel of the money claimed,) (*j*) brings into Court the sum of (*k*) ———, and says the said sum is enough to satisfy the claim of the Plaintiff in respect of the matter herein pleaded to. (*l*) 19 Vic. c. 48, s. 120.

Reply of Plaintiff in such case.

102. (*m*) The Plaintiff may (*n*) reply to a plea of payment of money into Court, by accepting the sum so paid in, in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and may in that case tax his costs of suit, and in case of non-payment thereof

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exchange, it was suggested that the plea of payment into court should state how much of the money was intended to be applied to the bill: *Jourdain* v. *Johnson*, 2 C. M. & R. 564; *Armfield* v. *Burgin et al*, 8 Dowl. P. C. 247; *Tattersall* v. *Parkinson*, 16 M. & W. 752; also see *Finleyson* v. *Mackenzie*, 3 Bing. N. C. 824; *Harris* v. *Bushell*, 2 Dowl. N. S. 514; *Hills et al* v. *Mesnard et al*, 10 Q. B. 266; *Bailey et al* v. *Sweeting*, 1 D. & L. 653.

(*j*) A plaintiff may recover less than he claims in his declaration, so the defendant in his plea may allege that less is due than is claimed: *Tattersall* v. *Parkinson*, 16 M. & W. 757, *per* Parke, B.

(*k*) A payment into court of a less sum than that admitted by the plea to be due, would be bad: see *Tattersall* v. *Parkinson*, 16 M. & W. 752; *Grimsley* v. *Parker*, 3 Ex. 610. If plaintiff be entitled to interest on his cause of action, defendant should pay interest, to be reckoned to the date of payment, and not merely to the date of the commencement of the action: *Kidd* v. *Walker*, 1 Dowl. P. C. 331. A defendant may be allowed to amend his plea by pleading payment of a further sum than that at first pleaded: *Domett et al* v. *Young et al*, Car. & M. 465. Where defendant paid into court the amount claimed and offered to pay costs which plaintiff declined, undertaking to pay them himself: *Held*, that defendant was entitled to succeed on his plea of payment into court: *Thame* v. *Boast*, 17 L. J. Q. B. 339.

(*l*) *And says that the said sum is enough to satisfy*, &c. This is tantamount to the old form of no damages *ultra*, and is a substitution therefor. It is the material and traversable point in the plea. Where, to an action for goods sold, money due, &c., defendant pleaded as to part never indebted, and as to the residue payment after action brought, naming the sum, which plaintiff accepted and received in satisfaction of the said *claim* of A, "and of all *damages* accrued in respect thereof," but only proved that the amount so paid was the debt sued for without costs: *Held*, plea not proven: *Cooke* v. *Hopewell*, 26 L. T. Rep. 224.

(*m*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 73. Substantially a re-enactment of Rule 18 E. T. 5 Vic., which was copied from Eng. rule 19 T. T. 1 Vic. The effect of this section is to allow plaintiff either to take the money paid into court with his costs, or to reply damages *ultra*. Whatever may be the result of the cause, plaintiff will be entitled to the amount paid into court, provided defendant be not a justice of the peace or other person entitled to special protection by statute.

(*n*) Plaintiff shall be at liberty either to accept or refuse the money paid into court. Defendant by pleading payment into court admits plaintiff's right to recover *some* damages, but contends that he has no right to a sum exceeding that paid into court and pleaded. This of course the plaintiff may dispute in his replication, and thereupon proceed to trial. The *amount* of damages to which a plaintiff may be entitled is generally a question for the decision of a jury.

Plaintiff satisfied. Plaintiff not satisfied.

within forty-eight hours, may sign judgment (*o*) for his costs so taxed; (*p*) or the Plaintiff may reply that the sum paid in is not enough (*q*) to satisfy his claim in respect of the matter to which the plea has been pleaded, (*r*) and in the event of an issue thereon being found for the Defendant, the Defendant shall be entitled to judgment and his costs of suit. (*s*) 19 Vic. c. 43, s. 122.

(*o*) Where plaintiff's attorney, by *mistake*, accepted money paid into court, and signed judgment for costs, the judgment upon application of plaintiff and upon payment of costs, was set aside, and plaintiff permitted to proceed with his action: *Emery* v. *Webster*, 9 Ex. 242.

(*p*) The *quantum* of costs to be allowed plaintiff will depend upon the form of issue raised by the plea of payment into court: see *Harold* v. *Smith*, 5 H. & N. 381. That plea may be either in respect of the whole cause of action, or only of a part selected, and, as it were, isolated by defendant. If the plea be to the whole declaration, plaintiff is undoubtedly entitled to take out of court the amount so pleaded, and to tax his costs of suit, which ends the cause. But if defendant has filed several pleas, of which the plea of payment into court applies only to part of the declaration, and the remaining pleas to the residue, the plaintiff by accepting the money so paid into court is only entitled to the costs of the cause in respect to that part of the declaration to which payment is pleaded: *Rumbelow* v. *Whalley*, 16 Q. B. 397; also R. G. pr. 12; and must either reply or enter a *nolle prosequi* as to the residue: *Emmett* v. *Standen*, 6 Dowl. P. C. 591. If he elect to go to trial, and fail on the residue, defendant will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for plea," but not before: R. G. pr. 12. And if plaintiff in such a case neglect either to enter a *nolle prosequi* or to proceed to trial, defendant will have the right, upon proper demand, to sign judgment of *non pros.*: see *Topham* v. *Kidmore*, 5 Dowl. P. C. 676; *Goodes* v. *Goldsmith*, *Ib.* 288; *Coates et al* v. *Stevens*, 3 Dowl. P. C. 784.

(*q*) Plaintiff, if he afterwards change his mind, may apply to amend his replication by accepting the money paid into court, upon paying defendant all costs incurred by him subsequent to the payment into court: *Kelly* v. *Flint*, 5 Dowl. P. C. 293.

(*r*) This is in lieu of the old form of replication, that the defendant "was and is indebted to plaintiff in a greater sum" than that paid into court: see *Faithful* v. *Achley*, 9 Dowl. P. C. 555.

(*s*) Defendant in this case, it is apprehended, would be entitled to his costs of suit, and not merely those incurred since payment into court, according to the old practice; the costs to be in respect of the whole or a portion (as the case may be) of the plaintiff's cause of action so far as covered by the plea of payment: see *Harrison* v. *Watt et ux*, 16 M. & W. 316; *Thame* v. *Boast*, 12 Q. B. 808; *Rumbelow* v. *Whalley*, 16 Q. B. 397. This rule as to costs will apply if plaintiff be nonsuited: *Shillibeer* v. *Lingwood*, 15 L. T. Rep. 143. Or if defendant be allowed to sign judgment under section 227, upon a suggestion that plaintiff neglects to proceed to trial: see *McLean* v. *Phillips*, 7 C. B. 817. And if part of the demand be paid after action brought and the remainder paid into court and pleaded, defendant will be entitled to the general costs of the cause: *Horner* v. *Denham*, 12 Q. B. 813. But where plaintiff having after plea obtained leave to amend his declaration on payment of costs by increasing the amount of damages, and defendant having after amendment paid money into court by which one of his pleas became

103. (*t*) In case doubts arise as to the form of pleas when causes of action may be considered to partake of the character both of breaches of contract and of wrongs, (*u*) no plea good in substance shall be objectionable on the ground of its treat- Plea good, though it treat an alleged breach of contract as a wrong, and *vice versâ*.

unavailable, held that he was not entitled to the costs of such plea. *Gould* v. *Oliver*, 5 Bing. N. C. 115. The phraseology of this section, though apparently contemplating payment pleaded to the whole declaration, is clearly like that of the old rules; the policy of which was to make each party pay costs in respect of that part of the case in which he was wrong: case in Chambers, reported in note *a* to p. 520 of 4 D. & L., *per* Alderson, B.; see also *Goodee* v. *Goldsmith*, 5 Dowl. P. C. 288; *Amor* v. *Cuthbert et al*, 1 Dowl. N. S. 160. Where therefore to debt for goods sold, money lent, &c., defendant pleaded except as to 15s. parcel, &c., never indebted, and as to the sum of 15s. payment into court, and plaintiff joined issue on the former plea, and accepted the 15s. paid in court and the issue was afterwards found for the defendant, it was *held* that plaintiff was entitled to all the costs relating to the 15s. paid into court: *Harrison* v. *Watt et ux*, 16 M. & W. 316: see further R. G. pr. 12. Where in an action of covenant the declaration contained several breaches, and £10 were paid into court, on one breach, leaving the others to be tried, upon which plaintiff recovered 1s. damages, plaintiff was held entitled to costs, notwithstanding the judge certified under Stat. 43 Eliz. cap. 6, s. 2, "that the jury in this case found a verdict for 1s. damages and no more:" *Richards* v. *Black*, 6 C. B. 443.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 74.

(*u*) It is unnecessary to enumerate any such doubts, as the section itself is sufficiently explanatory; but it may be mentioned that in the early case of *Powell* v. *Layton*, 2 B. & P. N.R. 365, the question arose, and it was held that to a count apparently in case, but substantially in contract, a plea in abatement for non-joinder (which can only be pleaded in an action on contract) was good: see also *Buddle* v. *Wilson*, 6 T. R. 369. A similar plea has been held to be inadmissible in an action clearly founded upon a tort: *Mitchell* v. *Tarbutt et al*, 5 T. R. 649; see also *Govett* v. *Radnidge et al.*, 3 East. 62; *Elwell* v. *The Grand Junction R. Co.*, 5 M. & W. 669. Where, in case against a common carrier for not safely conveying goods according to undertaking, to which defendant pleaded not guilty, *held* that the plea admitted the goods to have been received as alleged, but denied negligence in the performance of the duty resulting from the contract: *Webb* v. *Page*, 6 M. & G. 196. Though this section relieves defendants from the embarrassment of deciding whether a declaration is framed on breach of contract or for a wrong, yet it leaves open to doubt the effect of pleas on contract when pleaded to declarations sounding of tort or *vice versâ*, *e. g. non assumpsit* to an action on the case, or not guilty in an action of *assumpsit*. As to the effect of these and similar pleas in general, see R. G. pl. 6 *et seq.*, and in connexion therewith the following cases: *Passenger* v. *Brookes*, 1 Bing. N. C. 587; *Hemming* v. *Parry*, 6 C. & P. 580; *Smith* v. *Parsons*, 8 C. & P. 199; *Spencer* v. *Dawson*, 1 Moo. & R. 552. The mode in which the doubts here mentioned are precluded, is a necessary consequence of section 123, which enacts that no pleading shall be deemed insufficient which could heretofore have been objected to on special demurrer only; for a plea, though held bad before this act, for example, *non assumpsit*, in case was considered open to objection upon special demurrer only: *Davison* v. *Moreton*, 1 Chit. R. 715; *Heyne* v. ——. *Ib.* 716, note; *Ivemy* v. *Farrant*, 1 Dowl. P. C. 453; see also *Smith* v. *Jones*, 3 D. & R. 621. And it has been enacted by this act that either party can only object by demurrer to the pleading of the opposite party, on the ground "that such pleading does not set forth sufficient *ground* of action, defence or reply," &c.: section 120.

ing the declaration either as framed for a breach of contract or for a wrong. (*v*). 19 Vic. c. 43, s. 123.

104. (*w*) Pleas of payment (*x*) and set-off, (*y*) and all

(*v*) It may be necessary to draw attention to the fact that this section only declares that a plea good in substance shall not be objectionable merely because it treats a declaration as framed for a breach of contract, which is in fact for a wrong or *vice versa*, but does not render unobjectionable pleas in *assumpsit* to any form of action in which such pleas have heretofore been held or declared to be bad, such, for example, as *non assumpsit* to an action on a bill or note, &c.: see R. G. pl. 6, *et seq.*; also *Kelly* v. *Villebois*, 3 Jur. 1172; *Masson* v. *Hill et al*, 5 U.C. Q.B. 60; *Sewell* v. *Dale*, 8 Dowl. P. C. 309; *Eddison* v. *Peagram*, 4 D. & L. 277: *Bousfield* v. *Edge*, 1 Ex. 89; *Harney* v. *Hamilton*, 18 L. J. Ex. 377. It is presumed that pleas pleaded in contravention of established practice, may be set aside upon application under section 119 of this act.

(*w*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 75.

(*x*) A plea of payment is only necessary when there has been a debt incurred. No debt can be said to have been incurred where there has been no credit. Thus, where a man makes a purchase and *eo instanti* pays for the article and takes it and gives the money for it, there is no debt—it is an exchange of money for goods and there is no occasion to plead payment, for the man was never indebted. The same principle applies to all transactions that fairly come under the same arrangement, whether a man goes to an inn to eat his dinner, and pays for it immediately, or whether he goes to remain there for more than one meal, or even for a day or several days, where it is never intended that there should be any credit given, except for the moment as it were, while the goods are being handed over to be paid for: *Wood et ux.* v. *Bletcher*, 27 Law T. Rep. 126; see also *Bussey* v. *Barnett*, 9 M. & W. 312; *Littlechild* v. *Banks*, 7 Q. B. 739; *Fitzgerald et al* v. *The London Co-operative Assn.* 27 U. C. Q.B. 605. It has been held in debt on simple contract that where defendant pleads payment of a certain sum of money he must prove payment of *that* sum, (even though it be laid under a *videlicet*) in order to entitle him to a verdict on the whole plea; but that the plea may be taken distributively and the issue found for defendant as to the amount proved to have been paid, and as to the residue for plaintiff: *Cousins* v. *Paddon*, 2 C. M. & R. 547. Therefore, where in debt for goods sold and delivered, and work and labour done, the defendant pleaded *first, nunquam indebitatus; secondly*, as to parcel of the sum demanded, to wit, £338, payment of £338 in discharge of that parcel; *thirdly*, a set-off for money paid; the plaintiff proved a special contract for good sound saleable bricks, to be made for him by the defendant, at a certain price per thousand, and delivery of so many as amounted at that rate to £396; the defendant proved payment of £314 and a set-off for £21, and proved also that the bricks were badly made, and the jury found the value of those delivered to be not more than £335; the court directed the verdict to be entered on the plea of payment as to £314 for the defendant, as to the residue for the plaintiff; on the plea of set-off as to £21 for the defendant, as to the residue for the plaintiff; on the plea of *nunquam indebitatus* as to the whole sum demanded, except £335, for the defendant; so as to give the defendant judgment on the whole record: *Ib.*

(*y*) The statutes of set-off are 2 Geo. II. cap. 22, s. 13, and 8 Geo. II. cap. 24, ss. 4, 5. It has been held that if defendant plead to the whole cause of action set forth in the declaration a set-off of a sum of money, but do not prove that the amount so pleaded is equal to or greater than the aggregate amount of plaintiff's claim, there must be a verdict on that plea for the plaintiff: *Moore* v. *Butlin*, 7 A. & E. 595. It is an advantage to a defendant to be allowed to plead generally

other pleadings (*z*) capable of being construed distributively, shall be taken distributively, (*a*) and if issue be taken thereon and so much thereof as is a sufficient answer to part of the

Distributive plea to be construed distributively.

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that a greater sum is due to him than the amount of the plaintiff's demand; but then defendant has no right to take an unfair advantage of plaintiff by pleading to the whole, and thus taking the chance of proving as much as he can, and claim to be allowed a verdict for as much as he has proved, when he has not proved any set-off equal to that which he has pleaded or to the debt which the plaintiff has established. The general rule must apply, that if a party plead a special plea and fail in proving any part of it, he fails in proving the whole *quoad* the issue raised: *Tuck* v. *Tuck*, 5 M. & W. 111, *per* Abinger, C. B. But defendant cannot as a general rule for this purpose take into account a defence which arose after the commencement of the suit: see sections 97 and 98, and notes thereto. The language of the plea of set-off is to be understood as applying to the state of the account between the plaintiff and the defendant at the time of the commencement of the action. The defendant by that plea alleges that the plaintiff was at the time the action brought indebted to him in an amount equal to or greater than that in which he was indebted to plaintiff, and that such debt is still owing to him, defendant: *Spradbery* v. *Gillam*, 2 L. M. & P. 367, *per* Parke, B. The plea has been held to be so far divisable that if defendant by means of it taken with other pleas on the record, cover the *whole* of plaintiff's demand, he will be entitled on that plea to have a verdict entered in his favor for the amount proved: *Tuck* v. *Tuck*, 5 M. & W. 112, *per* Parke, B.; see also *Ford* v. *Beech*, 11 Q. B. 842; *Nichols* v. *Tuck*, 1 C. L. Rep. 532. But in this as in the case of a single plea to the whole declaration if the amount proved be less than the amount of claim established by plaintiff, the issue must be found for plaintiff: *Tuck* v. *Tuck*, 5 M. & W. 109; see also *Kilner* v. *Bailey et al*, 5 M. & W. 382; *Green* v. *Marsh*, 5 Dowl. P. C. 669. The case of *Tuck* v. *Tuck* is not so correctly reported in 7 Dowl. P. C. 373, as in 5 M. & W. 109. It in effect decides that plaintiff cannot have a verdict on a plea of set-off unless the plea cover plaintiff's demand as it stood originally, or as reduced by some other plea, but is no authority for depriving a defendant of the set-off in *reduction of damages*. Therefore it has been since held that a set-off, if pleaded and proved, though it do not cover the whole of plaintiff's claim, may prevail in reduction of damages: *Rodgers et al* v. *Maw*, 15 M. & W. 444.

(*z*) *And all other pleadings.* This section seems to embrace all forms of actions and all forms of pleading in any particular action—demurrers included. Demurrers have been held divisible long before this act: *Hinde et al* v. *Gray*, 1 M. & G. 201, note *a*; see also *Briscoe* v. *Hill*, 10 M. & W. 735; *Yates* v. *Tearle*, 8 Jur. 774. Whether there be a demurrer upon the record or not, the courts have laid down the rule that judgment must be given upon the whole record according to the truth. And that where several breaches are assigned in a declaration to the whole of which there is a demurrer, if any breach is well assigned, the plaintiff is entitled to judgment as to that breach: *Slade* v. *Hawley*, 13 M. & W. 757.

(*a*) Before the C. L. P. Acts where there was a plea justifying under an alleged right of way with horses, carts, and carriages, for the purpose of fetching water *and goods* from a navigable river, and the jury negatived the right as to the carrying of goods but affirmed it as to the carrying water, the court directed the verdict to be entered distributively: *Knight* v. *Woore*, 5 Dowl. P. C. 201. And where in trespass for breaking and entering *three* closes, defendant pleaded that the closes in which, &c., were the soil and freehold of one L. T., to which plaintiff replied alleging seisin in four other parties who demised to plaintiff, whose seisin the defendant in his rejoinder traversed, and at the trial plaintiff proved a case only as to *two* of the closes, but offered no evidence as to the third, it was held

causes of action be proved, and found true by the Jury, a verdict shall pass for the Defendant in respect of so much of the causes of action as are answered, and for the Plaintiff in respect of so much of the causes of action as are not answered; (*b*) and if upon a plea of set-off the Jury find a large

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that the issue was distributable, and that plaintiff was entitled to a verdict as to the two closes and defendant as to the third: *Phythian* v. *White et al*, 1 M. & W. 216; see also *Sharland* v. *Loaring*, 1 Ex. 375; *Vivian* v. *Jenkin et al*, 3 A. & E. 741; *Routledge* v. *Abbott et al*, 8 A. & E. 592. On a plea of *liberum tenementum* to an action of trespass *quare clausum fregit*, the defendant is entitled to a verdict if he prove a title to that *part* of the close in which the trespass was committed, and is not bound to prove title to the whole close: *Smith* v. *Royston*, 8 M. & W. 381. So as to a plea of leave and license to that action: *Bracegirdle* v. *Peacock et al*, 15 L. J. Q.B. 73; *Adams* v. *Andrews*, 20 L. J. Q.B. 33. Where a declaration was for breaking and entering a close generally and pulling down certain posts and bars standing thereon, to which defendant pleaded that there was a footway over the close, and that defendant, because the posts and bars obstructed the way, pulled them down, replication traversing the footway: *Held* that on these pleadings defendant was entitled to a verdict on proof of a right of way *in any direction* over the close: *Webber* v. *Sparkes et al*, 10 M. & W. 485. But where in case for disturbing the plaintiff's right of ferry from Greenwich to the Isle of Dogs and back again, to which defendant pleaded, *first*, not possessed of the ferry, *secondly*, that there was no such ferry; and plaintiff at the trial proved one half of what he claimed, *i. e.* the right *from* but not *to* the Isle of Dogs, it was held that the right alleged was divisible, and that plaintiffs were entitled to have the verdict entered for as much as they proved: *Giles et al* v. *Groves*, 12 Q. B. 721; but see *Higham* v. *Rabbett*, 7 Dowl. P. C. 653. So where to an action for applying water to other purposes than those of an engine defendant pleaded a prescriptive right to use the water for the purposes of a boiler and cistern. Defendant proved his right as to the boiler but not as to the cistern. *Held* that the verdict should be entered distributively: *Proprietors of the Rochdale Canal Co.* v. *Radcliffe*, 21 L. J. Q. B. 297. So in trover for certain goods described in which plaintiff succeeded only as to part of the goods claimed, it was held that defendant, who had pleaded amongst other pleas a plea denying plaintiff's property in the goods was entitled to have the verdict entered distributively: *Williams et al* v. *The Great Western Railway Co.* 8 M. & W. 856; see also *Elliott* v. *Bishop*, 10 Ex. 522. The same principle has been applied to actions for libel charging several offences, each of which might be separately justified: *Clarke* v. *Taylor et al*, 2 Bing. N.C. 654; *Mountney* v. *Watton*, 2 B. & Ad. 673; *McGregor* v. *Gregory*, 11 M. & W. 287. So in an action on several bills or notes to which there is a plea that they and each of them were and was produced by fraud: *Wood* v. *Peyton*, 2 D. & L. 172; see also *Loweth* v. *Smith et al*, 2 D. & L. 212. It has been clearly held that where a plea is so far distributive that part of it is an answer to the declaration, and the remaining part unnecessary to be proved, that proof of the former part is of itself sufficient to entitle defendant to a verdict: *Atkinson* v. *Warne*, 1 C. M. & R. 827. A plea pleaded to the whole declaration but an answer only on the face of it to some of the counts, is bad altogether and cannot be construed distributively under this section: *Chappell et al* v. *Davidson*, 2 Jur. N. S. 544; *Lyne et al* v. *Sissfield*, 1 H. & N. 278. But a plea to several counts bad as to some and good as to others may be taken distributively: *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369. See further *Stears* v. *South Essex Gas Light and Coke Co.* 9 C. B. N.S. 180.

(*b*) This section seems to apply only to pleas that answer the action by confession and avoidance, not to pleas in denial: *Wilkinson* v. *Kirby*, 23 L. J. C. P. 224.

sum proved to be due from the Plaintiff to the Defendant than is proved to be due from the Defendant to the Plaintiff, a verdict shall pass for the Defendant for the balance remaining due to him, (*c*) and he shall have Judgment to recover such balance and his costs of suit. (*d*) 19 Vic. c. 43, s. 124.

If on set-off, Defendant proves more due from Plaintiff than to him

105. (*e*) A Defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, (*f*) or may select and traverse separately

Traversing facts alleged in declaration.

It in effect extends the doctrine of *Cousins* v. *Paddon*, 2 C. M. & R. 547, and *Tuck* v. *Tuck*, 5 M. & W. 109, to all descriptions of pleadings: *Parr* v. *Jewell*, 16 C. B. 684; *Freshney et al* v. *Wells et al*, 26 L. J. Ex. 228; *Bennett* v. *Thompson*, 4 W. R 594; *Paterson* v. *Harris*, 2 B. & S. 814; see also *Gabriel et al* v. *Dresser*, 15 C. B. 622. It does not say that the principle of pleading is to be altered, according to which it is held that a plea which is bad in part is bad altogether: *Crump* v. *Adney et al*, 1 C. & M. 362; *Clarkson* v. *Lawson*, 6 Bing. 266; *Foulkes* v. *Scarfe et al*, 4 Scott, N. R. 713. The record is still to be taken as a whole record, and the meaning of the section is *that when at the trial the facts of a case can be taken distributively, they are to be so taken: Wilkinson* v. *Kirby*, 23 L. J. C. P. 228 *per* Jervis, C. J.

(*c*) The same in principle as in old Stat. U. C. 11 Geo. IV. cap. 5, s. 1.

(*d*) The right of a defendant to costs in general depends upon Stat. 23 Henry VIII. cap. 15 (extended by 4 Jac. I. cap. 3), which statute as construed in several cases applies, although a defendant cannot have a verdict in his favor on *every part* of the record: *Elderton* v. *Emmens*, 5 D. & L. 489. Costs are only given by this section to a party who succeeds upon an issue raised on the record: *Reynolds* v. *Harris*, 3 C. B. N.S. 267; see also *Traherne et al* v. *Gardner et al*, 8 El. & B. 161: *Davis* v. *Thomas*, 5 Jur. N.S. 709.

(*e*) Taken from Eng. Stat 15 & 16 Vic. cap. 76, s. 76.

(*f*) Such was the practice at common law. One plea only was allowed to be pleaded, and that plea true: *Gully et al* v. *The Bishop of Exeter*, 5 Bing. 45, *per* Best, C.J. In several actions there is a fixed and appropriate plea for traversing the declaration, in cases where the defendant means to deny its whole allegations, or the principal fact on which it is founded. The form of plea or traverse has usually been denominated the *general* issue in the particular action. It appears to have been so called because the issue that it tenders, involving the whole declaration or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a simple traverse. But as by the provision of recent rules of court (H. T. 4 Wm. IV., corresponding to ours of E. T. 5 Vic. of which R. G. pl. 6 *et seq.* are re-enactments,) such issues are now more limited in their effect than formerly, and the term "general issue" is therefore less appropriate: see R. G. pl. 6 *et seq.* and notes thereto; also Sch. B. No. 30 *et seq.* to this act. To review the cases distinguishing what defences may be given in evidence under the general issue, and what must be specially pleaded, would demand a treatise on pleading. Reference may be here made to a Digest of the decisions, compiled by Richard Charnock of Gray's Inn, London; see also *Blackie* v. *Pidding*, 6 C. B. 196; *Charnley* v. *Grundy*, 2 C. L. Rep. 822. If the general issue and special pleas be pleaded by defendant, and if it appear to the judge in chambers that a question might arise at nisi prius as to the admissibility as evidence of the matter specially pleaded under the general issue, the special pleas should be allowed to stand: *Lumley* v. *Gye*, 22 L. J. Ex. 9.

any material allegation in the declaration (*g*), although it might have been included in a general traverse. (*h*) 19 Vic. c. 43, s. 125.

(*g*) The general rule of law undoubtedly is, that a party shall not be allowed to take his traverse in such a form as to make matter which is immaterial, parcel of the issue: *Colborne* v. *Stockdale*, Stra. 493; *Goram* v. *Sweeting*, 2 Wms. Saunders, 204 a. But in certain cases, in which material and immaterial matters are mixed up in one combined and undivided allegation, the opposite party has been held entitled to traverse the whole compound allegation in the terms in which it is pleaded: *Tatem et al* v. *Perient*, Yelv. 195; *Smith* v. *Dixon*, 7 A. & E. 1; *Cutts* v. *Surridge et al*, 11 Jur. 585; *King* v. *Norman*, 4 C. B. 884. No traverse should be so large as to compel the opposite party to prove more than he otherwise would be bound to do in order to support his claim or defence: *Eden* v. *Turtle*, 10 M. & W. 635; *Bradley* v. *Bardsley et al*, 14 M. & W. 873; *Soares* v. *Glyn et al*, 8 Q. B. 24. The rules as to traverses are in general terms thus mentioned in Steph. Pl. 7 ed. 220 *et seq.* 1. The traverse must not be taken on an immaterial point. 2. It must not be too large, nor, on the other hand, too narrow. Numerous authorities are referred to by the learned author in support of these rules. The obligation to apply for leave to plead double or else judgment, applies as much to traverses as to affirmative pleadings: *Rosse* v. *Cummings*, 2 U. C. L. J. 227. Plaintiff of course will not be allowed to attempt a traverse of that which is not allowed in the declaration: *Jarvis* v. *Durand*, 4 U. C. L. J. 22. But there are certain pleas of which any two or more of them may be pleaded together as of course, without leave of the court or a judge: see section 112.

(*h*) In order that a defendant may not be put in a worse situation than when the general issue in its widest acceptation of the term was permitted, provision has been made for the allowance of several special pleas, separately traversing material allegations formerly traversed by one general plea. Instead of one plea only, as at common law, being allowed, it is not an uncommon thing now to find several upon the record. The strictness has been relaxed, for the promotion, but not for the perversion of justice: *Cooling* v. *The Great Northern Railway Co.* 15 Q.B. 496, *per* Campbell, C. J. The concluding part of the section under consideration does not apply to the pleading of several matters, as to which generally, see section 110 and notes thereto. The express power to traverse specially an allegation contained in the declaration, although it might have been included in a general traverse, is new, and such as has been heretofore refused: *Sutherland* v. *Pratt et al*, 11 M. & W. 312, *per* Parke, B. The true principle of pleading several matters is, that if the justice of the case require it, the court will not prevent it; but the court will not allow a party so to plead, merely for the purpose of throwing difficulties in the way of his opponent: *Gully et al* v. *Bishop of Exeter*, 5 Bing. 48, *per* Gaselee, J. The object of pleading is to narrow the matter in dispute to a single point; therefore a defendant is not permitted to traverse a series of facts wholly immaterial to his defence: *Ib.* 45, *per* Best, C. J. In criminal cases the law allows a prisoner to put the prosecutor upon proving his case in every material particular; but in civil proceedings the interest of both parties requires that they should be put to as *little expense as possible*. It is an important duty of the court, in the exercise of its discretion as to pleas, to render justice as cheap and as expeditious as possible: *Ib.* 46; see also *The London and Brighton R. Co.* v. *Wilson*, 6 Bing. N. C. 135; *The London & Brighton R. Co.* v. *Fairclough*, *Ib.* 270; *The South-Eastern R. Co.* v. *Hebblewhite*, 12 A. & E. 497. If a defendant, under colour of this section abuse the powers conferred as to traversing separately material allegations of plaintiff's declaration, not admissible under section 112, the course of the latter is (if no leave has been granted to traverse separately under section 110 the several matters), to sign judgment under section 113; but if leave has been given, then

106. (*i*) A Plaintiff may traverse the whole of any plea or subsequent pleading of the Defendant by a general denial, (*j*) or admitting some part or parts thereof (*k*) may

Traversing pleas.

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plaintiff must apply to the court or a judge, under the provisions of section 119 of this act. Where, since this act, in an action of crim. con., defendant applied under section 110 to be allowed to plead, 1st, not guilty; 2nd, that the person whom defendant debauched was not plaintiff's wife; 3rd, leave and license of plaintiff; 4th, that before and at the time of the committing of the grievances complained of, plaintiff had relinquished and renounced the society, comfort and assistance of his wife, and had separated himself and was living apart from her, and had never since returned to her; Burns, J., disallowed the second plea as being included in the first, and therefore "unnecessary," and also disallowed the fourth, as affording no answer to the declaration, and therefore "bad in substance": *Thom* v. *Huddy*, 2 U.C. L.J. 230. But see *Patterson* v. *McGregor*, 28 U.C.Q.B. 280.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 77.

(*j*) The general form of replication intended by this section is in the nature of the replication *de injuria*, and is indeed a substitute for it: *Glover* v. *Dixon et al*, 9 Ex. 158; *Stewart* v. *Rowlands*, *MS.* U. C. C. P. E. T. 1865. And with respect to the replication *de injuria*, it was a settled rule that it put in issue only the material allegations of the plea: *Davis* v. *Chapman*, 2 M. & G. 927, *per* Tindal, C. J.; *Elkin* v. *Janson*, 13 M. & W. 655; *Forster* v. *Bettes et al*, 5 U. C. Q. B. 599; and was only pleaded when the plea contained matter of confession or of excuse: *Crogate's case*, 8 Rep. 67 *a*; *Whittaker et al* v. *Mason*, 2 Bing. N. C. 359; *Isaac* v. *Farrar*, 1 M. & W. 65; *Parker* v. *Riley*, 3 M. & W. 230; *Humphreys* v. *O'Connell*, 7 M. & W. 370; *Solly et al* v. *Neish*, 4 Dowl. P. C. 248; *Jones et al* v. *Senior*, 4 M. & W. 123; *Noel* v. *Rich*, 4 Dowl. P. C. 228; *Salter* v. *Purchell*, 1 Q. B. 209; *Scott et al* v. *Chappelow*, 2 Dowl. N. S. 78; *Thompson* v. *Breakenridge et al*, 3 O. S. 170; *Blair* v. *Bruce*, 5 O. S. 524; *Leonard* v. *Buchanan*, M. T. 6 Vic. *MS.* R. & H. Dig. "De Injuria," 4; *Davidson* v. *Bartlett et al*, 1 U.C. Q.B. 50; *Hamilton* v. *Davis et al*, *Ib.* 176; *Vanorman* v. *Leonard*, 2 U.C. Q.B. 72; *Rattray* v. *McDonald et al*, 3 U.C. Q.B. 354; *Bown* v. *Hawke*, 5 U.C. Q.B. 568; *McCuniffe* v. *Allan et al*, *Ib.* 571; *Macfarlane* v. *Kezar et al*, *Ib.* 580; *Boswell* v. *Rutlan*, 6 U.C. Q.B. 199; *Muttleberry et al* v. *Hornby et al*, 6 U.C. Q.B. 61; *Brooke* v. *McCausland*, *Ib.* 104; *Richardson* v. *Phippen*, 9 U.C. Q.B. 255; *Parks* v. *Maybee*, 2 U. C. C. P. 257; *Coleman* v. *Sherwood*, 3 U. C. C. P. 359; *Walker et al* v. *Hawke*, *Ib.* 428. Where the plea contained matter of denial and not of excuse, plaintiff's only course, if not otherwise able to put in issue by one general replication the whole subject matter of the defence, was to take issue separately on independent and material allegations: *Regil* v. *Green*, 1 M. & W. 328. This section does not dispense with the necessity for replying specially where that was necessary before the act: *Glover* v. *Dixon et al*, 9 Ex. 158. It does not appear to apply to a plaintiff in replevin: *Trent* v. *Hunt*, 9 Ex. 14. *Quære*, if a general replication is a sufficient traverse of a plea by a defendant averring performance of conditions precedent: see *Tetley et al* v. *Wanless*, L. R. 2 Ex. 25, *per* Bramwell, B. *De injuria* has been held to be a good replication to a general or special plea of fraud: *Washbourn* v. *Burrows*, 1 Ex. 107.

(*k*) It is an established rule of pleading, that by pleading over, every traversable allegation which is not traversed is admitted: *Hudson* v. *Jones*, 1 Salk. 90. But allegations not material are not thereby confessed: *Rex* v. *Bishop of Chester et al*, 2 Salk. 560. In a case, which underwent much discussion in the House of Lords, it was held that the rule as to admissions upon the record applied only to cases in which there was an express admission upon the record, or a pleading in confession and avoidance: *Gwynne* v. *Burnell et al*, 6 Bing. N. C. 453; and that a replication which put in issue part only of a plea, thereby admitted the residue to

deny all the rest or deny any one or more allegations. (*l*) 19 Vic. c. 43, s. 126.

Replications, &c.

107. (*m*) A Defendant may in the like manner (*n*) deny the whole or part of a replication or subsequent pleading of the Plaintiff. 19 Vic. c. 43, s. 127.

Joining issue.

108. (*o*) Either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect : (*p*)

The Plaintiff joins issue (*q*) on the Defendant's, first (&c. *specifying which or what part*) plea.

The Defendant joins issue upon the Plaintiff's replication to the first (&c. *specifying which*) plea.

Joinder how construed.

And such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent plead-

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be true; and that if such residue were true and a good defence, a repleader might be awarded at the instance of defendant: see *Atkinson et al* v. *Davies*, 2 Dowl. N.S. 778: see also R. & H. Dig. "Arrest of Judgment," *passim* and "Repleader." Sometimes an express admission is made of certain facts contained in a pleading, with a denial of other facts upon which issue is taken: see *Carnaby* v. *Welby*, 8 A. & E. 872; *Hewitt* v. *Macquire*, 21 L. J. Ex. 30; *Tuckey* v. *Hawkins*, 4 C. B. 655.

(*l*) This is applying to plaintiffs, in their replications, the rules already enacted as to defendants in their pleas: sec. 105. It has never been doubted that a plaintiff who is at liberty to deny several facts stated in a plea, might select some only and traverse them: *Garten* v. *Robinson*, 2 Dowl. N. S. 47, *per* Wightman, J.

(*m*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 78.

(*n*) *In like manner*, &c., *i. e.* in the manner prescribed in sections 105, 106. This section in effect extends the doctrine of *Cousins* v. *Paddon*, 2 C. M. & R. 547, mentioned in notes to sections 105, 106, to all descriptions of pleadings: *Parr* v. *Jewell*, 16 C. B. 684.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 79.

(*p*) Compliance with section 77 as to the intitling of the pleading is necessary: see notes in that section.

(*q*) "*Takes issue*" are the words used in Schedule B., No. 43. It is suggested that in practice the plaintiff "joins issue" upon a negative plea, and "takes issue" upon an affirmative one. When he joins issue it is unnecessary to add any further pleading on the part of the defendant, the issue being then completed. But if plaintiff "takes issue," it seems that he ought to add a *similiter* for defendant. This he may do as part of the issue and may at once proceed: Paterson, Macnamara & Marshall's Prac. 202. The *similiter* is not abolished by the C. L. P. Act. It may still be used as a pleading and as "the last pleading," for the purpose of giving notice that a jury is required under the Law Reform Act of Ontario: *Quebec Bank* v. *Gray et al*, 5 U. C. L. J. N.S. 70.

ing, and an issue thereon; (*r*) and in all cases where the Plaintiff's pleading is in denial of the pleading of the Defendant, or some part of it, the Plaintiff may add a joinder of issue for the Defendant. (*s*) 19 Vic. c. 43, s. 128.

(*r*) The object of this new form is merely to enable a party in a compendious manner to traverse all those allegations in a pleading which he could have traversed before the act: *Glover* v. *Dixon et al*, 9 Ex. 159, *per* Pollock, C. B. The new form only traverses such material facts as could formerly be traversed, but where the plaintiff was bound to new assign, he must still do so: *Ib. per* Parke, B. For example, if in trespass *quare clausum fregit* defendant having an easement which he pleads, but which in use he exceeded, it is for plaintiff to new assign: *Colchester* v. *Roberts*, 4 M. & W. 769. Special provision is by this act made for new assignments: section 115. But to return to the text. It is enacted that the new form of joinder of issue "shall be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon." And it is a rule that no new matter foreign to the issue joined shall be admissible in evidence. Such facts therefore as would go to *disprove* the plea or other pleading upon which issue is joined would be proper evidence. New matter, if not disproving anything advanced in the plea, must be specially pleaded: *Sayre* v. *Earl of Rochford*, 2 W. Bl. 1165; *Thompson* v. *Hardinge et al*, 1 C. B. 940; *Ewer* v. *Jones*, 9 Q. B. 623; *Ryan* v. *Clark et al*, 7 D. & L. 8; *Evans* v. *Ogilvie*, 2 Y. & J. 79; *Cowling* v. *Higginson*, 4 M. & W. 245; *Penn* v. *Ward*, 2 C. M. & R. 338; *Oakes et ux.* v. *Wood*, 2 M. & W. 791; *Cowlishaw* v. *Chcslyn*, 1 C. & J. 48; *Wyld* v. *Pickford et al*, 8 M. & W. 443; *Baker* v. *Walker*, 3 D. & L. 46; *May* v. *Seyler et al*, 2 Ex 563; *Tolhurst* v. *Notley*, 17 L. J. Q.B. 97; *Weeding* v. *Aldrich*, 9 A. & E. 861; *Jones* v. *Jones et al*, 4 D. & L. 494; *Robertson* v. *Gantlett*, *Ib.* 548; *Eyre* v. *Scovell et al*, 5 D. & L. 516; *Powell* v. *Bradbury et al*, 7 C. B. 201; *Spotswoode* v. *Burrow et al*, 19 L. J. Ex. 226.

(*s*) The power of one party to join issue for the other appears to be restricted to plaintiffs. It is usual for plaintiff to add the joinder, make up the issue, and deliver it with notice of trial, all at the same time. But defendant is not conclusively bound by these acts of plaintiff. He may serve upon plaintiff a notice that "he does not receive the issue delivered in this cause, but considers the same as a replication." Thereupon it is open for defendant either to plead or demur in the usual manner. The English practice limits defendant for this purpose to four days: *Adkins* v. *Anderson*, 1 Dowl. N.S. 877; and our practice is now similar: R. G. pr. 33. If defendant neither plead nor demur within the time limited, plaintiff's course is to sign judgment for want of a plea: *Twycross* v. *King*, 6 Q. B. 663. A demurrer that is frivolous entitles plaintiff to move to set it aside and to enter judgment: *Talbot* v. *Bulkeley*, 4 D & L. 306. But where there are pleas on the record other than that demurred to, judgment so signed would appear to be irregular: *Ib.* The rule in such case should be to set aside the *issue*, trial, and subsequent proceedings: *Ib.* And where in consequence of a frivolous demurrer plaintiff was prevented from going to trial, the court notwithstanding the existence of several issues made a rule absolute for plaintiff to sign judgment as for want of a plea, unless defendant should consent to the following terms, viz., that the pleadings ending in the demurrer be struck out, the defendant paying the costs of the application, and of preparing for a trial which had been lost, within four days after application, and taking short notice of trial for the sittings after term *Tucker* v. *Barnesley*, 4 D. & L. 292. But it has been held that if a defendant at any stage of the cause strike out the joinder and demur, and that demurrer is *not set aside as frivolous*, it renders nugatory a notice of trial previously given. Nothing that plaintiff could afterwards do would render such notice good: *Pro e*

Pleading and demurring at the same time.

Affidavit may be required.

109. (*t*) Either party may, by leave of the Court or a Judge, (*u*) plead and demur to the same pleading at the same time, (*v*) upon an affidavit by such party or his Attorney, if required by the Court or Judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, (*w*) and that he is further advised and believes

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v. *Pain et al*, 2 L. M. & P. 613, *per* Erle, J.; see also *Lock* v. *The Wilts, Somerset, and Weymouth R. Co.* 14 Law T. Rep. 415.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 80. Founded upon the first report of the Common Law Commissioners, section 49. Held in England to apply to pleadings in *quare impedit*: *Marshall* v. *Bishop of Exeter et al*, 7 C. B. N.S. 653; see also *Regina* v. *Seale*, 5 El. & B. 1. The crown has a prerogative right to plead double traverse and demur at the same time: *Tobin et al* v. *The Queen*, 14 C. B. N.S. 505; *Regina* v. *Diplock*, 19 L. T. N. S. 380. Held on an information for intrusion upon land of the crown, there being no proof that the defendant had been out of possession for twenty years, that under not guilty defendant could not give evidence of title under a crown lease: *Regina* v. *Sinnott*, 27 U. C. Q. B. 539. Held also on this plea that the crown was not entitled to judgment alone, but must go down to trial to show intrusion and damages: *Ib.*

(*u*) *Court or judge.* Relative powers, see note *w* to section 48.

(*v*) The power of pleading and demurring is placed under the control of the court in order that it may "not be resorted to for delay." The application is discretionary and may be made to the court or a judge in chambers. If to the latter and he decline to grant it, the court above will not generally interfere with his decision: *Thompson* v. *Knowles*, 18 Jur. 1018. And if defendant without leave "plead and demur to the same pleading at the same time," it would seem that plaintiff may treat the whole as a nullity and sign judgment: *Bayley* v. *Baker*, 1 Dowl. N. S. 891. As to power of defendant to rejoin and demur: see *Dunne* v. *Gumley*, 8 Ir. C. L. R. App. ii.

(*w*) The privilege given by this section is only to be allowed where a man shows by his own affidavit that he has merits in fact as well as in law: *Lumley* v. *Gye*, 16 Jur. 1048. The court will not be satisfied with an affidavit following the words of the statute ("he is advised and believed," &c.) where the matters are within the personal knowledge of the party pleading: *Ib. per* Parke, B. In such a case the affidavit must be positive; but in other cases expression of belief in the words of the statute will be sufficient: *Ib.* If a third person be vouched by defendant, it should be shown by him either that he has made inquiry of that person, or that it would be impossible or inconvenient so to do: [illegible] in an action on a contract the court allowed defendant both to plead [illegible]demur to the declaration, though the validity of the contract sued upon had been affirmed on a motion for an injunction in the court of Chancery, to [illegible]he defendant was a party, and in the decision of which court he had [illegible]ed: *Ib.* So to a declaration alleging that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently, and deceitfully represented to the plaintiff that the defendant had attained the age of twenty-one years, and that the plaintiff confiding in the truth of the said representation and

that the objections raised by such demurrer are good and valid objections in law, (*x*) and the Court or a Judge may direct which issue shall be first disposed of. (*y*) 19 Vic. c. 43, s. 129.

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pretence, did lend the defendant a sum of money, &c.: whereas the defendant had not at the time of his making the said representation and pretence, attained the age of twenty-one, but was an infant under that age, as the defendant at the time of his making the said representation well knew, and that the defendant refused to pay the said loan, &c., whereby the plaintiff was damaged, &c.: *Price* v. *Hewett*, 8 Ex. 146. Defendant obtained leave to demur and to plead, first, not guilty, and secondly, a traverse that plaintiff confided in the alleged fraudulent representation upon an affidavit of the defendant's attorney, which stated that he was advised and believed that the defendant had under the circumstances aforesaid just ground to plead not guilty to the declaration, and also a traverse that plaintiff confided in the alleged fraudulent representation, and that he was also advised and believed that the declaration would be held bad in substance on demurrer: *Ib.* In an action to recover the price of a horse sold, the defendant pleaded that he became and was indebted to plaintiff by means of the fraud of plaintiff. The plaintiff applied for leave to demur and to reply to that plea, and it was refused: *Lawton* v. *Elmore*, 30 L. T. Rep. 244.

(*x*) As to which see sections 119, 123, of this act and notes thereto.

(*y*) The meaning of this provision is that it shall be in the discretion of *the* court in which the cause is entered to direct which issue shall be first disposed of in *that* court. Therefore where there were issues in law and in fact in a case, and the former were decided in favor of the plaintiff, the court in which the decision took place refused to delay the issues in fact until the issues in law were finally disposed of in a court of error, where defendant contemplated bringing the case: *Lumley* v. *Gye*, 2 El. & B. 216. Now in all cases where leave is given to raise an issue or issues of law together with an issue or issues of fact to any declaration or subsequent pleading, the issue or issues of law shall be determined before the trial of the issue or issues of fact, unless otherwise expressly ordered by the court or judge in the rule or order permitting such issue or issues to be raised: Rule M. T. 29 Vic. 25 U. C. Q. B. 150. It is generally advisable to determine a demurrer first, for if it goes to the whole cause of action and is decided against the plaintiff, it is *conclusive* and there is no occasion afterwards to try the issue in fact: *Price* v. *Hewett*, 8 Ex. 148; *Crucknell* v. *Trueman*, 9 M. & W. 684 *The Municipality of Sandwich* v. *Drouillard*, 3 U. C. L. J. 113; *Knight* v. *Lynch*, 8 Ir. C. L. R. App. lxvii. Whereas if the issue in fact is first tried and found for the plaintiff, he must still proceed to the determination of the demurrer, and, if that be determined against him, he will not be allowed his costs on the trial of the issue in fact: 2 Wms. Saunders, 300 (3). But see *Bird* v. *Higginson*, 5 A & E. 83, according to which the plaintiff would be entitled to costs of the trial But if it appear that the decision of the demurrer will not have *any bearing* on the issues in fact, the court or judge may have good reason for expressly directing that the issue in law shall not be tried before the issue in fact *Roberts* v. *Taylor et al*, 7 M. & G. 659. If the issues are to be tried before the demurrer is argued the damages are said to be *contingent*, depending upon the event of the demurrer, and it is necessary for the jury to assess contingent damages. The award of *venire* in such a case is as well to try the issue as to inquire of the contingent damages: 2 Wms. Saunders, 300 (3). It has been held that where the *venire* was in this form, but the jury without assessing contingent damages on the issue in law found a general verdict for the defendant upon all the issues in fact, that the plaintiff was not entitled to a *venire de novo*: *Gregory* v. *Duke of*

110. (*z*) The Plaintiff may, by leave of the Court or a

Brunswick et al, 6 M. & G. 953. And where leave had been granted to a defendant to plead and demur and directions were given that the demurrer should be first disposed of, and the parties thereupon proceeded to issue, and judgment was given for plaintiff on a demurrer to a surrejoinder, on the ground that the *plea* was bad, the court afterwards declined at plaintiff's instance to rescind the judge's order, giving to defendant leave both to plead and demur: *Sheehy* v. *The Professional Life Assur. Co.* 13 C. B. 787; see also *Hinton* v. *Acraman*, 4 D. & L. 462. Pending the decision of issues in law, the courts have refused judgment as in case of a non-suit for not proceeding to trial pursuant to notice on issues in fact: *Connop et al* v. *Levy*, 6 D. & L. 282. But in a case where defendant had pleaded several pleas, to some of which plaintiff demurred and to others joined issue, and the demurrers were argued and judgment given for defendant; but plaintiff not having proceeded to trial upon the issues in fact, defendant obtained a rule *nisi* for judgment as in case of nonsuit, and on shewing cause the plaintiff offered a *stet processus*; at the suggestion of the court a *nolle prosequi* was entered to so much of the declaration as applied to the issues in fact, the defendant waiving his right to costs upon such *nolle prosequi*: *Quarrington* v. *Arthur*, 2 Dowl. N.S. 1036. *Semble* that a *stet processus* cannot be entered to a part of a record: *Ib.* Where issues in law and in fact were joined on the same pleas, and the issues in fact were first tried and found by the jury for the plaintiff and no motion was made to set aside the verdict upon the issues in law coming up for argument, the court declined to hear them, it being considered useless and unnecessary to determine pleas to be good in law which had been found bad in fact: *Derbishire et al* v. *Feehan et al*, 12 U.C. C.P. 502. Where defendant pleaded not guilty and a special plea, to which the plaintiff demurred, and carried the case to trial before arguing the demurrer. Defendant obtained a verdict on not guilty. Plaintiff then set down the demurrer for argument in order to obtain the costs of it, but the court under the circumstances refused to hear the argument: *Macmartin* v. *Thompson*, 26 U. C. Q. B. 334. As to apportionment of costs if plaintiff succeed upon issues in fact but fail upon issues in law or *vice versa*: see *Bird* v. *Higginson*, 5 A. & E. 83; *Clarke* v. *Allatt*, 4 C. B. 335; *Partridge* v. *Gardner*, 4 Ex. 303; *Howell* v. *Rodbard*, *Ib.* 309; *Williams et al* v. *Vines et al*, 9 Jur. 809; *Poole* v. *Grantham*, 2 D. & L. 622; *Davis* v. *Davis*, 5 O. S. 453; *Sheldon* v. *Hamilton*, *MS.* M. T. 3 Vic. R. & H. Dig. "Costs," III. 3; *Bank B. N. America* v. *Ainley*, 7 U. C. Q.B. 521; *Scott* v. *Count de Richebourg*, 11 C. B. 447; *Smith* v. *Hartley*, *Ib.* 678.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 81; founded upon the first report of the Common Law Comrs. section 59. The crown has the prerogative right by distinct replications to reply several matters: *Regina* v. *Deptock*, 19 L.T. N.S. 380. The provisions of the statute of Anne, which enable a defendant, by leave of the court, to plead several matters, are by this section extended to plaintiffs, who may in like manner, in answer to the plea or subsequent pleading of a defendant, reply several matters. The statute of Anne is as follows: "That from and after, &c., it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, *with the leave of the same court*, to plead as many several matters thereto as he shall think necessary for his defence:" 4 Anne, cap. 16, s. 4. The practice which for some time prevailed under this act required limitation, and was in England restrained by the rule following. "Pleas, &c., founded on one and the same principal matter, but varied in statement, description or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed:" *Reg. Gen.* 5 H. T. 4 Wm. IV., Jarvis, N. R. 118. If several counts, pleas, &c., were pleaded contrary to this rule, a judge had express power upon application, to strike out, at the costs of the party pleading, all pleadings in violation of the rule: *Reg. Gen.* 6 H. T. 4 Wm. IV., Jarvis N. R. 120. A similar rule was adopted by the courts in this province. Our rule 32 of E. T. 5 Vic.

Several matters may be pleaded by leave of the Court or of a Judge.

Judge, (*a*) plead in answer to the plea or subsequent pleading of the Defendant as many several matters (*b*) as he thinks necessary to sustain his action, (*c*) and the defendant may by leave of the Court or a Judge plead in answer to the declaration or other subsequent pleading of the Plaintiff, (*d*) as many

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Cam. R. 38, was precisely the same as English rule 5, above mentioned. It was held as to *several pleas*, that if "founded on one and the same principal matter, but varied in statement, &c., they should *not be allowed:*" *Johnson* v. *Hunter*, 1 U. C. Q. B. 280. It was also held that although in this province there was no rule like the English rule 6, authorising a judge to strike out pleas filed in violation of English rule 5, yet that our judges had the power as to pleas filed in clear violation of our rule 32: *Ib.* The practice in this respect is now regulated by R. G. pl. 2.

(*a*) *Court or a judge.* Relative powers: see note *w* to section 48.

(*b*) *Several matters, &c.* This expression, when taken in reference to the principles of pleading, must mean either distinct answers to the pleading opposed: *Cooling* v. *The Great Northern R. Co.* 19 L. J. Q. B. 529, or distinct answers or traverses to one or more specific and material allegations of such pleading: sections 105, 106, 107.

(*c*) The right of a plaintiff to reply double is new, and by this statute for the first time authorised. It was held, on an application by a plaintiff under the English C. L. P. Act for leave to traverse defendant's plea *and* to reply specially upon an affidavit in general terms, that there was reasonable ground to traverse the plea, and that the matters proposed to be replied specially were true; that the affidavit was sufficient: *Pennall et al* v. *Clarke*, 1 C. L. Rep. 703. But it is in the discretion of the court or a judge to require the facts to be set forth at length, in order to determine the necessity for the application: *Ib.* Where in an action by assignees of a bankrupt on a covenant by defendant to pay money to the bankrupt, defendant pleaded that on a treaty of marriage between the bankrupt and his wife, it was agreed that he should covenant to pay to trustees £10,000 and interest, and assign the moneys mentioned in the declaration for securing payment of said sum; and that he entered into such covenant and made such assignment and contracted the marriage before his bankruptcy. To this plaintiff made application for leave to reply double; *first*, a traverse of the plea; *secondly*, that the treaty of marriage, the settlement, the assignment, and the marriage, were respectively entered into and solemnized in pursuance of a fraudulent arrangement between the bankrupt and his wife, to defeat creditors, he being at the time in a state of hopeless insolvency. The application was refused on the common affidavit, but granted on an affidavit specially denying the allegations of the plea, and averring that the deeds had been ordered by the Court of Chancery to be delivered up to be cancelled, and affirming the truth of the matter intended to be replied: *Ib.* If a plea be divisible in its nature, a plaintiff may without leave reply one matter to one part, and a different matter to another, the several matters together forming only one replication. As to the time within which a plaintiff must reply, see section 92 and notes thereto. This section applies to dower in the same manner as to any other form of action: *Street* v. *Dolson*, 2 U. C. L. J. 208. A proceeding by *audita querela* was held to be an "action or suit" within the meaning of the statute of Anne: *Giles* v. *Hutt et al.*, 5 D. & L. 387; but an information of intrusion at the suit of the crown was held not to be within that statute: *Attorney-General* v. *Donaldson et al*, 9 Dowl. P. C. 319.

(*d*) An application to *rejoin* several matters was refused where it appeared that the matters proposed to be rejoined would be a departure from the plea, and no answer to the replication: *Lafond* v. *Ruddock*, 13 C. B. 813.

several matters as he thinks necessary for his defence, (*e*) but

(*e*) At common law a defendant was allowed to plead one plea only, and it was a principle that pleadings should be true, which can rarely be the case where many pleas are pleaded. But as it was sometimes found difficult to comprise the merits of a defence in a single plea, the statute of Anne permitted a party to plead as many as might be necessary to his defence, provided he obtained the leave of the court, *thereby confining him* to such as might be deemed *essential to the justice of the cause: Gully et al* v. *Bishop of Exeter*, 5 Bing. 45, *per* Best, C. J. Although it is not in the power of a judge to try the truth or falsity of a plea upon affidavit: *Johnstone* v. *Knowles*, 1 Dowl. N. S. 30, yet when called on to exercise his discretion as to certain pleas being allowed, he must see to the powers with which he is armed by the statute of Anne. And it is quite clear that in a case where the pleas are such as not to involve the real justice of the case, *but to lead to great expense and intricacy at the trial*, it is the exercise of a sound discretion not to allow them to be put on the record: *London and Brighton R. Co.* v. *Wilson*, 6 Bing. N. C. 137, *per* Tindal, C. J.; *Same Plaintiffs* v. *Fairclough*, *Ib.* 270. The allowance of several pleas since the abolition of the old form of general issue is intended for the promotion and not for the perversion of justice; and if a perversion is evident, it is the duty of the judge to reject the plea: *Cooling* v. *The Great Northern R. Co.* 15 Q. B. 496, *per* Campbell, C. J. It has been found necessary to make the rules of court and the statute of Anne "a real acting power." There are some traverses which, although they might not give an opening for judgment *non obstante veredicto*, are clearly so much beside the merits that there is no hardship in obliging the party who has taken them to stand upon others: *Ib.* 497, *per* Coleridge, J. The practice of placing numerous and inconsistent pleas upon the record, ought to be discouraged: *Dunmore* v. *Turleton*, 16 L. & Eq. 392, *per* Campbell, C. J. It is usual for a defendant making application to be allowed to plead several matters, to submit an abstract of the pleas he proposes to plead: *Dunmore* v. *Tarleton*, 16 L. & Eq. 392; *Gether* v. *Capper*, 25 L. & Eq. 417. It is not necessary that the abstract should be critically precise or full: *Bedells et al* v. *Massey*, 2 D. & L. 322. A variance between the pleas as delivered and the abstract, which is not substantial or calculated to embarrass, will not entitle plaintiff to sign judgment: *Dunmore* v. *Tarleton*, 16 L. & Eq. 392; *Wills* v. *Robinson*, 5 Ex. 302. If the pleas delivered substantially vary from the abstract submitted, plaintiff may move to strike them out: *Holliday* v. *Bohn*, 3 M. & G. 115; *Flight* v. *Smale*, 4 C. B. 766; and in the Exchequer in England it has been held that in such case plaintiff may sign judgment as for want of a plea: *Baily* v. *Baker*, 9 M. & W. 769; see *Hills et al* v. *Hayman*, 2 Ex. 323; *Gabardi* v. *Harmer*, 3 Ex. 239; *Harvey* v. *Hamilton*, 4 Ex. 43; *Wills* v. *Robinson*, 5 Ex. 302. In an action for the infringement of a patent, the court, upon the affidavit made necessary by this section, allowed defendant to plead, *first*, not guilty; *secondly*, that the patentee was not the inventor; *thirdly*, non concessit; *fourthly*, that the invention was not a manufacture; *fifthly*, that the invention was not new; *sixthly*, that no sufficient specification was enrolled: *Platt et al* v. *Else et al*, 8 Ex. 364. But where, to a similar action, Platt, B., allowed the defendant to plead that the plaintiff having petitioned for letters patent, his petition was referred to the Solicitor-General, to whom he presented in a paper writing, setting forth its terms, that the said invention consisted of the matter therein mentioned; that the Solicitor-General, confiding in such representation, reported to her Majesty that letters patent might be granted; that the plaintiff, after the grant of the said letters patent, enrolled his specification, and therein falsely described his invention; and that so much of the said invention as was stated in the specification was not part of the invention for which the said letters patent had been granted: *held*, on motion to rescind the order and disallow the plea, that it was bad as pleading evidence: *Hancock* v. *Noyes*, 9 Ex. 388. A defendant in this province since the passing of this act having obtained leave to plead several matters to a declaration for an assault and battery, and

having pleaded, *first*, not guilty; *secondly*, justification; *thirdly, son assault demesne*, was upon the subsequent application of plaintiff compelled to make an election between "not guilty" and "justification," "these being inconsistent pleas:" *Goldburgh* v. *Lesson*, 2 U.C. L. J. 209, *per* Burns, J. But it is now the practice to allow such pleas, though inconsistent: *Purcell* v. *Welsh*, 5 Prac. R. 29. In an action of dower, leave was granted to plead the following, 1st, *Ne unques seizie;* 2nd, *Ne unques accouple;* 3rd, a release of dower: *Street* v. *Cuthbert*, *MS.* Chambers, Oct. 5, 1865, *per* Burns, J. In an action of assumpsit in which the declaration contained a special count alleging that defendant, in consideration, &c., agreed by writing under his hand to make and deliver to plaintiff a good deed in fee simple of a certain lot of land, and that although plaintiff had paid said consideration, yet that defendant had failed to make said deed, and the common *indebitatus* counts for money paid by plaintiff to defendant, &c., leave was asked by defendant to plead—1st. That he did not agree as alleged; 2nd. That plaintiff did not pay the consideration in first count mentioned; 3rd. That the agreement in first count mentioned was obtained by means of fraud and covin; 4th. To residue of declaration, not indebted. *Held* that the 2nd, 3rd, and 4th pleas might be allowed, but that defendant should not ask leave to deny his deed, and at the same time to plead in confession and avoidance of it without showing that something material may turn upon the construction of it, and 1st plea therefore disallowed: *Taylor* v. *McKinlay*, 3 U. C. L. J. 10. The allowance or disallowance of a plea is to be determined on not by its quality as being good or bad in law (assuming it not to be wholly frivolous), but with reference to any other pleas which may be proposed, and especially upon the consideration whether the question which it is desired to raise upon it arises under any other plea: *Gether* v. *Capper*, 25 L. & Eq. 417. And *semble*, leave will be granted to plead any pleas necessary to raise every question that can be justly suggested on any fair construction of a contract declared on, even a construction of which the court wholly disapproves: *Ib.* In an action on a charter party, by which a freighter was to pay the highest rate of freight which he could prove to have been paid for ships on the same voyage, and averment of general performance, and that the plaintiff was able to prove, as the fact was, that the highest rate of freight was a certain sum which the defendant though he had notice would not pay. To this defendant proposed to plead, *first*, that plaintiff was not able to prove nor was it in fact; *secondly*, that plaintiff did not in fact prove to the defendant that the rate of freight was as alleged. The latter plea having been disallowed at Chambers the court allowed it, on condition that it might be demurred to at once, and argued on the last day of the then term, that being in three days; intimating an opinion at the same time that it was a bad plea, but that they would not deprive the defendant of the opportunity of placing it on the record to raise the question as to the construction of the contract: *Ib.*

A declaration contained three counts, of which the *first* was upon the covenant of defendant as sheriff of the county of Oxford, given under stat. 3 Wm. IV. c. 8, and alleged that defendant had wilfully misconducted himself in his office of sheriff by voluntarily allowing one Sprague, who had been arrested at the suit of plaintiff, to escape; the *second* alleged that said Sprague being indebted to plaintiff, he placed a writ of capias for his arrest in the hands of the defendant, who, though he had ample opportunity to take said Sprague, yet failed to do so, to the injury of plaintiff; the *third* count alleged that Sprague being indebted to plaintiff, he placed a writ of *capias* for his arrest in defendant's hands, and that defendant falsely returned that said Sprague was not to be found in his county. Leave to plead the following pleas was granted to defendant: To *first* count, 1st, that Sprague was not indebted to plaintiff; 2nd, traverse of arrest; 3rd, that defendant did not wilfully misconduct himself in his said office, to the damage of plaintiff; 4th, that defendant did not voluntarily permit said Sprague to escape *modo et forma*. To *second* count, 1st, that Sprague was not indebted to plaintiff; 2nd,

not guilty; 3rd, that defendant could not arrest Sprague; 4th, plaintiff not damnified. To *third* count. 1st, not guilty; 2nd, Sprague not indebted to plaintiff: *Taylor* v. *Carroll*, 3 U.C. L. J. 10, *per* Burns, J. An affidavit of defendant's attorney was filed which stated the matters required by this section and also the attorney's reasons for believing 1st plea to 1st count, 1st plea to 2nd count, and 2nd plea to 3rd count to be true in substance and in fact: *Ib.*

It is presumed that the courts, in disposing of applications made under this section, will be guided if not governed by cases decided under the statute of Anne, many of which will be directly in point. They may be conveniently classed as follows:—

I.—*Pleas disallowed.*

First—Pleas substantially the same, for example, pleas calculated to raise a point that may be raised under other pleas on the record: *Hammond* v. *Teague*, 6 Bing. 197; *Reid et al* v. *Rew*, 2 Dowl. N. S. 543; *Dawson* v. *Macdonald*, 2 M & W. 26; *Heath et al* v. *Durant*, 1 D. & L. 571; *Jenkins* v. *Creech*, 5 Dowl. P.C. 293; *Turquand et al* v. *Hawtrey et al*, 9 M. & W. 727; *Legge* v. *Boyd*, 9 Dowl. P. C. 39; *Ross* v. *Clifton et al*, *Ib.* 1033; *The South Eastern R. Co.* v. *Hebblewhite*, 12 A. & E. 497; *Beavan* v. *Tanner*, 8 Dowl. P. C. 870; *Alexander* v. *Townley*, 2 Dowl. N. S. 886; *Griffith* v. *Selby*, 9 Ex. 393; *Municipality of Sandwich* v. *Drouillard*, 3 U. C. L. J. 113.

Secondly — Pleas merely inconsistent not objectionable: *Wilkinson* v. *Small*, 3 Dowl. P. C. 564. But objectionable if pleas grossly inconsistent with each other: *Maclellan* v. *Howard*, 4 T. R. 194; *Jenkins* v. *Edwards*, 5 T. R. 97; *Dowgall* v. *Bowman*, 3 Wils. 145; *Anderson* v. *Anderson*, 2 W. Bl. 1157; *Fox* v. *Chandler*, *Ib.* 905; *Palmer* v. *Wadbrooke*, 2 Stra. 876; *Laughton* v. *Ritchie*, 3 Taunt. 385; *Orgill* v. *Kemshead*, 4 Taunt. 459; *Chitty* v. *Hume*, 13 East. 255; *Shaw et al* v. *Lord Alvanley* 2 Bing. 325; *Whale* v. *Lenny et al*, 5 Bing. 12; *Steele* v. *Sterry et al*, 1 Scott, 101; *Thompson* v. *Jackson et al*, 3 M. & G. 621; *The London and Brighton R. Co.* v. *Fairclough*, 8 Dowl. P. C. 278; *Same plaintiffs*, v. *Wilson*, 8 Dowl. P. C. 40; *Griffith* v. *Roberts*, 2 M. & G. 907; *Needham* v. *Law*, 2 Dowl. N.S. 1027; *O'Brien* v. *Clement*, 15 M. & W. 435. Vexatious: *Gully et al* v. *Bishop of Exeter*, 5 Bing. 42; *Cooling* v *The Great Northern R. Co.* 15 Q. B. 486; or absurd: *Goodman* v. *Morrell*, 1 Dowl. N. S. 283; or fraudulent, such as release by a co-plaintiff who has no interest in the action: *Lascaridi et al* v. *Gurney et al*, 3 F. & F. 101.

Thirdly—Pleas immaterial and beside the merits, being such as do not involve the real justice of the case: *Murray* v. *Boucher*, 9 Dowl. P.C. 537; *The London & Brighton R. Co.* v. *Wilson*, 8 Dowl. P. C. 40; *Phillips et al* v. *Claggett*, 10 M. & W 102; *Steward* v. *Dunn*, 12 L. J. Ex. 213.

II.—*Pleas allowed.*

First—Pleas involving distinct grounds of defence: *Triebnerr* v. *Duerr*, 1 Bing. N. C. 266; *Pym* v. *Grazebrook et al*, 1 Dowl. N. S. 489; *Bulley* v. *Foulkes et al*, 7 Dowl. P. C. 839.

Secondly—Pleas though apparently the same, where it is possible that facts exist under which the pleas raise distinct grounds of defence: *Hart* v. *Bell*, 1 Hodges, 6; *Morse* v. *Appleby*, 8 Dowl. P. C. 203; *Johnstone* v. *Knowles*, 1 Dowl. N.S. 30; *Currie* v. *Almond*, 5 Bing. N.C. 224; *Leuckhart* v. *Cooper et al*, 3 Dowl. P.C. 415; *Steward* v. *Greaves et al*, 10 M. & W. 711; *Davidson* v. *Cooper et al*, 11 M. & W. 778; *Roe* v. *Fuller*, 7 Ex. 220.

Thirdly—Pleas apparently but not necessarily inconsistent and such as involve distinct defences: *Wilson* v. *Ames*, 5 Taunt. 340; *Wilkinson* v. *Small*, 3 Dowl. P. C 564; *Cooper* v. *Langdon*, 10 M. & W. 785.

Fourthly — Pleas showing different legal conclusions arising out of the same state of facts: *Curry* v. *Arnott*, 7 Dowl. P. C. 249; *Gether* v. *Capper*, 25 L. & Eq. 417.

if required by the Court or a Judge, (*f*) then only upon an affidavit of the party making such application or his Attorney, (*g*) to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact; (*h*) and the costs of

On affidavit if required

Costs.

Fifthly — Pleas to the several counts of a declaration containing more counts than one: *Vere* v. *Goldsborough*, 1 Bing. N. C. 353; *Langford* v. *Woods*, 8 Scott, N. R. 369.

Sixthly — Pleas which taken together amount to one entire answer; as to a declaration in debt for £80. 1st, "never indebted" as to £40, part thereof; and 2nd, a tender as to remaining £40: *Archer* v. *Garrard*, 3 M. & W. 63; *Macher* v. *Billing*, 3 Dowl. P. C. 246; *Vere* v. *Goldsborough*, 1 Bing. N. C. 353; *Daniels* v. *Lewis*, 1 Dowl. N. S. 844; *Phillips et al* v. *Claggett*, 10 M. & W. 102; *Harvey* v. *Hamilton*, 4 Ex. 43; *Rosse et al* v. *Cummings*, 2 U. C. L. J. 227, *per* Burns, J. It is apprehended that pleas classified under this sixth sub-division may be pleaded together without leave; as they constitute only one answer to the several parts of the declaration and may be pleaded at common law independently of the Statute of Anne: *Daniels* v. *Lewis*, 1 Dowl. N. S. 844. The statute is confined to giving or withdrawing leave to plead more than one plea to the same matter: *Ib. per* Williams, J. Where a defendant had pleaded two pleas to the same matter, one of which was disallowed by a judge, and he afterwards separately pleaded them to *different parts* of the same matter, the court refused to set them aside: *Ib.*

III.—*Doubtful.*

If the allowance or disallowance of several pleas under the foregoing rules be a point of doubt or nicety, the practice is to allow them: *Trickey* v. *Yeandall*, 1 Bing. 66; *Smith* v. *Dixon*, 4 Dowl. P. C. 571; *Bentley* v. *Keighley et al*, 1 D. & L. 944; *Hayward* v. *Bennet*, *Ib.* 916; *Lord Lucan* v. *Smith et al*, 28 L. T. R. 126.

(*f*) It is well to observe that an affidavit is not made necessary in all cases, but only "if required by the court or a judge." The practice however is in general for the court or judge to require the affidavit, and such also is the practice in England: *Dunmore* v. *Tarleton*, 16 L. & Eq. 391.

(*g*) In general the affidavit may be to the effect that defendant has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded are respectively true in substance and in fact; but in some cases a more particular affidavit may be required. If made by the party, it should state that he *is advised* and believes. If by the attorney, it should state that he is *informed* or *instructed* and believes: *Rowbotham* v. *Dupree*, 5 Dowl. P. C. 557; *Schofield* v. *Huggins*, 3 Dowl. P. C. 427. It may be made by an *agent* of defendant's attorney: *Yeatman* v. *Distin*, 3 U.C. L.J. 51. The affidavit by the agent was to the effect that the deponent "had been advised by defendant's attorney as to the facts by him alleged to exist, and believed that to enable defendant to defend the action properly according to the said facts he should plead, &c. (*naming the pleas*): *Ib.*

(*h*) In an action on a bill of exchange drawn by one A. B. directed to defendant, requiring him to pay to the order of said A. B. £750, sixty days after date, accepted by defendant and indorsed by A. B. to plaintiff, defendant obtained a summons for leave to plead. *First*—That the bill wa accepted by defendant for the accommodation of plaintiffs and said A. B., without any value or consideration. *Secondly*—That same was accepted for the accommodation of said A. B.

any issue, either of fact or of law, shall follow the finding or judgment on such issue, (*i*) and be adjudged to the successful

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without value or consideration, and indorsed by A. B. to plaintiffs without consideration. Defendant's affidavit stated that the bill of exchange in the declaration mentioned was accepted by defendant without any value or consideration received by defendant for said acceptance, and was as deponent believed for the accommodation of plaintiffs and one A. B., the drawer thereof, to take certain bills accepted by plaintiffs, drawn by said A. B.; that deponent was advised and believed that it was material for his defence to the action that he should plead that his said acceptance was either for the accommodation of plaintiff and A. B. jointly, or of said A. B. only, and was without any value received by deponent; summons made absolute, no cause having been shown: *Garrett et al* v. *Cotton*, 2 U. C. L. J. 233. So an acceptor of a bill of exchange was upon application for leave allowed to deny, *first*, his acceptance, *secondly*, the indorsement to plaintiff by payee, and, *thirdly*, to plead the Statute of Limitations: *Yeatman* v. *Dixin*, 3 U. C. L. J. 51. A defendant having obtained an order to plead several matters may elect to abandon it, or if before order the summons has been adjourned he may waive it and plead without the order, pleas not requiring leave: *Holt* v. *Forshall*, 30 L. & Eq. 495, *per* Jervis, C. J.; see also *Daniels* v. *Lewis*, 1 Dowl. N.S. 844. Although it may be that a mere adjournment requires no order, yet if there be any terms in favor of either party a substantive order should be drawn up: *Ib.* There are authorities to show that a party cannot be compelled to draw up an order he has obtained: *MacDougall* v. *Nicholls*, 3 A. & E 813; *Edensor* v. *Hoffman et al*, 2 C. & J. 140; see also *Brown* v. *Millington*, 20 L. & Eq. 383.

(*i*) Where leave is reserved by a judge at nisi prius to enter a nonsuit, the court will notwithstanding the leave reserved order a verdict for defendant on one issue without disturbing the verdict for the plaintiff on another if that course seems most consistent with doing justice between the parties: *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316. The right of a defendant to plead several pleas under the statute of Anne, when exercised necessarily, gives rise to several distinct issues. The right extended to plaintiffs as well as defendants by this enactment will have a tendency to multiply issues. Where there are several pleas or replications to the same subject matter, it is probable that some are true and some false, so that some may be found for one party to the suit and the remainder for his opponent. As it is only just that a party pleading false or improper pleadings should be made to bear the expense of them, the statute of Anne which first gave the right to plead double, instead of single as at common law, provides for the apportionment of costs consequent upon the decision of the several issues raised. The provision is in these words, "That if any such matter (*i. e.* the several matters thought necessary by a defendant for his defence and by leave of the court pleaded) shall upon a demurrer joined be deemed insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant had a probable cause to plead such matter, which upon the said issue shall be found against him:" 4 Anne, cap. 16, s. 5. This statute, being a remedial one, ought to be so construed as to advance the remedy. The costs intended to be given appear to be all the costs which attend the unnecessary pleading. This construction is analogous to that which has been put upon the statute of Gloucester, 6 Ed. I. cap. 1, s. 2, by which the costs of the writ only are given to the plaintiff if he succeed, and yet that statute has always been held to give all the costs of the suit: *Vollum* v. *Simpson*, 2 B. & P. 368, *per* Heath, J. Although a defendant, by pleading unnecessary pleas, may subject himself to the costs of the issues raised on those pleas, yet if he obtain a verdict on an issue

party, whatever may be the result of the other issue or issues. 19 Vic. c. 43, s. 130.

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raised by a plea which is an unqualified bar to the action, and which if pleaded alone would clearly entitle him to the general costs of the trial, the postea and general costs of the cause must be adjudged to him: *Ragg et ux* v. *Wells et ux*, 8 Taunt. 129; *Edwards* v. *Bethel*, 1 B. & Al. 254. But reason and common sense dictate that if the defendant has put the plaintiff to unnecessary expense by pleading that which either in law or in fact turns out to be unfounded, he should pay to plaintiff that expense, although he may be successful upon the general question: *Spencer* v. *Hamerton*, 4 A. & E. 413. The principle is clear, that plaintiff is entitled to be reimbursed the expense to which he has been put by defendant pleading unfounded pleas, notwithstanding the latter being entitled to the general costs of the cause: *Mullins* v. *Scott*, 5 Bing. N.C. 423; *Hart* v. *Cutbush*, 2 Dowl. P.C. 456. And defendant, under such circumstances, is bound to pay not merely the costs of the pleadings, but the costs of preparation of evidence on those pleadings: *Spencer* v. *Hamerton*, 4 A. & E. 413; *Doe d. Smith et al* v. *Webber*, 4 N. & M. 381; s. c. 1 H. & W. 10; *Empson* v. *Fairfax*, 8 A. & E. 296. The case of *Othir* v. *Calvert*, 1 Bing. 275, which decides the contrary, cannot be supported. The practice which it lays down was condemned in *Brooke* v. *Willet*, 2 H. Bl. 435, and *Vollum* v. *Simpson*, 2 B. & P. 368. But defendant will not be entitled to the costs of a witness brought to prove an issue on which he failed, though the same witness proved an issue on which he succeeded: *Richards* v. *Cohen*, 1 Dowl. P. C. 533; *Larnder* v. *Dick*, 2 Dowl. P.C. 333; *Eades* v. *Everatt et al*, 3 Dowl. P. C. 687; *Crowther* v. *Elwell*, 4 M. & W. 71. Nor will he be entitled to the costs of an issue which is not found one way or the other: *Vallance* v. *Adams*, 2 Dowl. P. C. 118. So if the plea be bad on which the defendant succeeded, he will not be entitled to the costs of that issue: *Cartwright* v. *Cook*, 1 Dowl. P. C. 529; *Goodburne* v. *Bowman*, 2 Dowl. P. C. 206; but if held good after argument, he will be entitled not only to the costs of the argument, but of the trial: *Gosbell* v. *Archer*, 2 A. & E. 500. On the other hand, if the defendant have a verdict on the general issue for instance, and the special pleas be found for plaintiff, plaintiff will be entitled to the costs of those issues, and the witnesses to support them: *Hart* v. *Culbush*, 2 Dowl. P. C. 456; *Dann* v. *Crease*, *Ib.* 269; *Spencer* v. *Hamerton*, 4 A. & E. 413. This is inapplicable if plaintiff sue in *forma pauperis*: *Gougenheim* v. *Lane et al*, 4 Dowl. P. C. 482. In an action for false imprisonment, the defendant paid £5 into court. The plaintiff recovered £25 by a verdict. A suggestion having been entered on the roll that the acts complained of were done under 7 & 8 Geo. IV. cap. 30, s. 41, was traversed, and a verdict found for defendant. *Held*, that defendant was not entitled to the costs of the suggestion, either under the old law or this section: *Norwood* v. *Pitt*, 6 Jur. N. S. 614. If a party is successful upon demurrer, he is entitled to his costs, irrespective of the determination of the suit, where the judgment on demurrer is given prior to the trial of the issues in fact: *Bentley* v. *Davies*, 23 L. J. Ex. 279. But if the issues in fact be first disposed of, and render unnecessary a decision of the issues in law, the court may refuse to hear argument as to the latter: *Derbishire et al* v. *Feehan et al*, 12 U.C.C.P. 502; *Macmartin* v. *Thompson*, 26 U.C.Q.B. 334. If the judge certify under the statute of Anne, defendant need not pay any such costs: *Fry* v. *Monckton*, 9 Dowl. P. C. 967. The Eng. *Reg. Gen.* 7 of H. T. 4 Wm. IV., Jervis N. C. 121, from which our rule 26 of E. T. 5 Vic. is taken, and which is substantially re-enacted in our R. G. pr. 51, was held not to conflict with the practice decided in *Spencer* v. *Hamerton*, 4 A. & E. 413. Indeed the rules of court, and especially the R. G. pr. 51, more firmly establish it. Nor did the old rules affect the statute of Anne as to the power of the judge to certify: *Robinson* v. *Messenger*, 8 A. & E. 606. The words "at the discretion of the court," as used in that statute, have been construed as not giving the power to refuse but only to tax costs: *Duberley* v. *Page et al*, 2 T. R. 391. Great difficulty is frequently

experienced in the apportionment of costs under the statute and rules. Many of the cases depend upon the particular circumstances attending them, and are in themselves so various that no one case can be taken as an unqualified precedent: *Staley* v. *Long*, 5 Dowl. P. C. 616; *Benn* v. *Bateman*, 8 M. & W. 666; *Hazlewood* v. *Back*, 9 M. & W. 1; *Anderson et al* v. *Chapman et al*, 7 Dowl. P. C. 822; *Mullins* v. *Scott*, 5 Bing. N. C. 423; *Lewis* v. *Holding*, 2 M. & G. 875; *Routledge* v. *Abbott et al*, 8 A. & E. 592; *Paddock* v. *Forrester et al*, 2 Dowl. N. S. 125; *Newton* v. *Holford et al*, 2 D. & L. 826; *Freeman* v. *Rosher*, 18 L. J. Q. B. 105; *Davis* v. *Davis*, 5 O. S. 453; *Evans* v. *Kingsmill*, 4 U. C. Q. B. 132; *Taylor* v. *Carr*, *Ib.* 149; *Bank B. N. A.* v. *Ainley*, 7 U.C. Q.B. 521; *Sheldon* v. *Hamilton*, M. T. 3 Vic. *M.S.* R. & H. Dig. "Costs," III. 2. The plaintiff in an action of tort had a verdict for £5, and the judge did not certify for costs. There was a demurrer on the record upon a new assignment previously argued, on which judgment had been given for the plaintiff. It was held that the plaintiff was not entitled to the costs of the demurrer: *Dunston* v. *Paterson*, 5 C. B. N. S 279; see also *Reynolds* v. *Harris*, 3 C. B. N. S. 267.

Independently of the statute of Anne, questions have arisen as to the right of the parties to costs when plaintiff succeeds on one of several counts in a declaration, and the defendant as to the others. Whenever a plaintiff succeeds on a trial as to any part of his demand, divided into counts, whether the defendant plead one plea to all the counts, or plead to the counts separately, plaintiff is entitled to the general costs of the cause; and defendant, though not formerly entitled to his costs on the counts or issues upon which plaintiff fails: *Lloyd* v. *Day*, Barnes, 149; *Butcher* v. *Green*, 2 Doug. 677; *Astley* v. *Young*, 2 Burr, 1232; *Postan* v. *Stanway*, 5 East. 261; is now clearly entitled to a deduction in respect to such counts or issues: *Cox* v. *Thomason*, 2 C. & J. 498; *Knight* v. *Brown*, 9 Bing 643. This rule applies as much where there is one plea, for instance, general issue to all the counts jointly, which for this purpose is to be taken distributively, as where distinct issues are joined on distinct pleas pleaded to as many separate counts: *Daniel et al* v. *Barry et al*, 4 Q. B. 59; *Nicholson et al* v. *Dyson*, 1 D. & L. 277; *Williams et al* v. *The Great Western R. Co.* 1 Dowl. N. S. 16.

The same principle has been held to apply to a declaration of one count only, but containing several material and traversable allegations, to which the general issue is pleaded, and some only of the matters alleged, are found in plaintiff's favour: *Prudhomme* v. *Fraser*, 2 A. & E. 645. So if there be several closes mentioned as abuttals in one count as trespass, the allegation is devisible, and the defendant is entitled to costs as to those closes, of the breaking of which he was not guilty: *Phythian* v. *White et al*, 1 M. & W. 216; *Anderson et al* v. *Chapman et al*, 5 M. & W. 483. In libel, where defendant pleaded not guilty and a justification, and succeeding on the first plea called no witness as to the second, he was held entitled to his costs in respect of that plea: *Empson* v. *Fairfax et al*, 8 A. & E. 296. The apportionment of costs as against or between several defendants is regulated by section 317 of this act.

Plaintiff, irrespectively of the present statute and rules of court, can recover costs only under the statute of Gloucester as a part of his damages, or under the statute of Anne where there are double pleas. If he succeed as to the whole of the causes of action sued upon, or one of them, his only claim is under the statute of Gloucester. If defendant succeed on a plea in bar of the causes of action, plaintiff can claim costs only under the statute of Anne. To put a case decided as an illustration of these remarks: a declaration for injury to the plaintiff's reversion contained two counts, to which the defendant pleaded—*first*, not guilty; *secondly*, to the first count, no reversion; *thirdly*, a justification, to which there was a replication, demurrer and judgment for defendant; *fourthly*, the Statute of Limitations to both counts; and *fifthly*, to the second count, a plea to which there was a new assignment, and to it a plea of not guilty, and a verdict was found for the plaintiff on the plea of not guilty as to part of the first count, with contingent

Rule not required.

111. (*j*) No rule of Court for leave to pay money into Court or to plead several matters shall be necessary where a Judge's Order has been made for the same purpose. (*k*) 19 Vic. c. 43, s. 131.

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damages; and as to the residue of the first and the second count, for the defendant, and on the plea of no reversion for the plaintiff as to both counts, and on the fifth plea the jury were discharged by consent, and as to the new assignment, the verdict was for the defendant: *held* that the plaintiff was not entitled to the costs of the issues as to the part of the first count on which he had succeeded, for he had no right under the statute of Gloucester, inasmuch as he could not have judgment for the damages assessed, and that he had no right under the statute of Anne, since he had succeeded on all the issues as to that part of the count. But that as to the other part of the first count, and the second count, he was entitled under the statute of Anne to the costs of one special plea, including a portion of the expenses of briefs and witnesses, inasmuch as the defendant succeeded on the first issue as to that part of the first count, and on the second count; and the plaintiff obtained a verdict on the issues raised on two other special pleas: *Howell* v. *Rodbard*, 4 Ex. 309. So where to a declaration in assumpsit the defendant pleaded several pleas upon which issues were joined and also a plea to which the plaintiff demurred, and the issues were tried and found for the plaintiff, and afterwards judgment was given for the defendant on the demurrer, the court holding the declaration insufficient: *held* that the plaintiff was not entitled under the statute of Anne to the costs of the issues found for him, as no issue in fact had been found for the defendant also: *Partridge* v. *Gardner*, 4 Ex. 303. The object of the statute of Anne is to punish a defendant for improperly pleading pleas which he cannot support; but there are other statutes which punish a plaintiff for bringing a frivolous suit though he succeed: 43 Elizabeth, cap. 6, 21; 1 Jac. cap. 15, s. 6; 22 & 23 Car. II. cap. 9.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 82.

(*k*) If a judge in Chambers refuse leave to plead several matters, the party who made the application can move the court *in banc*: *Johnstone* v. *Knowles*, 1 Dowl. N. S. 30. In such a case it would seem to be unnecessary for him in his rule to notice the proceedings previously had before the judge in Chambers: *Ib.* And if the judge to whom application is in the first instance made, though granting leave as to some pleas, withhold it as to others, the party dissatisfied may apply to the court to be allowed to file additional pleas. If the proposed additional pleas be consistent with what the judge in Chambers has already done, the parties should again apply to him. It is very inconvenient for the court *in banc* to be called upon to say what pleas shall or shall not be allowed in a case: *Smith* v. *Goldsworthy*, 2 Q. B. 720, *per* Denman, C. J. But if the application to the Court be to allow particular pleas disallowed by the judge in chambers, then it would appear that the application should be to rescind the judge's order: *Pym* v. *Grazecrook et al*, 1 Dowl. N. S. 489; see also *The South Eastern R. Co.* v. *Sprot*, 11 A. & E. 167. And, on the contrary, if at all consistent with the judge's order, it would seem unnecessary to notice the previous proceedings when applying to the full court: *Smith* v. *Goldsworthy*, 2 Q. B. 717; *Graham* v. *Furber*, 2 C. L. Rep. 11 n, *b*. The application to the court would be in the nature of an appeal from the decision of the judge: see *Waddell* v. *Corbett et al*, 26 U. C. Q. B. 243. Such and similar applications should be made in the course of the term next after the decision of the judge: *Orchard* v. *Moxey*, 2 El. & B. 206, affirmed in *Collins et al* v. *Johnson*, 16 C. B. 588; see also *Bank of Montreal* v. *Harrison*, 19 U. C. C. P. 276; see further note *w* to section 48. The court, before the C. L. P. Act, has allowed a defendant

Certain pleas may be pleaded together without leave.

112. (*l*) The following pleas, or any two or more of them, may be pleaded together as of course, without leave of the Court or a Judge, that is to say: a plea denying any contract or debt alleged on the declaration, (*m*) a plea of tender as to part, a plea of the Statute of Limitations, set-off, (*n*) discharge of the Defendant under any Bankrupt or Insolvent law, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property an injury to which is complained of is the Plaintiff's, leave and license, *son assault demesne*, and any other pleas which the Judges of the said Superior Courts, or

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to add pleas after a demurrer: *Smart et al* v. *Sandars et al*, 3 C. B. 380; and in one case, even after a notice of trial and countermand, the trial not being thereby delayed: *Field* v. *Sawyer*, 5 D. & L. 777.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 84; substantially a re-enactment, with amendments, of Eng. Rule 13, T. T. 1 Wm. IV.: Jervis N. R. 46.

(*m*) In the practical application of this section, there may be some difficulty experienced. There are contracts consisting of several parts, which cannot be denied without as many distinct pleas. Thus, the contract of the indorser of a promissory note is to pay it, if the maker do not, provided he, the indorser, receive notice of non-payment by the maker. Now the plea of "did not endorse" only puts the fact of indorsement in issue, which is only one part of the contract: see *Marston* v. *Allen*, 8 M. & W. 494; *Adams* v. *Jones*, 12 A. & E. 455; *Hayes* v. *Caulfield*, 5 Q.B. 81; *Wood* v. *Connop*, *Ib.* 292; *Bromage et al* v. *Lloyd et al*, 1 Ex. 32; *Bell* v. *Lord Ingestre*, 12 Q. B. 317; *Lloyd* v. *Howard*, 15 Q. B. 995; *Palmer* v. *Richards*, 15 Jur. 41. If defendant do not expressly deny notice of non-payment, he will be taken to have admitted it. This latter plea is necessary to the denial of the remaining part of the contract, and by this means the whole contract is denied within the meaning of the enactment. It is apprehended that any number of pleas may be used which, in consequence of the peculiarity of the contract sued upon, may become necessary for the purpose of denial. It is the peculiarity of the contract of the indorser of a promissory note which renders it necessary to use two pleas in order to deny it. The mere denial of the indorsement will admit the notice, and the denial of the notice will admit the indorsement. It is very true, if the defendant succeed on either, that it affords an answer to the action; but the contract is of a two-fold character, and the two pleas do not cover the same ground, but are distinct, applying to two several parts of the contract. *Non-assumpsit*, if allowable, might have traversed both; but the new rules compel a defendant in a case like this to traverse the contract severally by distinct answers. Taking section 105 with section 112 of this act, and construing them with the rules, the indorser of a note may deny the indorsement and want of notice without asking permission to do so: *Rosse et al* v. *Cummings*, 2 U. C. L. J. 227. In an action by bearer of a promissory note against maker, defendant cannot without leave plead denying that plaintiff is the bearer, and also a special plea in confession and avoidance: *Every* v. *Wheeler*, 3 U. C. L. J. 11. If defendant, without leave, plead several pleas which he has no right to plead, plaintiff may sign judgment: section 113.

(*n*) An equitable plea cannot be pleaded as a plea of set-off, and therefore if pleaded with other pleas without a judge's order, entitles plaintiff to sign judgment: *Watt* v. *George*, 3 U. C. L. J. 71.

any four of them of whom the Chief Justices of the said Courts shall be two, by any rule or order to be from time to time made in Term or in vacation, order and direct. (*nn*) 19 Vic. c. 43, s. 133.

In other cases several pleas, &c., shall not be filed without leave.

113. (*o*) Except in the cases herein specially provided for, (*p*) if either party plead several pleas, replications, avowries, cognizances or other pleadings (*q*) without leave of the Court or a Judge (*r*), the opposite party may sign judg-

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(*nn*) Several pleas to *distinct* parts of the declaration, and which, if taken together, formed but one entire defence, might and still may be pleaded without any leave for that purpose, such as tender to part and never indebted to the residue: *Archer* v. *Gerrard*, 3 M. & W. 63; or a special plea to part, and another special plea to the residue without any general issue to the whole: *Vere* v. *Goldsborough*, 1 Bing. N. C. 353. Besides, a defendant is not compelled to plead all the pleas for which he has obtained leave; he may plead a plea to part under leave to plead a plea to the whole declaration, or he may abandon some of the pleas: *Fryer* v. *Andrews*, 1 Ex. 471. Defendant cannot, without obtaining leave, traverse separately two distinct allegations in the declaration, each plea being an answer to the whole cause of action: *McKay* v. *Burley*, 4 U. C. L. J. 38. There is no necessity to obtain leave to plead several pleas when two or more pleas, or no pleas except those mentioned in this section, are pleaded to the same part of the declaration or debt or cause of action: *Archer* v. *Gerrard*, 3 M. & W. 63; nor where several defendants sever in pleading, and each pleads only such plea or pleas as he alone might plead without leave: *Cazneau* v. *Morrice et al*, 25 L. J. Q. B. 126.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 86.

(*p*) By preceding section 112 or rules to be made thereunder.

(*q*) To a count alleging an agreement by B. to serve A. as a clerk, and not to leave without notice, B. pleaded that whilst he was in A.'s employment, B. without any just cause or provocation insulted and abused him, whereupon he gave him notice that he should forthwith leave his service. And to this plea A. (without obtaining leave to reply double) replied thus—A. takes issue on B.'s plea, and *further* says that the notice intended in the declaration was a reasonable and a proper notice, but that the notice mentioned in B.'s plea was not a reasonable or a proper notice. B. having signed judgment under the section of the English C. L. P. Act, corresponding with the one here annotated, the court set it aside without costs, but declined to decide whether or not the replication was double or the plea regular: *Messiter* v. *Rose*, 13 C. B. 162.

(*r*) If a party who having obtained leave to plead several matters by order of a judge plead contrary to the effect of such order, even though by mistake, the opposite party may move to strike them out of the pleas: *Holliday* v. *Bohn*, 3 M. & G. 115; *Flight* v. *Smale*, 4 C. B. 766; or according to the decisions of the Exchequer in England, may sign judgment: *Baily* v. *Baker*, 9 M. & W. 769; *Hills et al* v. *Haymen*, 2 Ex. 323; *Gabardi* v. *Harmer*, 3 Ex. 239; *Harvey* v. *Hamilton*, 4 Ex. 43; *Wills* v. *Robinson*, 5 Ex. 302. But a departure from the order which is not substantial or calculated to embarrass will not entitle the opposite party to take either of these proceedings: *Wills* v. *Robinson*, 5 Ex. 302; *Dunmore* v. *Tarleton*, 1 C. L. Rep. 19.

ment, (*s*) but such judgment may be set aside by the Court or a Judge upon an affidavit of merits, and on such terms as to costs and otherwise as they or he may think fit. (*ss*) 19 Vic. c. 43, s. 135.

Objections when to be heard.

114. (*t*) All objections to the pleading of several pleas, replications or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the rule to show cause or the summons to plead several matters. (*u*) 19 Vic. c. 43, s. 132.

(*s*) In an action on a promissory note defendant without leave pleaded, 1. *non fecit;* 2. denial of presentment; 3. a special plea admitting the note, but avoiding it by showing a want of consideration. Plaintiff signed judgment. *Held* that as the first and third pleas were inconsistent and set up two distinct defences to the same cause of action, the defendant should not have pleaded them without leave, and that judgment was rightly signed by plaintiff: *Le Claire et al* v. *Prudhomme*, 2 U.C. L.J. 229; see further *Westlake* v. *Abbott*, 4 U.C. L.J. 46. So where to a declaration for a malicious arrest containing only one count defendant without leave pleaded—1. not guilty; 2. that he did not maliciously cause the plaintiff to be arrested, &c.; 3. that he, defendant, had reason to believe that plaintiff had parted with his property, &c. Plaintiff thereupon signed judgment. Defendant obtained a summons to set aside the judgment with costs, on the ground that "it had been signed after pleas had been filed and served, and was consequently irregular," but held that "the pleas should not have been pleaded without leave, and consequently that the judgment was rightly signed: *Wilkins* v. *Blacklock*, 2 U. C. L. J. 232. So where to a declaration by plaintiff as bearer against defendant as maker of a promissory note, defendant without leave pleaded —1. plaintiff not bearer of the note; 2. want of consideration; 3. fraud; and the plaintiff thereupon signed judgment; held regular: *Every* v. *Wheeler*, 3 U. C. L. J. 11.

(*ss*) The usual terms are "on payment of costs:" *McKay* v. *Burley*, 4 U. C. L. J. 88. But the statute says, "on such terms as to costs *and otherwise*." An order was made in one case relieving defendant on the merits and setting aside the judgment on the conditions precedent, that defendant should pay £50 into court (that sum being sufficient to cover the amount for which judgment was signed) to abide the event of the suit, and upon payment of all costs and signing the judgment and subsequent proceedings thereon and the costs of the application, and further as the cause was in the "inferior jurisdiction," upon the terms of defendant allowing plaintiff to go to trial at the then next sitting of the county court, taking one day's notice of trial: *Every* v. *Wheeler*, 3 U. C. L. J. 11.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 83.

(*u*) From the concluding words of this section the inference might be that no application involving objections to the pleading of several pleas, &c., can be entertained *in banc* by way of appeal from the judge's order allowing several pleas, but the courts in England have given a different construction to the section: *Griffith* v. *Selby*, 9 Ex. 393. If either party consent to the pleading of several matters, he will not be permitted afterwards to move the court to set aside any of the pleadings pleaded with his consent: *Howen* v. *Carr*, 5 Dowl. P. C. 305. In all cases in which a judge's order to plead several matters is rendered neces-

115. (*v*) One new assignment (*w*) only shall be pleaded to any number of pleas to the same cause of action, and such One new assignment only to seve-

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sary, the original order or a copy thereof must be either attached to the nisi prius record or demurrer book or be copied in the margin thereof: Rule M. T. 1863, 23 U.C. Q.B. 68. In case of noncompliance with this rule, the clerks or deputy clerks of the crown are not to pass the record, nor shall the demurrer be argued: *Ib.*

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 87; founded upon the first report of the Common Law Commissioners, section 45. The object of this section is to prevent unnecessary prolixity, whereby in some cases to several pleas there have been as many distinct new assignments as pleas, and before issue as many replications as pleas both to the declaration and new assignment, so that the same pleading in the same form of words has been repeated over and over again without reason or meaning.

(*w*) The necessity for a new assignment generally arises in two ways; first, where the plaintiff complains of one of several trespasses, in a form so general that it is applicable to any of them, and a trespass in respect of which the action is not brought is, either by mistake or design, justified by the defendant; secondly, where the defendant pleads justification of the trespass complained of, but the plaintiff maintains that there has been an excess beyond what the circumstances justify, of which several examples may be found in subsequent notes to this section. One object of a new assignment is to make certain what the plea has rendered uncertain; as where the defendant mistakes the nature of plaintiff's demand, and pleads a good answer to something which is not *the* cause of action sued upon: *James* v. *Lingham et al*, 5 Bing. N. C. 557, *per* Tindal, C. J.; see also *West* v. *Nibbs et al*, 4 C. B. 172. Though a declaration in debt be very general, and though the plea be equally general, if there never could be any doubt between the parties that the action is brought for the *balance* of an account, there will be no necessity for a new assignment: *James* v. *Lingham et al*, 5 Bing. N. C. 553. Where plaintiff declared in debt for £100 due for work and labour and on an account stated, to which defendant pleaded payment of £100 in satisfaction of the causes of action mentioned in the declaration, and plaintiff proved that £96 17*s.* 11*d*, was due to him for the balance of his account, after giving credit for the £100 he had received, and that defendant had admitted the correctness of his account: *held*, that plaintiff was entitled to a verdict without a new assignment: *Ib.*; see also *Kenningham* v. *Alison*, 2 Dowl. N. S. 658. Where the plaintiff's demand is *defined* by a bill of particulars, and it appears that he claims a balance only after giving credit for payments whenever made, the plea of payment applies as to that balance: *Eastwick* v. *Harman*, 8 Dowl. P. C. 401, *per* Alderson, B.; which for the purposes of pleading, is taken to be the particular sum for which the action is brought: *Dite* v. *Hawker*, 1 D. & L. 189. Thus, plaintiff declared in *indebitatus assumpsit* for work and labor done and on an account stated for £16 3*s.* 10*d.*: plea, except as to £2 3*s.* 10*d.* (paid into court), that the defendant, after the accruing of the debt, and before the commencement of the suit, paid to the plaintiff and the plaintiff accepted money to a large amount in full satisfaction of the debt in the declaration mentioned. Replication, denying the payment and acceptance as alleged. It appeared at the trial that the original sum due was £30 2*s.* 10*d.*, of which £14 had been paid, leaving the balance claimed in the action of £16 3*s.* 10*d.* *Held*, that the issue raised upon the pleadings was, whether the money paid was in satisfaction of the debt in the declaration mentioned, and that defendant having failed to show payment beyond £14, the plaintiff was entitled to a verdict for £14, the balance, less the money paid into court: *Ib.*; see also *Freeman* v. *Crafts*, 6 Dowl. P. C. 689. But where the declaration is general, and the plea narrows it, stating the demand to be in respect of a claim which it shows to have been satisfied, and plaintiff contends that the plea is wrong in so narrow-

ral pleas to the same cause of action.

new assignment shall be consistent with and confined by the particulars delivered in the action, if any, (*x*) and shall state that the Plaintiff proceeds for causes of action different from

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ing the declaration, he should new-assign: *Rogers* v. *Custance*, 1 Q. B. 77. Thus, debt in the common form for work and labor. Particulars of demand for contract work and extra work. Plea, that plaintiff and defendant by consent gave up a contract originally made between them for work, plaintiff agreeing to accept certain work which had been done under the contract at a reduced price; that by virtue of such agreement defendant became indebted to plaintiff in the amount mentioned in the declaration, and that defendant, *in pursuance of that agreement*, paid plaintiff and he accepted the said amount. Replication traversing the payment and acceptance. *Held*, that on these pleadings the plaintiff could not give evidence of any demand not a subject of the second agreement, and that to enable himself to recover for extra work, he ought to have new-assigned: *Ib.* In such a case the particulars of demand, even if they had been confined to extra work, could not aid the plea: *Ib.* It may be mentioned that whenever plaintiff goes for a balance of an account, whether there be a plea of payment or credit be given to defendant for a part in the declaration, plaintiff must under the general issue prove the whole account: *Price* v. *Rees*, 11 M. & W. 576.

(*x*) A defendant by calling for particulars before pleading may be so informed as to make it impossible for him to mistake the declaration, and thus prevent in a great measure the necessity for a new assignment. The office of a new assignment is practically to explain that which is left ambiguous on the face of the declaration owing to its generality: *West* v. *Nibbs et al*, 4 C. B. 184, *per* Williams, J. Particulars of demand where allowable have the same effect, though they form no part of the record: *Dempster et al* v. *Purnell*, 1 Dowl. N.S. 168. The object of a bill of particulars is to control the generality of the declaration; but, as remarked by a learned judge, in nine cases out of ten they are applied for to entrap the plaintiff within certain limits, and the court should be careful not to allow plaintiffs to be tied up too tightly by such means: *Rennie et al* v. *Beresford et al*, 3 D. & L. 468, *per* Alderson, B. There is a distinction between the explanation of a charge made in a bill of particulars and the charge itself. For instance, if in a bill by a surveyor for services performed by him, matters such as stationery, travelling expenses, &c., were of themselves and by themselves the distinct subject of a charge; no doubt there ought to be particulars given of each, but usually that is not so, nor is it necessary that it should be so in a surveyor's bill, as such matter is mere explanation of the charge. In such an action particulars claiming certain aggregate sums in respect of the survey stated, number of miles, travelling expenses, printers' accounts, stationery accounts, &c., are sufficient particulars without specifying the number of fields surveyed, the time employed, the number of persons engaged, &c.: *Ib.*; see also *Higgins* v. *Ede et al*, 15 M. & W. 76; *Irving* v. *Baker*, 15 L. J. Q. B. 322; *Boulton* v. *Pritchard*, 4 D. & L. 117. But in an action on the indebitatus counts by a broker to recover the amount of shares purchased by him for defendant, and commission on the same, the court obliged him to furnish the dates of the purchases within the compass of a few days and the names of the parties from whom he purchased: *Berkley* v. *De Vere*, 4 D. & L. 97. The chief object of particulars is to give substantial information to the defendant of plaintiff's demand, and in order to limit the proof of the latter to the causes of action in the declaration mentioned. The cases have gone great lengths in supporting particulars where they have really varied from the evidence given by plaintiff when the defendants could not under the circumstances have been misled. It is not for the court to look to the fact of the party having been misled, but whether under the ordinary circumstances in which a man would view the case there might have been an actual misleading. That depends upon the wisdom of

all those which the plea professes to justify, or for an excess over and above what all the defences set up in such pleas justify, or for both. (*y*) 19 Vic. c. 43, s. 136.

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the party, and there is no criterion unless the court adopt this—the whole circumstances being looked at, would a reasonable man be deceived by the form of the particulars? The true criterion therefore is not whether the defendant has been actually misled, but whether the particulars are of such a nature that a reasonable person would be misled by them: *Law* v. *Thompson et al*, 4 D. & L. 54. In pursuance of this principle it has been frequently decided that a mistake in a bill of particulars not calculated to deceive or mislead the party to whom the bill is given, will not be held to be material, and will not be allowed as a valid objection at the trial: *Barney* v. *Simpson*, 6 O. S. 96, *per* Sherwood, J. Thus an error in the date of a promissory note as given in a bill of particulars has been in one case held immaterial: *Ib.* But in an action for work and labor, the particulars of the plaintiff's demand stated the action to be brought "to recover from the defendants the sum of £450 claimed by the plaintiff for his services as clerk or manager to the defendants, from October, 1837, to October, 1839." An order was made for further and better particulars, when the plaintiff delivered the same with the addition of the words "after the rate of £200 per annum." Held that plaintiff could not give evidence of a claim for commission on the amount of business done by defendants, through his introduction: *Law* v. *Thompson et al*, 4 D. & L. 54. So where plaintiff in his declaration and particulars claimed damages for certain articles deposited with the defendant, which had not been returned, and of which due care had not been taken. Under the former description in his particulars he set out certain articles of glass, which however turned out to have been destroyed. Held that under such particulars he was not entitled to recover damages in respect of those articles: *Moss* v. *Smith*, 8 Dowl. P. C. 537. But under a bill of particulars for work and labour, the court allowed plaintiff to give in evidence an acknowledgment of a specific balance due for work and labour: *Drummond* v. *Bradley*, Dra. Rep. 254. The usefulness of particulars as a preventative of new assignments will be apparent in actions of trespass particularly. In trespass it has been held that defendant may obtain particulars of plaintiff's cause of action before declaration: *Nevills* v. *Hervey*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Particulars of Demand," 8. The court will always require some special ground for an application for particulars where none have been given by plaintiff; otherwise in every case of trespass it would be a step in the cause to apply for particulars on the affidavit of defendant, who would never know what the grievances complained of were. There ought to be some special statement of the property, and the court should see some reasons for granting a rule: *Horlock* v. *Lediard*, 2 Dowl. N. S. 277, *per* Parke, B. The same rule has been applied to special actions for breach of contract: *Pylie* v. *Stephen*, 8 Dowl. P. C. 771. Before this act it has been held that a court of common law cannot compel a plaintiff to give particulars of matters which he does not claim in his declaration. Thus in an action for the value of goods supplied to a third party, on the false representation of the defendant, the court would not compel the plaintiff to give a particular of goods supplied to, and bills of exchange, &c., given by such third party, such goods and bills not being claimed by the terms of the declaration: *Luck et al* v. *Handley*, 4 Ex. 486.

(*y*) A new assignment is in the nature of a new declaration. In effect the plaintiff says, "I do not dispute in this action the truth of your plea; my declaration is for a cause of action differing from that which you have answered," or he may say, "I dispute the truth of your plea, but my declaration is also for another cause of action differing from that which you have attempted to answer:" *Grove* v. *Withers*, 4 Ex. 881, *per* Parke, B. To do the latter is to reply and new

Pleas to new assignment.

116. (*z*) No plea which has already been pleaded (*a*) to

assign at the same time. A trespass justified may be so far divisible that plaintiff may reply as to part and new assign as to the residue. In trespass for breaking and entering plaintiff's dwelling house, and staying and continuing therein, making a noise and disturbance for a long time, to wit, for four days then next following, and seizing his goods, &c. Plea as to the breaking and entering the dwelling house, and staying and continuing therein as in the declaration mentioned, a justification by the leave and license of the plaintiff to take possession of certain goods. Replication traversing the leave and license and new assigning that the plaintiff issued his writ, &c., not only for the breaking and entering the dwelling house and staying and continuing therein as in the plea mentioned, but also for that the defendants, without the license of the plaintiff, stayed and continued in the dwelling house, making such noise and disturbance, &c., for other and different purposes than those in the plea mentioned, *and for a much longer time*, to wit, three days longer than was necessary for taking possession of the goods, &c. *Held* that the replication and new assignment were not bad for duplicity, *time* being in the case of a continuing trespass equally divisible for this purpose as *space: Lowth* v. *Smith et al*, 12 M. & W. 582; also *Worth* v. *Terrington et al*, 13 M. & W. 781. These cases are exactly like the case of a trespass in various parts of a close, where the defendant justifies under a right of way, and plaintiff may traverse the existence of such right and new assign trespasses in *another part* of the close: *Ib.* 789, *per* Parke, B. The necessity for a new assignment will frequently depend on the distributive character of defendant's plea, as in the case of *Adams* v. *Andrews*, 20 L. J. Q. B. 33; see also *Glover* v. *Dixon et al*, 9 Ex. 158. To a declaration in trespass for breaking, &c., a shop, rooms, and apartments of the plaintiff, the defendant pleaded that he was sheriff, and as sheriff had a writ of *fi. fa.* against one H., and that by the leave of the plaintiff the outer door being open he entered the same shop in the declaration mentioned (the same shop, rooms, and apartments in the declaration mentioned being one and the same shop, and not different rooms and apartments) to inquire, &c. The plaintiff replied *de injuria*, and new assigned that the defendant broke, &c., "two other rooms and apartments, to wit, a room called," &c., being other rooms in the declaration mentioned, besides and different from and other than the said shop in the said plea mentioned. *Held* new assignment good: *Harvey* v. *Lankester*, 7 D. & L. 32; see further *Meriton* v. *Coombes et al*, 19 L. J. C.P. 336. In actions of trespass to land, the *locus in quo* should be designated by abuttals or other descriptions, as it was at the time of the trespass and not at the time of the declaration. Therefore where in an action by a reversioner the declaration described the *locus in quo* as "abutting on the south and east on a close in the occupation and possession of the defendants," and the defendants, an English railway company, pleaded that they took part of said close abutting on the south on the fence of their railway under the provisions of the Railway Act 8 & 9 Vic. cap. 20, ss. 32, 33, which was the trespass complained of, and it appeared at the trial that at the time the trespass was committed the close in question abutted on the fence of the railway, but that afterwards the defendants took possession of and purchased under the provisions of the above act a small part of it adjoining the railway, so that the plaintiff's description of it was correct at the time of the declaration but not at the time of the trespass. *Held* that plaintiff could not recover for want of a new assignment: *Humfrey* v. *The London and N. W. R. Co.*, 7 Ex. 325. The effect of this section will be to simplify the form and abridge the length of new assignments.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 88. Founded upon the first report of the Common Law Commissioners, section 45.

(*a*) This is in accordance with the principles of the preceding section 115. There it has been enacted that plaintiff instead of new assigning separately to

the declaration shall be pleaded to such new assignment, except a plea in denial (*b*), unless by leave of a Court or Judge (*c*), and such leave shall be granted only upon satisfactory proof (*d*) that the repetition of such plea is essential to a trial of the merits. 19 Vic. c. 43, s. 137.

Time for pleading to an amended

117. (*e*) Where an amendment of any pleading is allowed (*f*) no new notice to plead thereto shall be neces-

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each of several pleas, shall be allowed only one new assignment, which must state generally that plaintiff proceeds for causes of action different from or beyond those justified. Here it is enacted that defendant shall not without leave plead to the new assignment pleas pleaded to the declaration. The consequence of these enactments will be that "if a defendant pleads one defence only at first and plaintiff new assigns, the defendant may then plead his next defence, and so on, putting each defence once and once only on the record; but if the defendant plead all his defences in the first instance, which is the usual course, the plaintiff will new assign once for all, and the defendant will of necessity be driven to deny the causes of action newly assigned, or pay money into court, or suffer judgment by default:" Common Law Commissioners.

(*b*) Pleas in bar are divided into two classes—pleas by way of traverse and pleas by way of confession and avoidance. Traverse is the more proper and ancient term. In the modern language of pleading, however, *deny* is often substituted for it; and "pleas in denial" is a term used instead of "pleas by way of traverse."

(*c*) Relative powers: see note *w* to section 48.

(*d*) *i. e.* It is presumed by affidavit.

(*e*) Ta. en from Eng. C. L. P. Act, 1852, section 90.

(*f*) The application for amendment may be either at the instance of the party whose pleading is in fault or at the instance of his opponent, who makes objection. This section contemplates amendments before entry of the record for trial. Amendments at the trial may be made under section 222 of this act. As to amendment after issue joined, see *Warner* v. *Blacklock*, 10 Jur. 716. Except under very special circumstances, a declaration may be amended at any time: *Trickel* v. *Jarman*, Finl. C. L. P. A. 196. It has been considered where a declaration was ordered to be amended in the names of one of the parties, that an amendment of the original filed without filing amended copy was sufficient: *Hart et al* v. *Boyle*, 6 O. S. 168. With respect to the terms of the amendment it as a general rule is only just that the party whose pleading is in fault should pay the costs really occasioned by the correction of such fault. Though this be the general rule, there may be exceptions dependent upon the circumstances of particular cases. The judge to whom application is made is in this respect clothed with ample authority. He may either allow an amendment without costs upon payment of a certain fixed sum as costs, or upon payment of costs to be taxed by the master. The court will not reverse his exercise of discretion though differing from him on the merits of the particular case: *Tomlinson* v. *Bollard*, 4 Q. B. 642. The application to amend should be in the first instance made to a judge in chambers. This is the most convenient and least expensive mode. Where a defendant applied to the court in the first instance, in a vexatious and expensive manner and for an amendment that might have been obtained at chambers, the court ordered his rule to be discharged with costs unless he would consent to pay the

pleading, &c.

sary (*g*), but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead (*h*), or within two days after amendment, whichever may last expire (*i*), unless otherwise ordered by the Court or a Judge (*j*); and in case the pleading amended

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costs of the amendment: *Duke of Brunswick* v. *Sloman*, 5 C. B. 218. Though a party obtain a rule or order to amend he may decline to avail himself of it. And will not in such a case be bound to pay the costs of obtaining leave to amend: *Brown* v. *Millington*, 22 L. J. Ex. 138; *Field* v. *Sawyer*, 6 C. B. 71. After a general demurrer to a declaration and leave to plead on the usual terms, the amount of the costs must depend upon the course the defendant elects to adopt as to demurring or pleading over to the amended declaration: *Metcalfe* v. *Booth*, 18 L. J. Q. B. 247. A fatal variance having in the course of a cause been discovered between the declaration and the evidence, the plaintiff applied to the judge to amend the declaration, and the following order was made: "Upon hearing counsel and by consent it is ordered that the record be withdrawn, and that the plaintiff do have leave to amend the record:" *Held* that although the order was silent as to costs, the plaintiff was liable to pay the costs of the day: *Skinner* v. *The London, Brighton & South Coast R. Co.* 4 Ex. 885; see also *Jackson* v. *Carrington*, 2 C. & K. 750. Where a plaintiff after notice of a trial (on an issue of not guilty), and shortly before trial, had leave to amend on payment of costs, and the declaration as amended was re-delivered according to the English practice, and a demurrer was then served, and afterwards costs of the amendment had been taxed, and the master allowed all the costs of preparing for trial, which included almost all the costs of the cause; and the plaintiff had obtained another order to amend on payment of costs upon both amendments, the court allowed the plaintiff to amend on paying the costs of the latter, and paying into court the costs of the former; reserving the question of review of taxation until it was seen whether, on the pleadings to the declaration as re-amended, the costs of preparing for trial would be thrown away; and if they were not—*semble*, that there would be a review of taxation, and that they would not be allowed as costs of the first amendment: *Alleson* v. *The Midland R. Co.* Finl. C. L. P. A. p. 197.

(*g*) Original notice given under sections 91 and 92 of this act.

(*h*) *i. e.* Eight days from the service of the original notice to plead, &c. It has been held where a plaintiff took a summons to amend, that defendant had a right to presume that plaintiff would follow it up, and that after its return it operated as a stay of proceedings for one day at least. Where the defendant's time for pleading was out on the day when the summons was returnable, a judgment signed for want of a plea on the morning of the next day was held irregular: *Hodgson* v. *Caley*, 8 Dowl. P. C. 318.

(*i*) The meaning is, that if the time for pleading pursuant to the original notice has expired before order for amendment, or if the time though not expired be within one day of expiring, in either case the party bound to plead shall have two days after amendment, the two days in either of these cases being the time "last to expire." The time allowed under the old practice in such cases may be ascertained upon reference to *Fuller* v. *Hall*, H. T. 5 Vic. *M.S.* R. & H. Dig. "Practice," I. 15; *Commercial Bank* v. *Boulton*, 1 Cham. R. 15.

(*j*) The time to be allowed by the judge may be less or more than that prescribed by this section. The power of the judge in such a case is one inherent in the jurisdiction of the courts.

If a defendant obtains further time to plead upon terms of pleading issuably, and

had been pleaded to before such amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the Court or a Judge allows, the plea originally pleaded thereto shall, if applicable, stand and be considered as pleaded in answer to the amended pleading (*k*). 19 Vic. c. 43, s. 139.

DILATORY PLEAS.

Dilatory pleas may be argued before a Judge in vacation.

118. (*l*) If a Defendant pleads any dilatory plea, being matter in law and not of fact, (*m*) the Plaintiff may set down such plea for argument on the first paper day thereafter on which the Court meets, or on any other day in Term, giving two days' notice thereof to the Defendant or his Attorney; (*n*) and if the Plaintiff fails so to set down the same for argument, he may apply to any Judge of the Court to hear and determine the issue joined thereon, in like manner as the

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plaintiff afterwards and before plea obtains leave to amend his declaration, and do amend materially to alter it, the record is thereby altered and defendant freed from his obligation to plead issuably: *Hutt et al* v. *Giles*, 11 M. & W. 756; *Barker* v. *Gleadow*, 5 Dowl. P. C. 134; *Woodman* v. *Goble*, 6 Dowl. P. C. 371; *Children* v. *Mannering*, 8 Dowl. P. C. 120; *Chapman* v. *Giles*, 1 D. & L. 389. Before this act it was held that if plaintiff *after* plea pleaded was allowed to amend, defendant was not entitled to plead *de novo* unless leave was given him so to do by the order allowing the amendment, or unless the nature of the amendment rendered pleading *de novo* essential: *Collins* v. *Aaron*, 5 Scott, 595; *Smith* v. *Hearne*, 1 D. & L. 992. Where plaintiff applied to amend his declaration, and the defendant at the same time applied for one month's further time to plead, which he obtained by judge's order, the month was held to run from the time when the declaration was amended: *Davies* v. *Stanley*, 8 Dowl. P. C. 433.

(*k*) This is perfectly in accordance with the old practice: see *Flagg* v. *Borsley*, 2 Dowl. P. C. 107. But there is an obvious distinction in principle between the case of a demurrer and a plea; the former cannot stand with the amended declaration, though the latter may: *Smith* v. *Hearn*, 12 M. & W. 718, *per* Alderson, B. In the case of a plea after the expiration of the two days without a further plea, plaintiff may join issue to the plea filed, treating it as pleaded to the amended declaration. Where a declaration had been amended upon application of defendant under section 119, and plaintiff immediately afterwards signed judgment as for want of a plea, the judgment being contrary to the enactment here annotated, and for other reasons not necessary to be here mentioned, was set aside without costs: *Moberly* v. *Baines*, 2 U. C. L. J. 212.

(*l*) This is taken from our old King's Bench Act 2 Geo. IV. cap. 1, s. 37.

(*m*) A general demurrer was held not to be a dilatory plea within the meaning of the statute: *Charles* v. *Hopkirk*, *M.S.* M. T. 4 Vic. Cam. Rules, 95.

(*n*) It is presumed that plaintiff would have, as in the case of demurrer or special case, to furnish to the clerk of the court three books for the use of the judges.

same might be done in open Court; (*o*) and in case the Judge gives judgment for the Plaintiff, he shall direct the plea to be taken off the file, with costs, to be taxed by the proper officer; (*p*) and the Defendant shall, within four days from the date of the orde., plead an issuable plea, and rejoin gratis, and go to trial at such time as he would have been bound to go to trial in case he had pleaded such issuable plea in the first instance. (*q*) 2 Geo. IV. c. 1, s. 37.

Unfair pleadings may be struck out or amended.

119. (*r*) The Court or a Judge (*s*) may order any pleading (*t*) so framed (*u*) as to prejudice, embarrass, or delay the fair trial of the action, (*v*) to be struck out, or may make

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(*o*) An application to a judge in vacation is probably here intended, though not so expressed.

(*p*) Where a judge in chambers granted an order to take a general demurrer off the file as being a dilatory plea, the court set aside the order: *Charles* v. *Hopkirk*, *M.S.* M. T. 4 Vic. Cam. Rules 95.

(*q*) The next section (s. 119) empowers the court or a judge to order any pleading so framed as "to prejudice, embarrass, or delay the fair trial of the cause, to be struck out;" and it is more than likely that it in practice will supersede the section here annotated.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 52. Founded upon the first report of the Common Law Commissioners, section 37. *Qu.* Does this section apply to proceedings on writs of *mandamus*? *Regina* v. *The Sadlers' Co.* 22 L. J. Q. B. 454, *per* Coleridge, J.

(*s*) *Court or a judge.* Relative powers: see note *w* to section 48.

(*t*) Applies to all ordinary pleadings, such as declaration, plea, replication, rejoinder, &c.

(*u*) The question is not whether the pleading was intended to prejudice, &c., but whether in fact it be so framed.

(*v*) The chief consideration is the fair and speedy trial: *Regina* v. *The Sadlers' Co.* 22 L.J. Q.B. 454, *per* Coleridge, J. Any pleading so framed as to prejudice, embarrass, or delay either party in the attainment of this end is within the meaning of the act. The judges have always set their faces against sham pleas. Bad pleading for delay has been treated as a contempt of court, and the fines arising from it were once a source of revenue to the crown: Com. Dig. "Prærogative," D. 52; In *Pierce* v. *Blake*, Salk. 515, the attorney was fined; and in *Blewitt* v. *Marsden*, 10 East, 237, and *Bartley* v. *Godslake*, 2 B. & Al. 199, the attorney was ordered to pay costs. A pleading irresistibly false on the face of it may be treated as a nullity: *Vere et al* v. *Carden*, 5 Bing. 413; *Blewitt* v. *Marsden*, 10 East, 237; *Balmanno* v. *Thompson*, 8 Dowl. P. C. 76. But if in doubt as to its falsity application should be made to set aside plea, and if left in doubt the court will not set it aside: *Smith et al* v. *Backwell*, 4 Bing. 512; *Richley* v. *Proone*, 1 B. & C. 286; *Merington* v. *Berket*, 2 B. & C. 81; *Bell* v. *Alexander*, 6 M. & S. 133; *La Forest et al* v. *Langan*, 4 Dowl. P. C. 642; *Shadwell* v. *Berthoud*, 5 B. & Al. 750; *Body* v. *Johnson, and Corbett* v. *Powell*, *Ib.* 751 *a*; *Smith* v. *Hardy*, 8 Bing. 435; *Bartley* v. *Godslake*, 2 B. & Al. 199; *Miley* v. *Walls*, 1 Dowl. P. C. 648; *Nutt* v. *Rush*, 4 Ex. 490; *Loughran* v. *Hill*, 6 Ir. C. L. R. 385; *Leathly* v. *Carey*, 8 Ir. C. L. R. App. i; *Armstrong* v. *Evans*, *Ib.* App. xxvii; *Gordon* v. *Hassard*, 9 Ir. C.

L. R. App. xxi; *Stokes* v. *Hartnett*, 10 Ir. C. L. R. App. xx; *Banks* v. *Jordon*, 7 Ir. Jur. N. S. 28; *O'Leary* v. *Hopper*, *Ib.* 29; *O'Brien* v. *Taggart*, *Ib.* 29. So if plea be frivolous: *Bradbury* v. *Emans*, 5 M. & W. 595; *Knowles* v. *Burward*, 10 A. & E. 19. Unless plea clearly frivolous or false it will not be set aside on motion: *Horner* v. *Keppel*, *Ib.* 17; *Cowper et al* v. *Jones et al*, 4 Dowl. P. C. 591; *O'Donnell* v. *Reilly*, 11 Ir. C. L. R. 329; *Archer* v. *McCaldin*, 6 Ir. Jur. N. S. 34; *Balmanno* v. *Thompson*, 8 Dowl. P. C. 76; *Banks et al* v. *The Metropolitan R. Co.* 3 Weekly Notes, 31. The words "prejudice, embarrass, *or* delay," are used disjunctively in the section annotated. The legal import of each word detached from the others has not been decided. Indeed, the idea which attaches to each word must of necessity be much blended with the ideas conveyed by the others. A party delayed may be prejudiced; a party prejudiced may be embarrassed; a party delayed and embarrassed must be prejudiced. The words are of very general signification, and must in all cases be received with reference to the object of pleading. The object of all written pleadings is to enable the parties before trial to arrive at some statement affirmed on one side and denied on the other, that the same may be submitted for decision to the proper tribunal, as the issue between the parties. The reason of the thing requires clearness and singleness of averment as much now as before the C. L. P. Act. A power must exist somewhere of compelling the parties to be clear and distinct in their statements. There must be a remedy against ambiguity whether intended or not. A rambling pleading, mixing up several grounds of action or defence, and composed of different matters of fact and law, must be objectionable: First report of the Common Law Commissioners. The delivery of any such pleading by one party to the other must necessarily "embarrass" him, and perhaps "delay" the trial to the "prejudice" of one party or the other. The remedy of the party aggrieved instead of being by special demurrer as formerly, is by application to amend at the costs of the party in fault. In effect the statute says, "no pleading shall be demurred to specially, and, even if it be not open to general demurrer, yet if it be so framed as to prejudice, embarrass, or to impede the trial, it shall be open to amendment or excision by the judge:" in *Regina* v. *The Sadlers' Co.* 22 L.J. Q.B. 454, *per* Coleridge, J. The rule is this, no mistake heretofore available only on special demurrer is now available, except where the mistake is one calculated to embarrass the plaintiff: *Dunmore* v. *Tarleton*, 16 L. & Eq. 393, *per* Erle, J. The desirable object in pleading is now to place on record the simple ground of action, defence, &c., in as intelligible a form as possible: *Ib.* 394. If a party instead of applying to set aside an embarrassing pleading demur, the court will give the pleading the meaning demurred to if the words used will fairly bear such a meaning: *Ruckley* v. *Kiernan*, 7 Ir. C. L. R. 75, 79. A pleading susceptible of one interpretation on demurrer and another at nisi prius is embarrassing: *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177; see also *Regan* v. *The Bagnalstown & Wexford R. Co.* 6 Ir. Jur. N. S. 395. A pleading so framed as unnecessarily to embrace more points than one, and compel the opposite party to come prepared for all, is a pleading so framed as to prejudice the fair trial of the action: *Forsyth* v. *Bristowe*, 8 Ex. 347; see also *Smith* v. *Hardy*, 8 Bing. 435; *Mitford* v. *Finden et al*, 8 M. & W. 511; *Waterman* v. *Carden*, 6 M. & G. 752; *The Welland R. Co.* v. *Blake*, 6 H. & N. 410; *Hooper* v. *The Bristol Port Railway & Pier Co.* 35 L. J. C. P. 299. A plea which did not answer the whole cause of action and would have embarrased the plaintiff in his reply was ordered to be amended: *Green et ux.* v. *Hurd*, 4 Prac. R. 337, *per* Draper, C. J. A plea containing matter of evidence was struck out by order of a judge: *Hancock* v. *Noyes*, 9 Ex. 388. So, in an action by an assignee, a plea that the property was not vested in plaintiff: *Cottula* v. *Soames*, 3 F. & F. 93; see also *Cuthbertson* v. *Irving*, 4 H. & N. 742. But where plaintiff *bona fide* states a contract according to his construction of it, and insists that he is correct, a judge will not compel him to alter his statement of it: *Taylor* v. *Smith*, 3 F. & F. 91. Pleadings which before this act would have been bad for duplicity, argu-

such other order respecting the same, (*w*) and also respecting

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mentativeness, uncertainty, or inconsistency, may be such as to render necessary applications to amend under the enactment here annotated.

Reference may be properly made to some such cases—

1. *Duplicity*—see *Messiter* v. *Rose*, 13 C. B. 162; *Forsyth* v. *Bristowe*, 8 Ex. 347; *Deacon et al* v. *Stodhart et al*, 5 Bing. N. C. 594; *Webster* v. *Watts*, 11 Q. B. 311.

2. *Argumentativeness* — *Leaf et al* v. *Tuton*, 10 M. & W. 359; *Turnley* v. *Macgregor*, 6 M. & G. 46.

3. *Uncertainty*—*Flockton et al* v. *Hall et al*, 14 Q. B. 380; *Cubitt et al* v. *Thompson et al*, 5 Ex. 811.

4. *Inconsistency*—Inconsistent pleas have been allowed when amounting to a "substantial defence": *Dueer* v. *Triebuer*, 3 Dowl. P. C. 133; *Wilkinson* v. *Small*, *Ib.* 564. But pleas "vexatiously inconsistent," as *non assumpsit* to a whole declaration and payment as to part, have been disallowed: *Steill* v. *Sturry*, *Ib.* 133; *Bastard* v. *Smith et al*, 5 A. & E. 827.

Since this act, *non assumpsit* pleaded to an action on a promissory note was in this province struck out on an application to a judge in chambers: *Rosse* v. *Dolson*, 2 U. C. L. J. 208, *per* Richards, J. Pleadings not issuable must often prove embarrassing. An issuable plea is one that at once puts the merits of the cause in issue either on the facts or the law: *Steele* v. *Harmer et al*, 14 M. & W. 136. A plea cannot be issuable if clearly bad in substance: *Lloyd et al* v. *Blackburn*, 1 Dowl. N. S. 647; *Watkins* v. *Bensusan*, *Ib.* 615; see also *Thomson* v. *Redman*, 2 Dowl. N. S. 1028; *Mackay* v. *Wood*, 9 Dowl. P. C. 278; *Selby* v. *The East Anglian Rs. Co.* 7 Ex. 53. A sham plea cannot be issuable: *Heron* v. *Heron*, 1 W. Bl. 376; *Lowfield* v. *Jackson*, 2 Wils. 117; *Cave* v. *Aaron*, 3 Wils. 33; *Brown* v. *Austin*, 4 Dowl. P. C. 161. As to when pleadings generally are or are not issuable, reference may be had to the following cases:—*Dickson* v. *Boulton*, 5 U. C. Q. B. 558; *Blewitt* v. *Gordon*, 1 Dowl. N.S. 815; *Humphreys* v. *Lord Waldegrave*, 6 M. & W. 622; *Myers* v. *Lazarus*, 1 Dowl. N. S. 316; *Willis* v. *Hallett*, 5 Bing. N. C. 465; *Hughes* v. *Pool*, 6 Scott. N. R. 959; *Parratt* v. *Goddard et al*, 1 Dowl. N. S. 874; *Mackay* v. *Wood*, 9 Dowl. P. C. 278; *Bateson* v. *Lee*, 1 D. & L. 224; *Whitehead* v. *Harrison*, *Ib.* 706; *Sewell* v. *Dale*, 8 Dowl. P. C. 309; *Sloane* v. *Packman*, 11 M. & W. 770; *Thomson* v. *Redman*, 2 Dowl. N. S. 1028; *Bury* v. *Goldner*, 1 D. & L. 834; *Searle* v. *Bradshaw*, 2 Dowl. P. C. 289; *Birch* v. *Leake*, 2 D. & L. 88; *Wilkinson* v. *Page*, 1 D. & L. 913; *Harvey* v. *Watson*, 7 M. & G. 644 *Verbist* v. *DeKeyser*, 3 D. & L. 392; *Hulhwaite* v. *Phaire*, 8 Dowl. P. C. 541; *Beauclerk* v. *Hook*, 20 L. J. Q. B. 485; *Tagg* v. *Simmonds et al*, 4 D. & L. 582; *Bousfield* v. *Edge*, 1 Ex. 89; *Wettenhall* v. *Graham*, 4 Bing. N.C. 714; *Besant* v. *Cross*, 20 L. J. C. P. 173; *Mayhew et al* v. *Blofield*, 1 Ex. 469; *The Cork & Bandon R. Co.* v. *Goode*, 13 C. B. 618; *Crutchley* v. *The London & Birmingham R. Co.* 2 D. & L. 102; *Laforest* v. *Wall*, 9 Q. B. 599; *Hunter* v. *Wilson*, 19 L. J. Ex. 8; *Linwood* v. *Squire*, 19 L. J. Ex. 237; *Moore* v. *Forster*, 5 C. B. 220; *Schenk* v. *Godts*, 1 C. L. Rep. 115; *Dunmore* v. *Tarletan*, 16 L. & Eq. 391; *Roberts* v. *Brett*, 34 L. & Eq. 421; *Wallace* v. *Grover et al*, 1 Cham. R. 1; *Eccles* v. *Johnson*, *Ib.* 93; *Sherwood* v. *March*, *Ib.* 176; *Jessup* v. *Frazer*, H. T. 4 Vic. *MS.* R. & H. Dig. "Assessment of Damages," 5.

(*w*) To hold that a plea is bad because more or less obscure would be unreasonable unless the party pleading it will not amend and clear up the obscurity when it is pointed out to him: Common Law Commissioners' first Report. If he fail or refuse to do so there is but one alternative—to strike out the pleading. A party whose pleading is defective or vicious will see the propriety of himself applying for an amendment. Even surplusage may vitiate, and may, if embarrassing, be struck out upon application of the adverse party. But it has been held that breaches in a declaration where there were three, one of which was

the costs of the application, as such Court or Judge sees fit. (*x*) 19 Vic. c. 43, s. 101.

DEMURRERS.

120. (*y*) Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence or reply, as the case may be. 19 Vic. c. 43, s. 99.

Either party may demur to the pleading of the opposite party.

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good and two bad, to which latter there was a demurrer, could not be treated as surplusage after demurrer: *Lush* v. *Russell*, 4 Ex. 637.

(*x*) If a rule under this section be made absolute in its terms, the party obtaining it gets the costs as costs in the cause: *Barnes* v. *Hayward*, 1 H. & N. 242.

(*y*) Taken from the Eng. Stat. 15 & 16 Vic. cap. 76, s. 50. The effect if not the object of this enactment, taken in connection with section 123, is to abolish special demurrers.

The sufficiency of a pleading has from the earliest period been held to depend upon its *substance;* but when written were substituted for oral pleadings, attention to *form* became requisite. The parties instead of pleading *impromptu* before the judge who tried the cause, were enabled some time before the time appointed for the trial, by an exchange between themselves of written statements of grounds of action and defence, to arrive at issue. The object in requiring a proper attention to form was to ascertain and settle upon the pleadings the exact questions to be determined between the parties, and as an incident to prevent the introduction of extraneous matter. The necessity for form once recognized let in a number of arbitrary rules intended to prevent uncertainty, obscurity, duplicity, and other like defects. An anxiety on the part of the judges, that pleadings should be certain and at the same time sure, led to unnecessary precision, which occasioned on the part of pleaders much and useless prolixity. The result of the whole has been obscurity, perplexity, and fiction, the very evils that special pleading was designed to prevent. In this way the evils grew in magnitude as decisions accumulated, until in the end *form* too often triumphed over *substance.* The legislature at a very early period of English history were alive to the growing tendency of technicality and subtlety. In the year 1585 a statute was passed which recited that "great delay and hindrance of justice has grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleadings, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law, and *very right of the cause* doth require, whereby the parties are constrained either utterly to lose their right, or else after long time and great trouble and expences to renew again their suits." For remedy whereof it was thereby enacted "that from henceforth after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as *the very right of the cause and matter in law* shall appear unto them, without regarding any imperfection, defect or want of form in any writ, return, plaint, declaration, or other pleading process or course of proceeding whatsoever, except those only which the party demurring shall *specially* and particularly set down and express, together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted:" 27 Eliz. cap. 5, s. 1. Notwithstanding this enactment, objections to form were frequently raised, to which the courts were constrained to yield, although "the very right of the cause and matter of law"

might be with the party whose pleading was found to be defective, but who was unfortunate enough to risk a special demurrer. For remedy of this evil it was enacted that "where any demurrer shall be joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, &c., *so as sufficient matter appear in the said pleadings upon which the court may give judgement according to the very right of the cause*," &c.: 4 Anne, c. 16, s. 1. There is but one pervading spirit in these acts, which is, to make substantial justice paramount to mere *form;* and yet experience has shown that the acts, though of great benefit, have failed in their object. Both acts required the judges to give judgment "according to the very right of the case and matter in law," without regarding imperfections, omissions, or defects in form. "*except those which were specifically set forth*," thus impliedly authorising the judges to give judgment *against* the very right of the cause, &c., on an objection for want of form, provided it were specifically pointed out. This gave birth to "special demurrers," the ally of unscrupulous technicality, and the preserver of all that was obnoxious and embarrassing in the rules of pleading. The necessity for form was retained with all its evils. Nothing remained to be done but to destroy a system which, though intended for good, had been perverted to serve dishonest purposes. Special demurrers are therefore by this section numbered with the things that are past. Demurrers were of two kinds—general, which related to matters of substance; and special, which related to matters of form. The latter only having been abolished, the former, if not retained in name, are in effect preserved. The true construction to be put upon this section is to ascertain whether the declaration or other pleading demurred to *would have been good on general demurrer before the act;* if so it will not be demurrable under this act. This is the true and almost the only test. It is intended by the act to do away with matters of form, but still it is not meant that that should be held to be good which is not good in *substance*: *Richards* v. *Beavis*, 2 C. L. Rep. 675, *per* Campbell, C. J. The question as to what is good on general demurrer is not altered by this act: *Ib.* 676; *per* Crompton, J. Of course pleadings cannot be held good where the parties do not choose to say what they mean. If the court were to hold such pleadings good they would be getting into the region of ambiguity and uncertainty, which would be a worse evil than that which the act was intended to remedy: *Ib. per* Crompton, J. Declaration not disclosing any consideration for an agreement *held* bad: *Fremlin* v. *Hamilton et al*, 8 Ex. 308. Declaration that defendants were indebted to plaintiff for freight, omitting the words "for money payable by the defendant to the plaintiff," held bad: *Place* v. *Potts et al*, *Ib.* 705. But see *Fagg* v. *Nudd*, 8 El. & B. 650. Declaration for malicious arrest not stating that the action on which the arrest took place was at an end, held good: *Eakins* v. *Christopher*, 18 U. C. C. P. 532.

The boundary between substance and form is not at all times easy to be defined. The only guide in the way of precedent is that of general demurrer. Whenever before this act pleadings were held to be bad on general demurrer, they will generally be held to be bad upon demurrer under this act; but the converse as to special demurrer is by no means a safe guide. It will not do to say that in all cases where pleadings were held bad on special demurrer only, they will be good under this act. An analysis of the cases will do more to assist the judgment in this inquiry than any theory that can be propounded. With a view to this, the Editor subjoins *some* cases decided before the act. To review *all* would be the work of a pleader, and a labour which it is believed no pleader can satisfactorily accomplish.

It is enacted that either party may object to the pleading of the opposite party on the ground that such pleading does not set forth "sufficient *ground of action, defence*, or *reply*, as the case may be. As to these severally—

First—as to the *ground of action*, which should appear in the declaration. Plaintiff must so explain his cause of action as to make it appear to the court that there is sufficient foundation for the action. All essentials or whatever is of the substance of the action must be alleged, that the court may be enabled to give judgment for him in case a verdict is found in his favour: Bac. Abr. "Pleas and Pleadings," A. The law requires the declaration to contain certainty and truth that the defendant may be able to make a proper answer thereto and the court give a right judgment thereon: *Ib.* B. In trespass for taking goods, &c., a declaration not setting out the goods by specific description, but mentioning them as "divers goods and chattels," &c., bad on general demurrer: *Friesman* v. *Donnelly et al*, 5 O. S. 16; see also *Holmes* v. *Hodgson*, 8 Moore, 379. But though informal if it do not aver the goods, &c., to be the goods of the plaintiff, it is not bad on general demurrer: *O'Brien* v. *Harahy*, 1 U. C. Q. B. 475. A declaration by plaintiff suing on a lease as reversioner, which shows plaintiff if reversioner at all to be so jointly with another person not a co-plaintiff, bad on general demurrer: *Scott* v. *Godwin*, 1 B. & P. 67. So a declaration on a charter party describing plaintiff as "freighter for six voyages," but omitting to aver that defendant agreed to six voyages, has been held bad since the Eng. C. L. P. Act: *Richards* v. *Beavis*, 2 C. L. Rep. 673. So a declaration for omitting to cleanse drains whereby the plaintiff's premises suffered damage, is not sufficient, though it describe defendant as "owner and proprietor" of the premises on which the drains are situate. Further grounds of liability should be stated to make the cause of action good in substance. Defendant though both owner and proprietor is not necessarily as such bound to cleanse drains: *Russell* v. *Shenton*, 3 Q. B. 449. A declaration in case against a tenant for allowing premises to become out of repair, but not showing defendant to be more than a tenant at will, has been held bad on general demurrer: *Harnett et ux.* v. *Maitland*, 16 M. & W. 257. *Qu.* If a declaration in *covenant* for non-repair not stating a term would be bad on general demurrer: see *Turner* v. *Lamb*, 14 M. & W. 412. A declaration averring a promise to have been made by defendant, in consideration that plaintiff would forbear to prosecute a *qui tam* action, but not averring that plaintiff did forbear, has been held bad on general demurrer: *Hart* v. *Meyers*, 7 U. C. Q. B. 416. Where the declaration sets out the consideration for defendant's promise, and in doing so discloses in substance a good cause of action, an uncertainty in stating a part of the demand will not make the declaration bad on general demurrer: *Bradford et al* v. *O'Brien*, 6 U.C. Q.B. 417. If any part of the declaration show a good cause of action, it will be sufficient: *Davis* v. *The London & Blackwall R. Co.* 1 M. & G. 801, *per* Tindal, C. J. A declaration *in assumpsit* averring in consideration that plaintiff, at request of defendant, had promised to do all the work necessary in bottling beer, it was agreed between plaintiff and defendant that defendant should within twelve months from a certain day (named) supply plaintiff with at least 500 hogsheads of beer to bottle, and breach, that defendant not regarding, &c., held good in substance: *Fannin* v. *Anderson*, 7 Q. B. 811; see also *Duke et al* v. *Dive*, 1 Ex. 36, and *Balfe* v. *West et al*, 1 C. L. Rep. 225, the latter case having bad on demurrer: *Wright* v. *Clements*, 3 B. & A. 503; also see Schedule B. tion for a libel, averring the libel to be "in substance as follows," would be been decided since the English C. L. P. Act. It would appear that a declara- to this Act, No. 29. Where by agreement concurrent acts are to be done by plaintiff and defendant, it is sufficient in a declaration against defendant for not doing the act on his part, for plaintiff to allege generally "that he was willing to perform the agreement" without expressly averring that he was ready and willing to do the concurrent act on his part: *Kemble* v. *Mills*, 1 M. & G. 757. In an action for breach of contract plaintiff averred that defendant on 4th August,

1844, agreed with plaintiff to erect a house by the middle of November "next ensuing." Breach that the house was not erected in the middle of the month of November. Held bad on general demurrer in not showing that November, 1844, was November next ensuing the agreement: *Ekins* v. *Evans*, 2 U. C. Q.B. 144. In debt on bond the declaration averred that defendant and one S. acknowledged themselves bound to plaintiff in £8000, to be paid to plaintiff, or to one W. E. on request, and that thereby and by reason of the non-payment thereof an action hath accrued, &c. *Held* that it was unnecessary to allege a request, and that non-payment was sufficiently shown: *Kepp et al* v. *Wiggett et al*, 6 C. B. 280. The omission of a special request even when proper to be inserted is matter of form only, and cannot be objected to on general demurrer: *McLeod* v. *Jackson*, 5 O. S. 318. But where in debt on bond, conditioned on delivery of good "merchantable" grain, to deliver a certain quantity of whiskey, an averment in the declaration that plaintiff had delivered good "distillery" grain, but that defendant had not, &c., was held to be bad on general demurrer: *Cowper* v. *Fairman*, 3 O. S. 568. A count on a bond conditioned to pay money on notice, but averring notice only that the money was due, is bad: *Batson et al* v. *Spearman*, 9 A. & E. 293. So in an action on a policy of insurance on which losses arising from riot or civil commotion were excepted, a declaration negativing loss by civil commotion only is bad: *Condlin* v. *Home Dist. Mutual Fire Ins. Co.* H. T. 6 Vic. *MS.* R. & H. Dig. "Insurance," 2. A declaration averring that A. and others had agreed to become members of a certain society, and that in the event of either of them leaving it he should pay to *the President*, but not averring to what president or how the obligation should be enforced, was held bad on general demurrer: *Shepherd* v. *Duncan*, 15 L. T. Rep. 303. Where the declaration stated that plaintiff sued the defendant for that the defendant agreed with the plaintiff to cause a certain valuation to be made, by neglecting to do which special damage accrued to the plaintiff but did not aver any consideration for the agreement, it was held bad. And *per cur.*, "the C. L. P. Act, 1852, has no doubt afforded great latitude in pleading; but it has not removed the necessity of stating a consideration for an agreement upon which a party is sought to be charged:" *Fremlin* v. *Hamilton et al*, 8 Ex. 308. So where a declaration in an action for freight stated that "the defendants are indebted to the plaintiff for freight," &c., but omitted to aver that there was any money payable by defendant to plaintiff, the declaration was held bad: *Place* v. *Potts et al*, *Ib.* 705. This is a defect which may be cured by pleading over: *Wilkinson* v. *Sharland*, 24 L. J. Ex. N. S. 116. But a declaration "for money found to be due from the defendant to the plaintiff on account stated between them" has been held sufficient, as the law implies a promise between them: *Fagg* v. *Nudd*, 3 El. & B. 650.

2. *Plea.* If defendant do not demur to the declaration, his only alternative is to answer it by matter of fact. In doing so he is said to plead, and the answer of fact so made is called the plea. Pleas are divided into dilatory and peremptory. A peremptory plea or plea in bar may be defined as one which shows some sufficient ground for barring or defeating the plaintiff's action. Pleas in bar are divided into pleas by way of traverse and pleas by way of confession and avoidance. As the plaintiff's declaration must set forth all essentials necessary to maintain his action, so the defendant's plea in bar must be substantially good and certain: Bac. Abr. "Pleas and Pleadings," I. 2. Pleas, though they may be general, yet should not be so general as to be vague. Care should be taken not to get "into the region of uncertainty and ambiguity." A plea to an action of covenant that defendant did not break his covenant held bad on demurrer: *Taylor* v. *Needham*, 2 Taunt. 278. A plea of performance otherwise than in the terms of the covenant is also bad: *Scudamore et al* v. *Stratton et al*, 1 B. & P. 455. So to a bond conditioned to pay a sum of money in the event of another person not paying it, a plea of satisfaction and discharge before breach is bad: *Spence* v. *Healey*, 1 C. L. Rep. 857. In debt on bond a plea of license not being by deed

is bad: *Sellers* v. *Bickford*, 1 Moore, 460. So to a declaration in covenant for not repairing a house within a reasonable time, it is a bad plea that defendant repaired the house within a reasonable time after he was required to do so by plaintiff: *Fisher* v. *Ford*, 4 Jur. 1034; see also *Jones* v. *Gibbons*, 8 Ex. 920. To a similar declaration a plea of eviction was held bad: *Newton* v. *Allin*, 1 G. & D. 44. Where, in an action of assumpsit for non-payment of rent, according to agreement, defendant pleaded eviction by a stranger, but omitted to negative that the stranger derived title under himself, the plea was held bad: *McNab* v. *McDonell*, 2 U. C. Q. B. 169. A plea justifying an arrest on suspicion of felony, without showing the grounds of the suspicion, is bad: *Mure* v. *Kaye et al*, 4 Taunt. 34. To a declaration charging expulsion from a dwelling-house, a general plea of *liberum tenementum*, is good: *Harvey* v. *Bridges et al*, 3 D. & L. 55; but not to a declaration charging an assault: *Roberts* v. *Tayler et al*, 1 C. B. 117; nor to a declaration in trespass, *quare clausum fregit* and carrying away plaintiff's hay and corn, &c.: *Wilcox* v. *Montgomery*, 5 O. S. 312. There may be a general plea of fraud: *Washbourn* v. *Burrows*, 1 Ex. 107; see also *Robson* v. *Luscombe*, 2 D. & L. 859. To an action for a libel a plea in general terms that plaintiff is a swindler and an immoral character, is bad: *Holmes* v. *Catesby*, 1 Taunt. 543; *Brown* v. *Beatty*, 12 U. C. C. P. 107; *Stewart* v. *Rowlands*, 14 U. C. C. P. 485; *Baretto* v. *Pirie*, 26 U. C. Q. B. 468; but if the declaration charge some specific fact of libel, a plea that it is true in substance and in fact seems to be good: *Weaver* v. *Lloyd*, 2 B. & C. 678; *Honess et al* v. *Stubbs*, 7 C. B. N.S. 555; *Hunter* v. *Sharpe*, 13 L. T. N.S. 592; *Behrens et al* v. *Allen*, 8 Jur. N.S. 118. To an action on the case for fixing a dog spear whereby plaintiff's dog was wounded, a general plea alleging that plaintiff had notice of the spear, is good: *Jordin* v. *Crump*, 8 M. & W. 782. To trespass for shooting a dog, a plea that the dog was used to worry sheep; that just before he was shot he was worrying defendant's sheep, and could not be otherwise restrained from so doing, has been held a good plea, as it would be intended that the dog was about to renew the attack: *Kellett* v. *Stannard*, 2 Ir. C. L. R. 156. To an action against a gas company for a nuisance, a plea that they are "now" managing their works carefully, &c., is bad: *Watson* v. *Gas Co.* 5 U. C. Q. B. 262. So a plea of set-off to an action claiming unliquidated damages: *Attwool* v. *Attwool*, 1 C. L. Rep. 242. To an action on a bond, the plea of *nil debit* is bad: *Anon*, 2 Wils. 173. And a plea contrary to the express condition of the bond is bad. Therefore to a bond conditioned for the payment of money, a plea that the bond was given as an indemnity, was held to be bad: *Mease* v. *Mease*, 1 Cowp. 47; see also *Murray* v. *King*, 5 B. & Al. 165. To a declaration on an agreement to forbear suing, a plea that defendant had no cause of action is bad: *Wade* v. *Simeon*, 2 C. B. 548. So to an action on a note, a plea that it was given for lands sold without a note in writing: *Jones et al* v. *Jones et al*, 6 M. & W. 84. A material alteration in writing avoids a bond, but a plea alleging an alteration without averring it to be in writing is bad: *Harden* v. *Clifton*, 1 Q. B. 522. To an action on a bond, conditioned for the performance of several matters, a general plea of performance is bad: *Roakes* v. *Manser et al*, 1 C. B. 531. So to an action on a bond conditioned that A, as a bank agent, should account, &c., a plea that before action brought, A ceased to be agent, and that while he was agent he kept all the clauses of the bond: *Bank of Upper Canada* v. *Bethune et al*, E.T. 5 Wm. IV. *MS.* R. & H. Dig. "Pleading," V. 2. Debt on bond conditioned that if the obligor should practice as a surgeon at S, at any time, without the consent in writing of the obligee, then obligor should be obliged to pay obligee £1000—the bond to be void. Plea, that defendant did not practice as a surgeon at S, without the consent in writing of the obligee: *Held* bad on general demurrer: *Hastings et al* v. *Whitley*, 2 Ex. 611. So to a bond conditioned that defendant should "well and truly" convey to plaintiff, his heirs and assigns forever, a piece of land, a plea by defendant that he did make and execute a conveyance in fee simple to plaintiff, is bad: *Prindle* v. *McCan et al*, 4 U. C. Q. B. 228. To an action of debt for

money lent a plea as to £100, part thereof, that defendant made his note to plaintiff's order for £100, is bad for not averring that the note was still running: *Price* v. *Price*, 16 M. & W. 232. A plea of infancy when there has been a liability contracted and subsequent repudiation should allege that the repudiation was made within a reasonable time after defendant attained his majority: *The Dublin and Wicklow R. Co.* v. *Black*, 8 Ex. 181. To an action on a foreign judgment defendants pleaded that they were not served with any process, and that plaintiff unjustly, and behind their backs, entered an appearance for them was held bad in not averring that defendants had no notice of the writ: *Sheehy* v. *The Professional Life Assur. Co.* 13 C. B. 787. In assumpsit for work and labor there was a plea, that the money mentioned in the declaration accrued due to the plaintiff for the building of a church; that the plaintiff having suspended the work another agreement was entered into between him and one A, under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A duly made, and the plaintiff received, the payments stipulated fo by the second agreement, in satisfaction and discharge of the original agreement between the plaintiffs and the defendants, and of the performance thereof by the latter: *Held* a bad plea in substance: *James* v. *Isaacs et al*, 12 C. B. 791. A plea to a declaration on a note showing it to have fallen due in January, 1848, that defendant paid the note on the 31st December, 1847, before it became due, is bad on general demurrer: *Bown* v. *Hawke*, 6 U. C. R. 275.

3. *Replication.* A replication is the plaintiff's answer to defendant's plea, and should fortify and support the declaration. The material requisite in a replication is that it should pursue what has been first alleged and insisted upon in the declaration, otherwise there will be a departure in pleading: Bac. Abr. "Pleas and Pleading," A. A replication which in general terms denies the whole substance of the plea is good even on special demurrer: *Darbishire* v. *Butler*, 5 Moore, 198. Where in trespass for seizing cattle and causing them to be sold, defendant pleaded that the cattle were taken *damage feazant*, and proceeded to justify the sale under Prov. Stat. 1 Vic. c. 21. Replication that defendant's fences were defective, and that the cattle escaped from the highway into the close. *Held* replication clearly bad, in not averring that the cattle escaped through the defect in the fences: *Stedman* v. *Wasley*, 1 U.C. Q.B. 464. Since the first Eng. C. L. P. act it has been held that in an action on a foreign judgment to which there was a plea denying notice of the proceedings and residence in the jurisdiction, a replication that the action was on a bill accepted within the said jurisdiction by defendant (who was then a resident there,) and payable at a place within the jurisdiction, and that by the laws of the foreign country in such cases, the place of payment is deemed the elected domicile of the acceptor, and that notice of the proceedings were served there in accordance with the foreign law: *Held* bad for not alleging that the law was so at the time the bill was accepted: *Meeus* v. *Thellusson*, 22 L. J. Ex. 239. To an action of assumpsit defendants pleaded payment into court as to part and a set-off as to the residue. Replication to the first plea that defendants were indebted in a greater amount than the amount paid, and to the other plea that plaintiff was not (not adding "nor is" in either case) indebted *modo et forma*, both replications were held bad on general demurrer: *Small* v. *Strachan et al*, 2 U. C. Q.B. 434. To an action of replevin in the old form, the defendant avowed for a distress for rent due to him by one C, on a demise at a yearly rent, of which one year's rent was in arrear on 1st January, 1850. Replication to this that the close on which the distress was made was at the time when, &c., the close of him the plaintiff: *Held* bad as containing no answer in substance to the avowry: *Robertson* v. *Meyers*, 7 U. C. Q. B. 415.

4. *Rejoinder.* Rejoinder or defendant's answer to plaintiff's replication, must fortify and support defendant's plea. It must also pursue the line of defence first insisted upon, or else there will be a departure: Bac. Abr. "Pleas and Plead-

121. (*z*) The form of a demurrer (*a*) shall be as follows, or to the like effect: (*b*) Form of Demurrer.

The Defendant, by his Attorney, (*or* Plaintiff, *as the case may be*,) (*or* in person, &c.,) says that the declaration (*or* plea, &c.) is bad in substance. (*c*)

And on the margin thereof some substantial matter of law intended to be argued shall be stated; (*d*) and the Court or a A substantial ground of demurrer

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ing,' A. To debt on an indemnity bond the defendant pleaded *non damnificatus*, and the plaintiff having replied, showed how she was damnified. The defendant rejoined that the injury arose through the plaintiff's own fraudulent act: *Held* on general demurrer to be a departure: *Hamilton* v. *Davis et al*, 1 U. C. Q.B. 490. So where plaintiff declared in debt on bond for the non-performance of an award, the defendant pleaded no award. The plaintiff replied setting out the award, to which the defendant rejoined matter extrinsic to the award, and relied upon it as showing the award void: *Held* a departure: *Maxwell* v. *Ransom*, 1 U.C. Q.B. 219.

5. *Surrejoinder*. This and all subsequent pleadings being governed by the same rules and with the same effect as the pleadings already noticed, there is no necessity for pursuing the subject any further.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 89.

(*a*) Demurrers for matters of form are by this act abolished; but demurrers for matters of substance are retained and are such as are intended by this section: see note to section 120. The words "except in the cases herein specifically provided for," used in the corresponding section of the English act, are not to be found it will be perceived in our section. The meaning of such an exception was a matter of doubt to the commentators on the English act, and our legislature have done wisely in omitting it.

(*b*) It is presumed that a demurrer, like any other pleading, must be intitled of the proper court and of the day and year when pleaded: see section 77 of this act; and in connection therewith see *Holland et al* v. *Tealdi*, 8 Dowl. P. C. 320.

(*c*) As to the distinction between substance and form see note to section 120.

(*d*) The provision following is a substantial re-enactment of Rule 14 E. T. 5 Vic., which was taken from Eng. R. G. 2 H. T. 4 Wm. IV. (2 Dowl. P. C. 304), and which was held not to apply to revenue cases: *Rex* v. *Woollett*, 2 C. M. & R. 256. It was held under it that a substantial compliance with its terms was in all ordinary cases necessary. A statement that "the matters in the plea contain no answer to the action," was held to be insufficient: *Ross* v. *Robeson*, 3 Dowl. P. C. 779. And, *per* Parke, B., "The statement in the margin is merely a repetition of the general demurrer, and would suit any other general demurrer to the plea just as well. Some special ground ought to have been stated:" *Ib.* 780. It has also been held that if several grounds be stated in the margin it is not necessary for the party demurring to specify on which of those grounds he intends to rely: *Whitmore* v. *Nicholls*, 5 Dowl. P. C. 521. And, *per* Williams, J., "It may be that there are several grounds stated in the margin which cannot be sustained when they come to be argued. But that does not vitiate the other points, or render this statement a nullity so as to entitle plaintiff to set aside the demurrer as for want of a plea:" *Ib.* For examples of statements of several grounds of demurrer see *Smith* v. *Monteith*, 13 M. & W. 427; *Bonzi et al* v. *Stewart*, 7 M. & G. 746. If a party demur to several pleas on the same grounds, the causes of

to be stated in the margin.

Judge may set aside any demurrer delivered without such statement, or with a frivolous statement, (*e*) and may give leave to sign judgment as for want of a plea; (*f*)

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demurrer to all after the first are sufficiently stated by stating that the plea, &c., is insufficient, "for the like causes and grounds of objection which have been taken to the said (first) plea:" *Braham* v. *Watkins*, 16 M. & W. 77. The marginal notes are meant for the information of the court and not of the parties: *Scott et al* v. *Chappelow*, 4 M. & G. 336.

(*e*) To decide when an objection is frivolous, it will be necessary to bear in mind that the main object of this act is to make form subservient to matter. The court must obviously possess a discretionary power to set aside frivolous demurrers or pleadings, to preserve its own records from abuse, the public time from being wasted, to prevent the useless accumulation of costs to the prejudice of the client, and to the advantage of those only who ought to protect him from these evils, and to the delay, if not the perversion of justice: see section 119, and notes thereto. But it is manifest that all these evils will be aggravated if the exercise of a judge's discretion is frequently made the subject of an appeal to the court. When the court clearly sees an attempt to secure a triumph to falsehood by means of a bad pleading the possibility of a doubt being raised in argument affords no reason for interfering with the judge's discretion: *Lane* v. *Ridley*, 10 Q. B. 481, *per* Denman, C. J.; *Padwick* v. *Turner*, 11 Q. B. 124.

(*f*) The mode pointed out by this section for taking advantage of an irregular demurrer is the proper one to be adopted. No objection that might be taken advantage of in this mode can be raised on the argument of the demurrer: *Lacey* v. *Umbers*, 3 Dowl. P. C. 732. To entitle a party to set aside a demurrer because of a frivolous statement the objection taken must be clearly tenable. If there be any doubt as to the sufficiency of the objection, the court will not interfere: *Tyndall et al* v. *Ulleshorne*, 3 Dowl. P. C. 2; *Undershell* v. *Fuller*, 5 Tyr. 392; *Walker* v. *Catley*, 5 Dowl. P. C. 592; *Chevers* v. *Parkington*, 6 Dowl. P. C. 75. A frivolous demurrer is not so much an irregularity as an improper proceeding, which the court in its discretion may set aside at any time: *Cutts* v. *Surridge et al*, 9 Q. B. 1023, *per* Denman, C. J. But an objection to the marginal notes or form of demurrer should not be deferred till after joinder in demurrer, at which time it would be too late: *Norton* v. *Mackintosh*, 7 Dowl. P. C. 529. A defective marginal note may be amended on payment of costs: *Ross* v. *Robeson*, 3 Dowl. P. C. 779; and the case postponed until the points of argument are properly stated: *Parker* v. *Riley*, 3 M. & W. 230. The rule to set aside a demurrer as frivolous or for any cause contemplated by this section will it is apprehended be *nisi* in the first instance: *Kinnear* v. *Keane*, 3 Dowl. P. C. 154; and in the case of a frivolous demurrer should be drawn up "on reading the pleadings:" *Howorth* v. *Hubbersty*, 3 Dowl. P. C. 455; *Danieli* v. *Lewis*, 1 Dowl. N. S. 542. A rule that the demurrer be set aside as irregular "unless cause be shown on Thursday next" has been issued: *Kinnear* v. *Keene*, 3 Dowl. P.C. 154. If the demurrer be set aside, all the pleadings connected with it may also be set aside at the same time. In one case a rule was drawn up in the following form, "that the demurrer delivered herein be set aside as irregular, and the pleadings connected therewith be struck out, and that the defendant do pay to the plaintiff, his attorney or agent, within four days after taxation, all costs of and occasioned by the said demurrer, including the costs of preparing for the trial of and attending to try this cause, and of this application, to be taxed by one of the masters. And that the defendant do take short notice of trial for the sittings after term; and in default of payment of such costs within four days after taxation as aforesaid, it is ordered that the plaintiff be at liberty to sign judgment as for want of a plea: *Tucker* v. *Barnesley*, 16 M. & W. 54. In

And the form of a joinder in demurrer shall be as follows, or to the like effect : (*g*) Form of joinder in demurrer.

The Plaintiff (*or* Defendant) says that the declaration (*or* plea, &c.) is good in substance. (*h*) 19 Vic. c. 43, s. 138.

122. (*i*) Where issue is joined on demurrer, the court shall give Judgment according as the very right of the cause and matter in law appears unto them, without regarding any imperfection, omission, defect in or lack of form, (*j*) and no Judgment shall be arrested, stayed or reversed, for any such imperfection, omission, defect in or lack of form. (*k*) 19 Vic. c. 43, s. 99. Judgment to be given according to the very right.

123. (*l*) No pleading or amended pleading (*m*) shall be deemed insufficient (*n*) for any defect which formerly could Special Demurrers superseded.

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the Queen's Bench and Common Pleas it is the practice on cross demurrers for the plaintiff to begin: see *Halhead et al* v. *Young*, 6 E. & B. 312; *The Wolverhampton Water Works Co.* v. *Hawkesford*, 28 L. J. C. P. 242; *Churchward* v. *The Queen*, L. R. 1 Q. B. 173. But in the Exchequer the practice is different, the party first demurring being entitled to begin: see *Hill* v. *Cowdery*, 1 H. & N. 360; *Redway* v. *Sweeting*, L. R. 2 Ex. 400. The word plea as used in this section means pleading, and applies to any pleading by either party: *Cutts* v. *Surridge et al*, 9 Q. B. 1023, *per* Denman, C. J.

(*g*) See note *b supra*.

(*h*) As to when a pleading can be said to be good in substance, see note *y* to section 120.

(*i*) Taken from latter part of Eng. Stat. 15 & 16 Vic. cap. 76, s. 50.

(*j*) It is made the duty of the court to give judgment as "the very right of the cause" and "matter in law" appears unto them, without regarding any imperfection, omission, defect in or lack of form: see note *y* to section 120, as to the difference between form and substance in pleadings. 159.

(*k*) The latter part of this section is in effect the same as the statutes of Elizabeth and Anne, recited in note *y* to section 120, with one exception—the designed omission of all mention respecting special demurrers: see section 123.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 51. Founded upon the first report of the Common Law Commissioners, section 35. This section is clearly prospective: *James* v. *Isaacs et al*, 12 C. B. 795, *per* Maule, J.; see also *Pinhorn* v. *Souster*, 8 Ex. 138; *Chase* v. *Scripture*, 14 U. C. Q. B. 443. 493

(*m*) Applies equally to declarations, pleas, replications, rejoinders, and all subsequent pleadings: see note *y* to section 120.

(*n*) Before the passing of this act the sufficiency of a plea depended upon its substance *and* form. The doctrine was well expressed as follows: "The law requires two things. The one that it (the pleading) be in matter sufficient. The other that it be deduced and expressed according to the form of law. If either the one or the other of these be wanting, it is cause of demurrer:" *Colt et al* v. *Bishop*

only have been objected to by special demurrer. (*o*) 19 Vic. c. 48, s. 100.

EQUITABLE DEFENCES. (*oo*)

Equitable defence may be pleaded.

124. (*p*) Any Defendant, or the Plaintiff in Replevin, in any cause (*q*) who if Judgment were obtained, would be

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of Coventry, Hob. Rep. 164, *per* Hobart, C. J. Now the sufficiency of a pleading must depend more upon its substance than form—the latter being only necessary in so far that the party pleading must use apt language to explain what he means in describing his cause of action, ground of defence, &c. If a pleading though not deficient in matter be so far deficient in form as to prejudice, embarrass, or delay the opposite party, then an application to amend would appear to be the correct course: section 119.

(*o*) *For any defect which could only be objected to by special demurrer, i. e.* for any defect which could heretofore have been objected to by special demurrer *only*. The true meaning of the sentence rests upon the import of the word "only," and its connection with the context. Many pleadings have been held insufficient upon special demurrers which might have been held equally so upon general demurrers. Both for matters of substance and of form a special demurrer was deemed a prudent proceeding. It follows that there may be pleadings held bad upon special demurrers, which under this act would be also bad, though special demurrers are abolished. For example, reference may be made to the following decided cases: *Burgess* v. *Beaumont*, 2 D. & L. 590; *Hill* v. *Montagu*, 2 M. & S. 377; *Vyse* v. *Wakefield*, 6 M. & W. 442; *Bevins* v. *Hulme*, 15 M. & W. 88; *Crawshay et al* v. *Barry*, 1 M. & G. 235; *Milner* v. *Jordan*, 8 Q. B. 615; *Robertson* v. *Showler*, 2 D. & L. 687; *Dawson* v. *Collis et al*, 10 C. B. 523. A departure in pleading is still a ground of demurrer, being matter of substance and not mere form: see *Bartlett* v. *Wells*, 31 L. J. Q. B. 57; *Brine* v. *The Great Western R. Co.*, *Ib.* 101; *The Thames Iron Works and Shipbuilding Co.* v. *The Royal Mail Steam Packet Co.* 31 L. J. C. P. 169; *Rixon et al* v. *Emary et al*, L. R. 3 C. P. 546.

(*oo*) Suitors in a court have a right to expect the administration of complete and final justice in that court. Whether proceedings be had in law or in equity such ought to be the result of the proceedings. But cases have arisen in which a court of law has given judgment in favour of a suitor, which a court of equity has restrained him from enforcing. The fruit of a judgment at law is the writ of execution. If the judgment were just, no court either of law or equity should have the power of preventing the issue of execution. The mischief was that hitherto in some cases decided in courts of common law the administration of law has not been the administration of justice. This was in a great measure attributable to the fact of defences valid in equity being wholly excluded from the cognizance of courts of common law. Upon a consideration of this mischief the Common Law Commissioners formed the opinion that "there are cases in courts of common law have not sufficient power to prevent the law from the means of vexatious and of useless expense." To enable these courts to nister complete and final justice it was recommended "that whatever is gro for a perpetual injunction (in equity) shall for the future be received by courts of common law in the first instance as a defence." This recommendation has been substantially enacted in the following sections.

(*p*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 83. Founded upon the second report of the Common Law Commissioners, section 49.

(*q*) This enactment applies only to actions in which pleadings are allowed. As there are no pleadings allowable in ejectment, there can be no equitable plea

entitled to relief against such Judgment on equitable grounds, (*r*) may plead the facts which entitle him to such

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or replication in that form of action: *Neave* v. *Avery et al*, 16 C. B. 328. As to interpleader issues: see *Rusden* v. *Pope*, L. R. 3 Ex. 269; s. c. 18 L. T. N.S. 651.

(*r*) The important question is what "equitable grounds" will be sufficient as a defence in a court of common law. The first English reported case appears to be *Burgoyne* v. *Cottrell*, 24 L. J. Q. B. 28, which arose in the bail court. The action was by the indorsee of two bills of exchange drawn abroad and directed as follows, the one "To the Chairman and Board of Directors of the A. Company," and the other "To the Board of Directors of the A. Company." They were accepted by defendant, the chairman of the company, in such a manner as in the opinion of plaintiff to make him personally liable upon his acceptances. Defendant desired to plead as a defence on equitable grounds in effect that the bills were addressed to the company and intended to be made binding on the company, and that by *mistake* the defendant as chairman had so accepted them as to make himself personally liable: see also *Courtauld* v. *Saunders*, 16 L. T. N. S. 562. And, *per* Crompton, J., "The notion seems to be that to support an equitable plea you must show some equity that will give you a right to an *unconditional injunction*." The plea was allowed to stand with liberty to plaintiff to demur. The opinion thus expressed has been confirmed and supported in each of the courts of Exchequer, Queen's Bench, and Common Pleas.

First—Exchequer. *Mines Royal Societies* v. *Magnay*, 10 Ex. 489. Action on a lease for non-payment of rent and non-repair of premises. Defendant applied to be allowed to plead an agreement, in substance that defendant *should* surrender, &c., and that owing to the fraud and laches of plaintiff such surrender was *not* completed. Parke, B., "In my opinion the equitable defence allowed to be pleaded by this statute means such a defence as would in a court of equity be a complete answer to the plaintiff's claim, and would, as such, afford sufficient grounds for a perpetual injunction granted absolutely and without any conditions. But according to the statement in the plea a court of equity would not interfere except upon the condition of the execution of a valid surrender by defendant. We have no machinery by which we can compel the execution of a surrender. The statute does not say that the courts of common law may give relief on equitable conditions, but that a plea shall be allowed which discloses a *defence* upon equitable grounds:" *Ib.* 493. Leave to plead the intended plea was therefore refused.

The gravamen of this decision is that owing to the imperfect machinery of courts of common law complete and final justice could not be done. These courts have no power to order the execution and completion of a surrender, nor indeed of any other *executory* contract: see *Hyde* v. *Graham*, 1 H. & C. 593; *Wakley* v. *Froggatt*, 2 H. & C. 669. When an agreement to do a thing is wholly *executed*, nothing remains to be done by either party towards perfecting it, such an agreement would be a sufficient equitable ground of defence in courts of common law. Thus, in cover for goods, defendants were allowed to plead that the plaintiff was the owner of certain chemical works, that the goods in question were stock in trade, and materials on the premises; that the defendants agreed to purchase the chemical works, and that the goods in question were to be included in the property sold; that certain brokers were employed to make the contract, and that they made it by bought and sold notes; that by *mistake* of the brokers the notes were so worded as not to include the stock-in-trade and materials; that possession of the chemical works, including the goods in question, had been delivered by plaintiff to defendants, and the purchase *completed;* and that plaintiff was unjustly availing himself of what was a mere mistake in the notes. And, *per* Parke, B., "The statute says that 'it shall be lawful for the defendant in any

relief by way of defence, and the said Courts shall receive

cause in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence.' We have already held that the relief must be absolute and unconditional; and in this case I think that absolute and unconditional relief would be granted. It seems to me that there would be no use in reforming the agreement when it is *wholly executed* and nothing remains to be done by either party:" *Steele* v. *Haddock et al*, 10 Ex. 645.

Second—Queen's Bench, Wodehouse et al v. *Farebrother*, 5 El. & B. 277. Action on a bond against defendant as surety for a third party, who had covenanted with plaintiff to repay £2000 lent on a mortgage of a policy of insurance, and to keep up the policy until the money was repaid—breaches assigned. The defendant admitted the breaches, but set up as an equitable defence that he was willing to pay all that plaintiff was entitled to in equity, if plaintiff would assign his securities, but that plaintiff refused so to do. To this plea there was a demurrer. And, *per* Campbell, C. J., "It is not for us, sitting here judicially, to say how far it is desirable or expedient that equitable jurisdiction should be given to courts of common law. We have only, looking to the language of the legislature, to consider what equitable jurisdiction has actually been given to us, bearing in mind that unless, in as far as our power and our procedure have been altered by express enactment, or reasonable implication from what has been expressly enacted, they remain unchanged under the Common Law Procedure Act. We are authorized to receive this defence by way of plea, if the facts pleaded would entitle the defendant to relief on equitable grounds in a court of equity against a judgment obtained in this action in a court of law, no equitable defence having been set up there. The first objection to the plea is that the defendant does not satisfactorily show that if such a judgment were obtained he would be entitled to relief against it on equitable grounds within the meaning of the enactment. He does not impeach the deed sued upon as fraudulent, or show that a judgment obtained in this action would not be honest. On the contrary, he admits that he executed the deed, that he broke his covenant in the manner alleged by the declaration, and that he is liable to pay to the plaintiffs the several sums demanded in respect of arrears of interest, of non-payment of the premiums of insurance, and of the costs incurred by the plaintiffs, against which he was bound to indemnify them. He only contends that after having made these payments or at the time of making them, he is entitled to have the policy handed over to him, which was assigned to the plaintiffs as a security for the debt due to them from the principal debtor for whom he was surety, alleging that the plaintiffs had refused to hand it over to him although he offered, on receiving it, to pay the sums which he owed them, still offering to pay these sums and to indemnify the plaintiffs. There is no doubt that as a surety having done all that is incumbent upon him in fulfilment of his engagement, he would be entitled, as against the debtor for whom he was surety, to stand in the shoes of the creditor and to have an assignment of any security which the satisfied creditor held for the debt guaranteed. But no authority was cited to show *what precise relief* a court of equity would have given to the defendant, *if judgment had been obtained against him in this action;* and at all events we conceive that he would be entitled to no relief against the judgment, unless he filed a bill against the now plaintiffs and the principal debtor, and paid into court or undertook to pay the sums which he admits that he owes to the plaintiffs on the judgment. He could only ask for *a temporary or conditional injunction* against suing out execution on the judgment, not for a perpetual or absolute injunction. The very important question therefore arises whether, where a defendant would only be entitled to a relief against a judgment to the extent of a temporary or conditional injunction, he is entitled to set up his equitable grounds of relief by way of defence in a court of

such defence by way of plea; but such plea must begin with Commencement of plea.

law? We are of opinion that as yet the legislature has authorized us to receive a plea disclosing equitable grounds of relief only where the facts would entitle the defendant to an absolute and perpetual injunction against the judgment. In this last case no difficulty occurs, for the plea is a simple bar to the action, and we should only have to pronounce the common law judgment 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day.' But if the injunction is to be temporary or conditional in equity, at common law we have no such judgment, and we have no analogous judgment. We could not attempt to do justice between the parties without pronouncing, instead of a common law judgment an equitable decree. If upon such a plea we were to give judgment in bar of the action, all legal remedy would be gone, although the defendant confesses his liability to pay the sums which this action seeks to recover. It is said that the plaintiffs might afterwards have relief in equity, or might perhaps bring another action when they have transferred the policy to the defendant, but we think that it was intended to admit a plea on equitable grounds only where *final justice* may be done by the court of law in the pending suit. This could only be by pronouncing an equitable decree. But we have no warrant to pronounce such a decree. * * * * * Where the judgment if obtained would be substantially reversed by a perpetual injunction in equity, that which would be sufficient ground for the perpetual injunction is admitted as a legal defence, in the same manner as payment after the day which at common law was only ground for equitable relief after a judgment had been obtained for the penalty of the bond, was by the statute of Anne let in as a legal defence, and as by the recent statute to an action against a surety on an instrument under seal, time given to the principal debtor without the consent of the surety is turned into a legal defence, although previously it was only ground for equitable relief. But where the ground for equitable relief is not a complete bar to any proceedings upon the judgment, and is not if offered by plea a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross equities; we should often be without means to determine what are the fit conditions on which relief should be given; no power is conferred upon us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition; there are no writs of execution against persons or goods adapted to such a judgment, and no one can conjecture what remedy it would give against the lands of the debtor. In short, we think a plea on equitable grounds is to prevail only when followed by a common law judgment, it will do *complete and final justice between the parties.* Such appears to have been the view of this subject taken by the judges of the court of Exchequer, in *Mines Royal Societies* v. *Magnay*, 10 Ex. 489, where leave was refused to plead such a plea, something remaining to be done by the defendant before he could have claimed a perpetual injunction in a court of equity. As that case was decided merely on motion without the opportunity of carrying it into a court of error, we should not have considered ourselves bound by it had we disapproved of it; but we entirely concur in the reasoning on which it is founded. And therefore, without deeming it necessary to consider the replication or the rejoinder, on the insufficiency of the plea, we give judgment for the plaintiffs:" *Ib.* 286.

Third—Court of Common Pleas. Although one of the judges of this court at an early period spoke of the decision of *Mines Royal Society* v. *Magnay*, as "a rather narrow construction of the act:" *Chilton* v. *Carrington et al*, 16 C. B. 206, *per* Crowder, J. Yet subsequent authorities in the court of Common Pleas in effect support that case. The leading authority in the Common Pleas is *Wood* v. *The Copper Miners' Co.* 17 C. B. 561. This was an action for the breach of covenants in a lease. The defendant in effect pleaded as an equitable defence that the parties had agreed to refer to arbitration the terms on which the lease

the words "for defence on equitable grounds," or words to

should be cancelled and had bound themselves not to sue upon it. It was not alleged that any award had been made; but, on the contrary, it appeared that the arbitrator had been discharged from making an award. There was a demurrer to the plea. And, *per* Jervis, C. J., "It seems to me that the plaintiff in this case is entitled to the judgment of the court. Without attempting to defend the form or the precise circumstances under which a court of law will admit an equitable plea to enure as an answer to an action, it is plain that inasmuch as a judgment for the defendants here would bar the action, we cannot hold this to be a good equitable plea, unless it discloses a case in which a court of equity would grant a perpetual unqualified and unconditional injunction. No doubt in this as in all cases, the court will not admit an equitable plea, that would carry the legal defence further than a court of equity would extend its protection to the party. What is the effect of this plea? Mr. Bovill (defendant's counsel) says it discloses an absolute agreement between the parties, upon sufficient consideration to rescind the contract, and then a reference to Mr. Bros (the arbitrator) to ascertain the compensation to be paid by the defendants to the plaintiff therefor. I think, however, it is a reference to Mr. Bros to say upon what terms the contract shall be rescinded. * * In truth the plea amounts to no more than a plea of the pendency of an arbitration under an order of reference empowering an arbitrator to say upon what terms the action is to be discontinued. Although it is quite possible that a court of equity * * might interfere to restrain the bringing of an action in violation of the compact entered into between the parties, it could only be done upon terms and conditions which we have no power of imposing or enforcing." See also *Flight* v. *Gray*, 27 L. J. C. P. 13.

The principles which govern courts of common law in entertaining pleas disclosing equitable defences under the C. L. P. Act are it is conceived, fully established in the foregoing cases. There is no material difference in the views of the three superior courts of common law in England, as expressed in the leading case of each court in regard to those principles. Nothing now remains than to notice some cases in which these established principles have been applied.

First—Equitable pleas allowed. It seems to be settled that in general where a party seeks to enforce an agreement in writing, defendant may on equitable grounds show by parol that such agreement was framed in mistake: *Vorley* v. *Barrett*, 28 L. T. Rep. 87, *per* Creswell, J. The object of the legislature is to enable parties to have the benefit of an equitable answer without going into equity: *Ib.*; see also *Wood* v. *Dwarris et al*, 11 Ex. 493; *Perez et al* v. *Oleaga et al*, *Ib.* 506. Thus in an action on a covenant binding defendant, a surgeon, not to practice in A. an equitable plea was allowed to the effect that as between defendant and plaintiff the part of A. in which the defendant practised had always been treated as a part of B. and that it was not intended to restrain the defendant from practising in the part of B. in question, and that the covenant was framed by mistake: *Luce* v. *Izod*, 2 Jur. N. S. 573. In an action by the payee against the maker of two promissory notes, the defendant pleaded by way of equitable defence that the notes were made by him, defendant, whose name was James Harridane, and by one John Harridane, that defendant made the notes at the request and for the accommodation of John Harridane, to secure a debt due from him to the plaintiff, and that he did so without value or consideration, and that the notes were delivered to the plaintiff and received by him from the defendant upon an express agreement made between them that the defendant should be liable thereon as surety only, and that plaintiff at the time the notes were made had notice and knowledge of the same having been so made by him as surety. The plea then stated that the plaintiff, whilst holder of the notes, without the knowledge or consent of defendant, for a good and valuable consideration, agreed to give and did give the said John Harradine time for the payment of the notes, and forbore

the like effect. 19 Vic. c. 43, s. 287; 20 Vic. c. 57, s. 11; 20 Vic. c. 58, s. 2.

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to enforce them, and that he could and might, had he not given such time, have obtained payment from the said John Harridane. The plaintiff having demurred to this plea, it was argued and holden to disclose good equitable grounds of defence: *Pooley* v. *Harradine*, 7 El. & B. 431. This case overrules several *obiter dicta* in *Strong* v. *Foster*, 17 C. B. 201, which case unless examined closely appears to be an authority against the position taken by the court in *Pooley* v. *Harradine*. See further *Elliott* v. *Mason*, 26 L. J. Ex. 175; *Gordon* v. *Rae*, 8 El. & B. 1065; *Watts* v. *Shuttleworth*, 5 H. & N. 235; s. c. in Error, 7 H. & N. 353; *Rayner et al* v. *Fussey*, 28 L. J. Ex. 132; *Greenough* v. *McClelland*, 2 E. & E. 424; *Perley* v. *Loney et al*, 17 U. C. Q. B. 279; *Thompson* v. *McDonald*, *Ib.* 304.

B.'s wife had contracted a debt before marriage. After marriage, B. and his wife borrowed money on B.'s bond to pay off that debt, and then mortgaged to C. lands which B. and his wife held in fee in right of the wife, to raise money to discharge the bond. On the wife's death, C. as her heir at law became entitled to the equity of redemption, having before by the mortgage acquired the legal estate. In an action by C. against B. on his covenant on the mortgage and for payment of the sum thereby secured, the foregoing facts were held to be a good equitable defence: *Gee* v. *Smart*, 8 El. & B. 313. Upon an action brought for use and occupation, a plea that defendant entered upon an agreement (not in writing) for a lease for 42 years, under which no rent was to be paid until certain conditions were performed by plaintiff, which never had been performed, held good: *The Trustees of the Toronto Hospital* v. *Heward*, 8 U. C. C. P. 84.

Second — Equitable pleas disallowed. The legislature never intended that the course of practice of courts of equity should be pleaded and become the subject of investigation at law: *Prothero* v. *Phelps*, 25 L. J. Ch. 109, *per* Turner, L. J. Action upon an agreement to put a stop to an action formerly pending between plaintiff and defendant and to release defendant from the covenants contained in a certain lease, assigning breaches of the covenant. The plea, which was in substance that plaintiff had gone into equity to enforce specific performance of the same agreement, and had obtained a decree in his favour, and that this decree was a final adjudication between the parties, and that according to the rules and practice of chancery after such a decree, the defendant would be entitled to relief on equitable grounds against a judgment in the present action, held bad: *Phelps* v. *Prothero et al*, 16 C. B. 370. In an action by the trustee of a married woman against a banker for dividends which the latter had paid over to a third party, pursuant to a power of attorney given by plaintiff, it was held an equitable plea that the married woman had obtained an advance of her dividends by means of the power of attorney which she had revoked before defendant had received notice of the revocation of the power, was not allowable: *Clarke* v. *Laurie*, 28 L. T. Rep. 125. And, *per* Pollock, C. B., "It is an established rule now and it is essential to the carrying into effect of the statute which gives these equitable pleas, that no equitable plea shall be permitted except in a case where the plea and the decision and judgment of the court upon it will work out and complete all the equity that belong to the matter to which the plea refers. As for instance, if a person is sued upon a bond or any covenant under seal, who has, by an instrument not under seal, dispensed with performance and accepted something in lieu of it, and so on, there you are permitted to plead now that which at law would have been formerly no defence. But there the judgment works out the whole equity of the matter. That could not be so here. An equitable plea in answer to the claim of the trustee would not settle the whole matter as between the parties; there would still be a question whether the trustee would not be liable to the *cestui que trust*, and we have no power of protecting the trustee against such an action. * * We are of opinion that the equitable plea ought not to be allowed in the present

case:" *Ib.* Pleas of equitable set-off may be allowed; but if having no natural connexion with the subject of plaintiff's claim, must be rejected. To an action for money payable for freight and porterage for the conveyance of goods, the defendants pleaded as to £47 0s. 6d., an equitable plea that plaintiff was a bargeman and was employed by defendants in that capacity; that in the course of such employment plaintiff agreed to carry on a certain river a large quantity of coal belonging to the defendants in certain barges of the plaintiff, and that the said coal was so utterly lost on the said voyage by and through negligence, &c., of the plaintiff, and that the cost price of the coal so lost was £47 0s. 6d., and that defendant claims equitably to set the said sum off against plaintiff's demand. *Held* plea bad: *Stimson* v. *Hall et al*, 28 L. T. Rep. 325. And, *per* Bramwell, B., "It is a common opinion that equity deals out a sort of vague justice unfettered by rules—a sort of natural equity; but that is a mistake; their rules are in fact as binding as ours. Then the question is whether, according to law as administered in equity, equity would give unconditional relief. Now, in the case of *Beasley et al* v. *D'Arcy*, 2 Sch. & Lef. 403, which has been cited, it was clear that there was an equity, but here there is no natural connexion between the claim and the cross-claim, and there is no semblance of authority in defendant's favor." See further as to equitable pleas of set-off: *Stimson* v. *Hall et al*, 1 H. & N. 831; *Atterbury et al* v. *Jarvie*, 2 H. & N. 114; *Minshull* v. *Oakes et al*, *Ib.* 793; *Jackson* v. *Isaacs*, 3 H. & N. 405; *Elkin* v. *Baker*, 31 L. J. C. P. 177; *Cochrane* v. *Day*, 9 C. B. N. S. 448; *In re Commercial Bank*, L. R. 1 C. P. 538; *Watson* v. *The Mid Wales R. Co.* L. R. 2 C. P. 593; *Wood et al* v. *Ross et al*, 8 U. C. C. P. 299.

To an action on a bill of exchange against the acceptor, the court refused leave to plead as an equitable plea that the bill was accepted upon a distinct promise by plaintiff that if the defendant would pay a certain discount the plaintiff would renew from time to time until the defendant was of ability to meet the bill, &c.: *Flight* v. *Gray*, 4 Jur. N.S. 13. Where a defendant was under terms to take short notice of trial, and it was proposed to plead certain equitable pleas, setting up a cross claim for unliquidated damages, the court held that the pleas were inconsistent with the terms and calculated to defeat them, and refused therefore to allow the pleas, leaving the defendant to bring a cross-action: *Atterbury* v. *Jarvie*, 29 L. T. Rep. 128. To a declaration in *sci. fa.* against a shareholder of a company, the defendant pleaded that he was requested by plaintiff and others to become a transferee in the company as the nominee of A. and B. and for their benefit, and upon the representation of the plaintiff and others that he should incur no responsibility on account of such shares; that relying on such representation, he became a transferee of the said shares in the declaration mentioned as such nominee of A. & B., and for their benefit and not for his own benefit; that he never had any interest in the said shares or in the said company, except as such nominee; that he never was to derive or acquire and never did derive or acquire any profit, benefit or advantage, from the said shares; that the said company and the scheme thereof was entirely abandoned, and no profit was ever acquired by the company; and that the plaintiff was unjustly and irregularly and contrary to the said representation and in fraud thereof seeking to charge the defendant and to make him responsible and liable as a shareholder. *Held* a bad plea: *Bill* v. *Richards*, 2 H. & N. 311. If the plea require taking of an account or other proceeding of that nature, it will be bad as an equitable plea: *Collis* v. *Prendergast*, 7 Ir. C. L. R. 542.

The plea to be good must be such that the judgment of the court upon it will work out and complete all the equity that belongs to the matter to which the plea refers: *Clarke* v. *Laurie*, 26 L. J. Ex. 36; *Bill* v. *Richards*, 5 W. R. 650; *Gee* v. *Smart*, 8 El. & B. 313; *Scott* v. *Littledale et al*, 27 L. J. Q. B. 201; *Collins* v. *Cave*, 27 L. J. Ex. 146; *Griggs* v. *Firley*, 6 U. C. L. J. 61; *Boyes* v. *McGregor*, 8 U. C. C. P. 244. If however an equitable plea be allowed by a judge, the court will

not strike it out merely because the question is doubtful whether it discloses the right to absolute and unconditional relief in equity: *Elliott* v. *Mason*, 26 L. J. Ex. 175. Where defendant had leave to plead two pleas on equitable grounds, the court on motion varied the order by allowing defendant to plead the first of the pleas, striking out on equitable grounds, and to plead another plea in the same terms on equitable grounds, omitting an allegation as to acceptance in satisfaction: *Jonassohn* v. *Ransome et al*, 3 C.B. N.S. 779. A defendant does not lose his defence at law by mistakingly pleading his plea on equitable grounds: *Thorne* v. *Tilbury et al*, 27 L. J. Ex. 407. A plea so pleaded may be sustained as a plea at law, if it disclose a good defence: *Hyde* v. *Graham*, 1 H. & C. 593; see further *Wakley* v. *Froggatt*, 2 H. & C. 669. Where an action is brought for rent, a plea that the premises were burnt down will not be allowed: *Loft et al* v. *Dennis*, 28 L. J. Q. B. 168. A person who gives another a bill payable at a future day cannot in an action against him on the bill set up a want of consideration as the defence: *Balfour et al* v. *The Official Manager of the Sea, Fire, Life Assur. Co.* 27 L. J. Ex. 17. Misrepresentation, unless fraudulent, is no defence either at law or in equity: *Gorsuch* v. *Cree et al*, 8 C. B. N.S. 574. To an action of debt, a plea by defendant of an assignment in bankruptcy is no answer either on legal or equitable grounds: see *The European Central R. Co.* v. *Westall*, 6 B. & S. 970; *Eyre et al* v. *Archer*, 33 L. J. C. P. 299; *Jones* v. *Morris*, 34 L.J. Q.B. 90; *The Ipstone Park Iron Ore Co.* v. *Pattinson*, 9 L.T. N.S. 806; *Wright* v. *Jelley*, 19 L. T. N.S. 384; *Baldwin* v. *Peterman*, 16 U. C. C. P. 310. Declaration on a covenant by defendant as surety for the payment of rent by one B. Plea on equitable grounds that defendant executed on the understanding and representation that Y. K. and E. should also execute, and that he should be responsible with them and not solely, and that it was represented to him by B. and by the said K. that immediately after defendant's execution the other three would execute. It was then alleged that they never did execute, and that before any breach and with due diligence he gave notice to the plaintiffs of the premises, and that he claimed to have been released by such non-execution. *Held* plea bad, for there was nothing to connect the plaintiffs with the representations on which defendant executed, and they might have leased to B. on the understanding only that defendant should be surety: *The Corporation of the County of Huron* v. *Armstrong*, 27 U. C. Q. B. 533. The court seemed to think that the defence, if any, might have been given in evidence under *non est factum*, on the ground that in substance the defendant executed the deed conditionally, and that the condition was not performed: *Ib.*

Third — Other matters. It has been said that a defendant who in an action at law pleads a subject matter as an equitable defence is not necessarily precluded from applying upon that subject matter to a court of equity for an injunction: see *Phelps* v. *Prothero et al*, 16 C. B. 370; s. c. 25 L. J. Ch. 105; *Collins* v. *Cave*, 27 L. J. Ex. 146; *Pearse* v. *Robins*, 26 L. J. Ex. 183. And though the plea be demurred to at law and the demurrer remain undecided, a court of equity may still interfere: *Evans* v. *Bremridge*, 27 L. T. Rep. 8. But a party who, having unsuccessfully defended an action at law, afterwards resorts to equity upon the same ground of defence and there succeeds, shall be entitled only to the costs of one proceeding: *Watson* v. *Alcock*, 4 DeG. M. & G. 247. Where to an action to recover damages for a fraudulent representation, the defendant asked leave to plead for a defence on equitable grounds that the plaintiff had filed a bill in Chancery for the very same alleged grievances and causes of action, which court gave judgment in favor of the defendant, the decision in Chancery was held to be no estoppel; *Collins* v. *Cave*, 4 Jur. N. S. 31. It is now held that if a defendant exercise the option of pleading at law and fail, he cannot afterwards obtain relief in equity: *Gompertz* v. *Pooley*, 7 W. R. 275; *Terrell* v. *Higgs*, 1 DeG. & J. 388; *Wild* v. *Hillas*, 28 L. J. Ch. 170; *Cooper* v. *Evans*, L. R. 4 Eq. 45; *Kingsford* v. *Swinford*, 28 L. J. Ch. 413. Where defendant at law has filed a bill in equity, he is not allowed at law to plead an equitable defence on the same grounds: *Schlumberger* v. *Lister*, 2 E. & E. 855.

Defence by way of *auditâ querelâ.*

125. (*s*) Any such matter which, had it arisen before or during the time for pleading, would have been an answer to

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In order that any doubts existing as to the effect of equitable defences pleaded in suits at law may be removed, it is now by statute declared that "if the defendant in any suit at law shall plead any equitable defence, and judgment shall be given against such defendant upon such equitable plea, such judgment shall be pleadable as a good bar and estoppel against any bill filed by such defendant in equity against the plaintiff or representative of such plaintiff at law in respect to the same subject matter which has been brought into judgment by such equitable defence at law:" 29 & 30 Vic. cap. 42, s. 3. And it is further provided that the act is not to be construed as declaring that such judgment at law on an equitable defence has not been heretofore a good bar to any suit in equity on the same subject matter: *Ib.* In one case the court when allowing an equitable plea, thinking that it would raise an issue which could not be satisfactorily disposed of by a jury, gave to plaintiff the option of having the trial *in banc: Luce* v. *Izod*, 1 H. & N. 245. When it was open to courts of law and equity to adjudicate upon the same subject, under the operation of this section, there was danger of conflict of decisions. Thus, the payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay £200 to the payee in trust for E, or £6 10s. per quarter so long as the £200 shall be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the £6 10s. per quarter to the payee; and on payment of the £200 all claim on the notes to cease, and the same to be given up. The brother not having paid the £6 10s. to the payee for two quarters, but having paid these sums to E, the *cestui que trust* (as the latter admitted) the payee brought his action upon the notes against the maker. *Held* in Error reversing the judgment of the court of Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action. *Held* in Equity that the agreement must be construed as a contract by the brother, to provide for E. the annuity of £25, or the gross sum of £200 as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract, and not an agreement under which the original right of the payee would revive on any failure of the quarterly payments by the brother. *Held* also that the brother was entitled to the specific performance of the agreement in equity not on the ground of the circuity of cross actions which the rule of law occasioned, but on the ground that the court by modifying its decree could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement, without depriving another party altogether of such benefit: *Beech* v. *Ford*, 7 Hare, 208. Where a defendant pleads an equitable plea alone, he may possibly have a right to do so without the leave of the court: *Atterbury* v. *Jarvie*, 26 L. J. Ex. 182, *per* Channell, B., contra, *per* Bramwell, B., in *Hunter* v. *Gibbons*, 1 H. & N. 459. But where the application to plead such plea is an appeal from the decision of a judge at chambers on a summons to plead several matters, and is in substance an application to be allowed to add pleas, the allowance of such plea is in the discretion of the court to be exercised with reference to all the circumstances under which the application is made: *Atterbury* v. *Jarvie*, 26 L. J. Ex. 178. Where an action is brought for breach of covenant and the defendant at law has only an equitable defence, he is not compelled by this act to defend at law, but may as before the act seek relief in a court of equity: *Kingsford* v. *Swinford*, 7 W. R. 215. An equitable plea pleaded at law can only be proved by such witnesses as a court of law will receive: *Perley* v. *Loney et al*, 18 U. C. Q. B. 429.

(*s*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 84. Founded upon the second report of the Common Law Commissioners, section 50.

the action by way of plea, (*t*) may, if it arises after the lapse of the period during which it could have been pleaded, be set up by way of *auditâ querelâ*. (*u*) 19 Vic. c. 43, s. 288.

(*t*) *Any such matter, &c., i. e.* matter entitling defendant to relief on equitable grounds: as to which see notes to section 124.

(*u*) *Auditâ querelâ* is a remedial writ invented to prevent a defect of justice in cases where a party having a good defence has no opportunity of making it by the ordinary process of law. Thus it lies for a person who is either in execution or in danger of being so, upon a judgment or recognizance when he has matter to show that the execution if issued ought not to have issued, or if not issued should not issue: 2 Wms. Saund. 147 (1). It lies by an infant taken in execution: *Loyd* v. *Ogle*, Carth. 278. On a judgment against bail under age: *Markham* v. *Turner*, Yelv. 155. By an infant, to avoid a recognizance: *Randall* v. *Wall*, Yelv. 88; 1 And. 25; 2 And. 158. But it must be brought by him within age: *Anon.* 1 And. 228. So for one in execution at the suit of an administrator *durante minori ætate*, when the infant comes to age: *Anon.* 3 Leon. 278. Where an administrator has a verdict, and his letters are revoked: *Ket* v. *Life*, Yelv. 125; 1 Keb. 863; 2 Keb. 668; Comb. 214. It lies for bail, if the judgment against the principal be reversed: *Le Greece Sr. Apsley* v. *Geve*, Palm. 302; Yelv. 59; Jenk. Cent. 319. After judgment in K. B., and before execution awarded, the defendant brought error in exchequer chamber, and died pending the writ; the record was remanded as if he had been non-suited; upon which a *capias* issued against the defendant, to which *non est inv.* was returned; then two *sci. fa.*'s against the bail into Middlesex, to which *non est inv.* was returned, and upon this a *capias ad satisfaciendum* against the bail, who, being taken in execution, was held entitled to auditâ querelâ; but otherwise, if *sci. feci* had been returned: *Hobs* v. *Tadcastle*, Moore, 432. It lies by one of the bail, where the other was taken by a *capias*, and discharged by the then plaintiff: *Evans* v. *Arnold*, 3 Leon. 260. So it lies on a render of the principal, but if the bail piece be discharged the *sci. fa.* is void: 2 Keb. 475, pl. 1. For relief in case of an irregular statute-merchant, &c.: 2 Saund. 696, 148; 1 Leon. 228. By terre-tenant against conusee who had land in execution: *Hide's* case, 1 And. 133. The feoffee of the conusor of a statute-merchant may have auditâ querelâ against the conusee taking out execution, where the mayor before whom it was acknowledged has not authority to take it: *Anon.* 1 Dy. 25, pl. 27. Auditâ querelâ *quare similiter extendi non debet*, or *quare restitui non debet*, both lie by him whose land is extended alone, where other lands extendable are omitted; and if one terre-tenant make default, whereby execution is awarded, still he shall have auditâ querelâ for contribution: *Verey* v. *Carew*, Moore, 535. A defeasance is good, that if the statute be extended upon land in a particular county, it shall be void; and auditâ querelâ lies, though the statute want one of the seals: *Trot* v. *Spurling*, Moore, 811. For tenant by *elegit*, against another who has a prior charge, for omitting part of the land chargeable: *Deane* v. *Hynde*, 2 And. 170; Yelv. 12. To avoid execution upon a recognizance, for that the debt is attached: *Wallpool* v. *King*, 1 Leon. 297. On tender of money on a recognizance: *Hughes* v. *Phillips*, Yelv. 38. So, if the sheriff delivers up a term under an *elegit*, after a tender by the defendant of the money appraised by inquisition: 2 Saund. 68 *d*. To force the filing of an *elegit* after a *capias*: 2 Keb. 153, pl. 29. In case of a wrong delivery by the sheriff of land under an *elegit*: 2 Saund. 68 *g*. The conusor of a statute enfeoffs A. B. and C. severally of his lands; execution is sued against A. alone; in auditâ querelâ to have B. contributory, he cannot plead to the *scire facias* that C. has been likewise omitted, but must sue his auditâ querelâ: *Anon.* 3 Dy. 332 pl. 23. It lies to discharge the land, if the conusor (taken by *capias*) be let at large by the conusee's consent: *Linacer's* case, 1 Leon. 230, 231; 2 Leon. 96. Upon a voluntary escape

by the sheriff: *Phillips* v. *Stone*, 2 Leon. 119. If two joint and several obligors are outlawed, and one of them, being taken on the *capias utlagatum*, is suffered to escape, and the party recover the original debt in an action of debt on the escape, the other obligor (being taken) may bring an auditâ querelâ, but he must show the time when and the place where satisfaction was made: *Alford* v. *Tatnell*, 1 Mod. 170. Auditâ querelâ lies against a sheriff who arrests one in execution, and, without returning the writ, suffers him to escape, and then arrests him again upon an *alias capias*: Moore, 57, pl. 163. If two joint and several obligors be sued severally, and once a satisfaction be had against one, or against the sheriff upon the escape of one, or if satisfaction be had against a joint possessor, the other may have an auditâ querelâ: *Foster* v. *Jackson*, Hob. 58; *Alford* v. *Tatnell*, 2 Mod. 49. He who has a release after verdict, and before judgment, cannot plead it, but must help himself by auditâ querelâ: Hob. 162. One feoffee of the conusor (if his land only is put in execution) shall have it against all the other feoffees, and against the conusor also (if he has reserved part in his hands), to make contribution; but the conusor shall not have it against any of the feoffees to make them contributory, if the part left in his hands is put in execution for the whole: *Ross* v. *Pope*, Plow. 72. If two are bound jointly and severally, and there are several judgments against them in several courts, and a *capias* against one, who is taken, and afterwards an *elegit* against the other, he who was taken upon the *capias* can have auditâ querelâ: *Cowley* v. *Lydiat*, 1 Ro. 8, 9. If there be judgment against A. in C. P., and damages against him for a trespass, and A. pays the whole, and afterwards execution is issued against B. on a judgment obtained against B. and C. for the same trespass, both may join in an auditâ querelâ, though C. is not yet actually aggrieved: *Corbet* v. *Barnes*, W. Jo. 378, 379; Cro. Car. 1043. He that is once so discharged shall never be taken again: *Anon.* Hob. 2. If a recover in trespass against B. (a soldier) for taking his property by compulsion of his comrades, and take out execution thereon, and then a statute pardon all acts of hostility, and discharge the offenders from all actions and executions on that account, B. may, by auditâ querelâ, be relieved from the judgment and execution: *Benson* v. *Idle*, 2 Mod. 37. It lies in the case of a person (convicted under the bribery act) procuring the conviction of another person before execution against himself: 2 Saund. 148 *b c d*. On an *exigent* after judgment, the defendant cannot appear *gratis*, and plead a release from all executions, but must bring auditâ querelâ; otherwise, if before judgment: *Anon.* 3 Dy. 286, pl. 41. Where after judgment the defendant would be received on a matter of fact, which does not appear in any of the proceedings, the remedy is by auditâ querelâ, and not by writ of error: *Lampton* v. *Collingwood*, Holt, 271; s. c. Comb. 325; *Peters* v. *White*, 2 Show. 238. So it lies after a return of two *nihils* to a *sci. fa.*, and execution awarded: 2 Saund. Rep. 72 *v*. It lies upon arbitration made after verdict, and before judgment: *Morsten* v. *Morrice*, 1 Ro. 384. Auditâ querelâ must be brought, and not an action on the case, where the plaintiff takes the defendant, and afterwards re-takes him in execution within the year, for the same debt; if it had been after the year, then the execution had been erroneous, and he must have brought a writ of error: *Baugh* v. *Killingworth*, 4 Mod. 14. An auditâ querelâ cannot be brought before final judgment entered: *Lampiere* v. *Mereday*, 1 Mod. 111; 3 Keb. 291, pl. 14. But if it be brought after the day in banc, and the judgment be not entered up, the party shall be ordered to enter it as of that day, to prevent the plea of *nul tiel* record: 1 Mod. 111. A recusant, after judgment on a *qui tam* action, on the statute 23 Eliz. cap. 1, cannot have an auditâ querelâ to prevent execution, on a certificate of conformity: *Peters q. t.* v. *White*, 2 Show. 240. It cannot be had by one of several terre-tenants, if execution be had on a *sci. fa.* against him alone, for he ought to have pleaded there were others: 2 Saund. 9 *a*. It is unnecessary, where the escape of the principal was by consent, but the bail may plead it: 2 Keb. 567, pl. 73. So also of payment: *Ib.* 577, pl. 100. If one of two obligors be sued to outlawry, and after-

wards judgment and execution is had against the other obligor, the outlaw cannot be relieved by auditâ querelâ: *Higden* v. *Whitchurch*, 1 Mod. 224. It does not lie where there is or has been any other remedy at law: 2 Saund. 148 *a*; T. Raym. 89. And sometimes it does not lie, although there is no other remedy: *Young* v. *Collet*, T. Raym. 89. This writ lies not against the king: *Ford* v. *Mead*, Noy, 26; *Rex* v. *Lammas*, Comb. 326, 398. No one can have it but the party grieved: 2 Saund. 148 *a*. If two joint and several obligors be sued jointly, and both taken in execution, the death or escape of one will not discharge the other: *Forster* v. *Jackson*, Hob. 58; *Blumfield* v. *Usewich*, 5 Co. 86 b. It does not lie where the matter alleged does not discharge the party: 2 Saund. 148 *a*. If a *supersedeas* be granted to an auditâ querelâ, upon the process of *venire facias*, before bail found, it is regular: *Peters q. t.* v. *White*, 2 Show. 239. It is unnecessary, where execution is sued before the day on a recognizance; but it may be superseded by showing the defeasance to the chancellor: 1 Keb. 345, pl. 4. An acquittance in these words, "received £10 in part payment of a greater sum, wherein the defendant was condemned by a judgment given by justices at *nisi prius*," should the plaintiff sue out execution for the whole, is not a good release to found an auditâ querelâ: *Anon.* 1 Dy. 50, pl. 6. It does not lie upon a release made before verdict, if defendant had time to plead it; but otherwise where it is made after verdict: *Salkill* v. *Lord Howard*, 2 Ro. 128. It does not lie in chancery upon a judgment in another court: *Mostyn* v. *Pierce*, Moore, 850; 2 Show. 239. It has been refused where the applicant was a stranger to the judgment, having no other privity than that he was alienee of the land which was taken in execution, and had acquired his interest after execution had issued: *Beard* v. *Ketchum*, 8 U. C. Q.B. 523. Though the point is involved in some doubt, it seems to be a writ of common right—*ex debito justitiæ*: *Giles et al* v. *Nathan et al*, Marsh. 226; *Giles* v. *Hutt et al*, 1 Ex. 59; and is in the nature of a bill in equity to be relieved against the oppression of plaintiff: 3 Blac. Com. 406. And yet a defendant is not either by the existence of the remedy or by having unsuccessfully resorted to it precluded from bringing his original bill in equity for relief: *Williams* v. *Roberts*, 8 Hare, 315. The writ, however, is not a difficult proceeding: *Baker et al* v. *Ridgway*, 2 Bing. 48, *per* Burrough, J. Though *ex debito justitiæ*, it cannot issue without an order in open court: *Dearie* v. *Ker*, 7 D. & L. 231; *Beard* v. *Ketchum*, 8 U. C. Q.B. 523; *Troup* v. *Ricardo et al*, 8 L. T. N.S. 757. It may be mentioned that Eng. Rule 79 of H. T. 1853, ordering that "no writ of auditâ querelâ shall be allowed unless by rule of court or order of a judge," is not adopted among our New Rules of T. T. 1856. The writ when issued in the name of the Queen, directed to the court in which the original proceedings have been had, sets out the record down to judgment, then states the subsequent matter, and enjoins the court to call the parties before it to cause justice to be done: see form in *Turner* v. *Davies*, 2 Wms. Saund. 137 *n*; also *Lord Porchester* v. *Petrie*, 3 Doug. 261. If the writ be founded on record, or the party be in custody, the process upon it, when allowed, is a *scire facias*. But if the auditâ querelâ be grounded on a matter of fact, or the party be not in custody, but only brought *quia timet*, the process on the auditâ querelâ is a *venire facias*, and on default thereto a *distringas ad infinitum*: *Clerk* v. *Moor*, 1 Salk. 92. The process issued upon the auditâ querelâ should be personally served: *Williams et al* v. *Roberts*, 1 L. M. & P. 381; and the party served warned to appear. If he appear, the party who sued out the process declares. In the declaration the whole writ of auditâ querelâ is recited in the same manner as in a declaration on a *scire facias*: 2 Sellon's Pr. II. 256; thereupon the party made defendant pleads: *Giles* v. *Hutt et al*, 1 Ex. 701; and the parties proceed to issue. It is now held that security for costs may be ordered as in an ordinary action: *Holmes* v. *Pemberton*, 1 El. & El 369. The indulgence shown by the courts in modern times by way of motion has in a great measure superseded procedure by auditâ querelâ: *Sutton* v. *Bishop*, 1 Burr. 2287; *Wicket et al* v. *Cremer*, 1 Rayd. 439; *Humphreys* v. *Knight*, 6 Bing. 572; *Plevin* v. *Henshall et al*, 10 Bing. 24; *Barrow* v. *Poile*, 1 B. & Ad. 630; *Ouch-*

Replication on equitable grounds.

126. (*v*) The Plaintiff may reply, in answer to any plea of the Defendant, (*w*) facts which avoid such plea upon equitable grounds, (*x*) but such replication must begin with the

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terlony v. *Gibson*, 6 Scott, N. R. 577; *Sharp* v. *D'Almaine*, 8 Dowl. 664; *Turner* v. *Pulman*, 2 Ex. 513. But relief upon motion is only granted where the right to relief is clear and beyond all question: *Hewes* v. *Mott*, 6 Taunt. 329; *Baker et al* v. *Ridgway*, 2 Bing. 41; *Hanson* v. *Blakey et al*, 4 Bing. 493; *Lister* v. *Mundell*, 1 B. & P. 427; *Symons* v. *Blake*, 2 C. M. & R. 416; *Beard* v. *Ketchum*, 8 U. C. Q. B. 524; *Schofield et al* v. *Bull et al*, 3 U. C. L. J. 204.

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 85.

(*w*) It is enacted that the plaintiff may reply in answer "to *any* plea of the defendant, facts which avoid such plea upon equitable grounds," &c. This section is sufficiently comprehensive to admit an equitable replication either to a *legal* or an *equitable* plea: *Wood* v. *The Copper Miners' Co.* 17 C. B. 587. It would seem that where the plea is legal, the replication may be considered either upon legal or equitable grounds, though stated to be upon equitable grounds; but only upon equitable grounds when the plea is an equitable plea: *Vorley* v. *Barrett*, 1 C. B. N. S. 234, *per* Willes, J. A plea or replication on equitable grounds must be founded on a matter depending upon the principles of equity, and not upon the mere practice of courts of equity: *Prothero* v. *Phelps*, 25 L. J. Ch. 105. An equitable replication setting up matter inconsistent with the legal right asserted in the declaration, is bad as a departure: *Gulliver* v. *Gulliver et al*, 1 H. & N. 174; *Hunter* v. *Gibbons*, *Ib.* 459; *Reis et al* v. *The Scottish Eq. Life Assur. Co.* 2 H. & N. 19; *Schlumberger* v. *Lister*, 2 E. & E. 855; *Jacobs* v. *The Equitable Insur. Co.* 17 U. C. Q. B. 35; s. c. 18 U. C. Q. B. 14. So if there be in the equitable replication any matter inconsistent with the declaration: *The Thames Iron Works & Shipbuilding Co.* v. *The Royal Mail Steam Packet Co.* 13 C. B. N. S. 358. So if in an action of contract the replication set up in answer to a plea of discharge or excuse, a substantive cause of action in tort: *De Roo et al* v. *Foster*, 12 C. B. N. S. 272; *Bartlett* v. *Wells*, 1 B. & S. 836. Contra where the replication, while consistent with the declaration, merely shows that it is inequitable for the defendant to set up the defence pleaded: *Lyall et al* v. *Edwards et al*, 6 H. & N. 337; *Sloper* v. *Cottrell*, 6 E. & B. 497; *De Pothonier* v. *De Mattos*, E. B. & E. 461; *Wilson* v. *Gabriel et al*, 4 B. & S. 243; *Watson* v. *The Mid Wales R. Co.* L. R. 2 C. P. 593; *The National Savings Bank Association* v. *Travall*, L. R. 2 C. P. 556; *Whitehouse* v. *Routh*, 20 U. C. Q. B. 65, 78; *Smith* v. *The Provincial Insurance Co.* 18 U. C. C. P. 223; *Smith* v. *The Royal Insurance Co.* 27 U. C. Q. B. 54. An equitable plea makes the subsequent pleadings equitable, although not so pleaded: *Savin* v. *Hoylake R. Co.* L. R. 1 Ex. 9. But it does not follow that an equitable replication will be good at law merely because if pleaded as an answer to a bill in equity it would be a good answer: *Lewis et al* v. *Manning*, 2 L. J. N. S. 247. The right given to suitors to reply equitable matters does not give suitors the right to set at nought the well understood common law rules of pleading necessary, with a view to the elimination of particular issues of fact or law: *Ib.*

(*x*) A court of common law having no power to enforce anything which depends upon a condition (see note *r* to section 124), an equitable replication must disclose facts which in equity would entitle plaintiff to unconditional relief: *Teede et al* v. *Johnson*, 11 Ex. 840. Declaration on a guarantee by defendant for payment of goods supplied by the plaintiffs to one A. Plea that after A. became indebted to the plaintiffs, he being also indebted to other persons by an indenture between A. of the first part, C. and D. (one of the plaintiffs) trustees for themselves and the rest of the creditors of the second part, and the several other persons whose

words "for replication on equitable grounds," or words to the like effect. 19 Vic. c. 43, s. 289.

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names and seals were thereunto subscribed and set (being creditors of A.) of the third part; after reciting that A. was indebted to the parties thereto of the second and third parts in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full, it was witnessed that A. assigned all his estate and effects to the said trustees upon trust to pay ratably and without preference to themselves and their partners and the parties thereto of the third part, the sums set opposite their names in the schedule; and in consideration of the assignment the several creditors, parties thereto of the second and third parts, released A. from all debts which they or their partners might have against him up to the date thereof. Replication on equitable grounds that D. executed the agreement in his character of trustee and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign nor seal the schedule, nor was the debt of the plaintiffs contained therein, and that if the deed operated in law as a release it was executed by mistake and in ignorance that such would be its legal effect. *Held* that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds: *Teede et al* v. *Johnson*, 11 Ex. 840. The principles governing the allowance or disallowance of equitable pleas must, it is manifest, in many respects govern the allowance or disallowance of equitable replications: see note *r* to section 124. Whenever the Statute of Limitations is a good answer to a declaration and is pleaded, it would appear that in general it cannot be avoided in a court of law by an equitable replication. Thus, action against the executors of a deceased for work, labor, and materials, &c. Plea of the Statute of Limitations. Replication on equitable grounds that the testator by his will appointed defendants his executors, and amongst other things devised certain premises to them to sell, &c., that said testator also bequeathed to them the residue of his personal estate upon trust to call in and convert it into money, &c., and that they should from the money so to arise from the real and personal estate pay testator's debts, funeral expenses, and legacies bequeathed, and hold the residue in trust for plaintiff and his other children in equal shares. Averment of sufficiency to pay same, &c. *Held* replication bad: *Gulliver* v. *Gulliver et al*, 1 H & N. 174. So in an action for breaking plaintiff's close and converting his goods, a replication to a plea of the Statute of Limitations that the cause of action was fraudulently concealed from plaintiff until within six years before action was disallowed: *Hunter* v. *Gibbons*, 1 H. & N. 459. In *Gulliver* v. *Gulliver et al*, besides the plea of the Statute of Limitations there was as to £65 paid, &c, a plea of set off, to which plaintiff replied on equitable grounds that the testator by his last will devised and bequeathed certain real and personal estate to plaintiff, his son, and other children, and by said will declared the same should be deemed to be advancements, and that the children should not be required to account for the same; that defendants' set off were the same moneys and effects so given as such advancements, and that defendants ought not therefore to be allowad to set off, &c. *Held* also bad. Where defendant relies upon an equitable ground of defence, it is open to plaintiff in his replication to show a better equity: *Sloper* v. *Cottereil*, 6 E. & B. 497. Thus, action for money had and received. Plea on equitable grounds that the money was bequeathed to the sole and separate use of the plaintiff, and was paid to the defendant by the executors upon her separate receipt, and that she in her lifetime disposed of and assigned the fund upon trusts in which the plaintiff took no interest, and that the defendant held the money upon those trusts. Replication upon equitable grounds, alleging a prior assignment by the wife to the husband before the receipt of the money by the defendant, and that the defendant received the money merely as agent of the wife in order to get in the money

from the executors as the money of the plaintiff. *Held* sufficient: *Ib.* In this case the court was of opinion that the legal as well as equitable right to the money was in the plaintiff. Had there been only an equitable right some difficulty might have been experienced owing to plaintiff in his replication setting up a pure equitable claim to money which in his declaration he claimed upon legal grounds, and thus lay the replication open to objection upon the ground of departure. Whenever in a case there is a conflict of equities, the principles mentioned in a recent decision of Kinderaley, V. C., may be consulted with advantage. The question raised was whether the equitable interest of a vendor's lien for unpaid purchase money should be preferred to the equitable interest of an equitable mortgagee. *Per cur.* "The rule of the court of equity for determining the preference as between persons having adverse equitable interests is not always *qui potior est tempore potior jure*; that is not only not universally true as between persons having only equitable interests, but it is not so even where the equitable interests are precisely the same in nature, and in that respect perfectly equal. Nor is it always true of persons having equitable interests, if their equities are equal; for it is impossible that two persons should have equal equities, except where a court of equity would altogether refuse to lend its assistance to one side or the other; and if the court will interfere to enforce the right of one against the other on *any* ground, as for priority in time, how can their equities be equal? The rule seems to be this as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity. In a contest between persons having equitable interests, priority of time is the ground of interference last resorted to. That is, a court will not resort to it until it finds that there is no other sufficient ground of preference between them. In examining into the relative merits or equities of the two parties, the points to which the court must direct its attention are these—the nature and condition of their respective equitable interests—the circumstances and manner of their requisition, and the whole conduct of each party in respect thereto. In this case the two equitable interests both arise out of the forbearance of money. The vendor's lien is a right created by a rule of equity without special contract, the right of the equitable mortgagee is created by special contract; but this does not constitute any sufficient ground of preference, though if it makes any difference it is in favour of the mortgagee. The mortgagee has also possession of the title deeds, and there is authority for holding, that as between two persons where equitable interests are of precisely the same nature and quality, and in that respect equal, the possession of the deeds gives the better equity. And as regards the conduct of the parties, everything appears in favour of the equitable mortgagee; he was guilty of no negligence, and was encouraged by the vendors to rely on the purchaser's title, and assured by their acts that the mortgagor, so far as they were concerned, had an absolute title at law and equity:" *Anon.* Finl. C. L. P. A. p. 450. In another case it was held that a legal mortgagee was not to be postponed to a prior equitable mortgagee on the ground of not having got the title deeds, unless there were fraud on the part of the former, and that neither negligence nor fraud could be imputed to him when he had made *bona fide* enquiries and got reasonable answers. *Secus*, if he had made no inquiry: *Hewitt* v. *Loosemore*, 21 L. J. Ch. 69. If a plaintiff sue upon a written executed contract, to which defendant pleads inequitable matter as a defence, and to which there is a good equitable answer, courts of common law may admit the answer, although a court of equity might be precluded by its rules from entertaining such an answer until the contract should be reformed: *Wood* v. *Dwarris et al*, 11 Ex. 493. Thus, to a declaration on a policy of insurance defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition that if any statement in the proposal were untrue the policy should be void, and that a particular statement mentioned was untrue. Replication on equitable grounds that before the policy was made, defendants issued a prospectus contain-

ing a representation that all policies effected by them should be indisputable, except in cases of fraud, and that plaintiff effected the policy on the faith of such representation. *Held* that the replication was a good avoidance of the plea: *Ib.* So where plaintiff and defendant became co-sureties for one A. B., by endorsing a bill for £300. A. B. became bankrupt. The plaintiff had had other dealings with A. B., and had advanced him £2661 6s. 6d. for the purpose of erecting houses pursuant to a building contract, and had supplied him with building materials worth £1512 for the same purpose, as well as £136 17s. 4d. for other purposes. After the bankruptcy of A. B., the plaintiff and the other creditors agreed that the building agreement should be delivered up to the plaintiff, to be cancelled upon the payment by the plaintiff of £150 in full discharge of all claims which the creditors might have upon the house and property comprised in the agreement, and that the plaintiff should relinquish all claims on the bankrupt or his estate for the said money which had been so advanced to the bankrupt for building purposes and for building materials. The attorneys of the parties in drawing up the agreement made the plaintiff "relinquish all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above mentioned purposes." The plaintiff having paid the £300 upon the bill which was dishonored by A. B., sued the defendant for contribution. The defendant pleaded that the plaintiff had discharged A. B. by the above-mentioned agreement. To which the plaintiff replied on equitable grounds that the memorandum of agreement was drawn up by mistake, the real agreement being confined to claims of the plaintiff for moneys advanced for building purposes, and having no reference to the £300 bill and being already executed; he also denied that he had relinquished his claim against the bankrupt for the £300. To this replication the defendant demurred. *Held* that it was doubtful whether the terms of the memorandum of agreement included the claim for the £300, but that even if it were so, the defendant by demurring *having admitted the mistake*, the replication was a good equitable answer to the plea, and that the agreement having been executed, it was not necessary that a court of equity should reform it to entitle plaintiff to the benefit of his replication: *Vorley* v. *Barrett*, 28 L. T. Rep. 86. But in an action of account upon the statute of 4 Anne, cap. 16, s. 27, by one tenant in common against another for not accounting for rents received, the defendant pleaded that before the receipt of the rents the plaintiff and defendant by indenture demised the premises to one C. D. for a term of 500 years, which term, after divers assignments, vested in defendant, to which there was an equitable replication that the said indenture was a mortgage to secure a sum of money, and that defendant had received more than sufficient to pay the mortgage debt. This replication was struck out because the court of common law had no power to order a reconveyance: *Gorely* v. *Gorely*, 1 H. & N. 144. An action was brought on a covenant in a mortgage deed made by defendant and one E. F., securing payment of £2800. Plea on equitable grounds that under the mortgage deed certain chattels were assigned to plaintiff as a security with power to sell, and that he sold, and that the proceeds were sufficient to satisfy his demand. Replication on equitable grounds that part of the goods so assigned were not in fact the property of the assignor till after the date of the indenture, and did not pass by it, and that afterwards they became the property of E. F. by a decree in chancery, which bound him to pay £700 for them, and that he had not paid it. The plaintiff therefore asserted his right to deduct from the proceeds of the sale the £700 for which he, as purchaser, having notice of a trust, was liable in equity. He also claimed to deduct the £600 subsequently advanced to E. F., and to apply only the sum remaining after these deductions in discharge of the defendant's liability. The court decided in favour of the claim to deduct the £700, as the proceeds of the property sold were in truth less that amount, but refused to allow the £600 to be deducted, as that was an attempt to tack the second mortgage to the first: *Marcon et al* v. *Bloxam*, 11 Ex. 586. In an action on a policy of insurance, defendants

Striking out any such plea, &c., which cannot be dealt with by a court of law.

127. (*y*) In case it appears to the Court or any Judge thereof, (*z*) that any such equitable plea or equitable replication cannot be dealt with by a Court of Law so as to do justice between the parties, (*a*) the Court or Judge may order the same to be struck out, (*b*) on such terms, as to costs and otherwise, as to such Court or Judge seems reasonable. 19 Vic. c. 43, s. 290.

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pleaded that the life insured had gone beyond the seas, contrary to the terms of the policy, and so vitiated it. Plaintiff proposed to reply on equitable grounds, first, facts showing that at the time of the making of the policy it was expressly agreed that the policy should not be vitiated by the life insured going to places out of Europe, secondly, leave and license to go to places out of Europe. Leave to reply as in the first replication refused, leave to reply as in the second replication granted: *Reis et al* v. *The Scottish Equitable Life Assur. Co.* 29 L. T. Rep. 113. In an action of covenant by the devisee of the reversion against the lessee, the declaration alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea that the reversion of and in, &c., did not belong to the lessor, as alleged. In an action by the assignee in the name of the assignor of a ship and charter party for freight, the defendant pleaded a release by plaintiff and payment. *Held* that it was a good equitable replication that the release and payment respectively took place after the defendant had notice of the assignment, and were a fraud upon the assignee: *Pothomer* v. *De Mallo*, 31 L. T. Rep. 177; 6 W. R. 628.

(*y*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 86.

(*z*) Although an equitable plea has been allowed by a judge at chambers, the plaintiff still has a right to apply to the court for a rule to strike it out, and this not by way of appeal from the decision of the judge at chambers, but as a substantive motion: *Wood* v. *The Copper Miners' Co.* 26 L. T. Rep. 91.

(*a*) A court of equity often refuses to entertain bills for relief when its jurisdiction cannot be beneficially exercised: see *Hills* v. *Croll*, 2 Ph. 60; *Lumley* v. *Wagner*, 21 L. J. Ch. 898.

(*b*) To an action by the drawer against the acceptor of a bill of exchange at three months, dated 12th July, the defendant pleaded by way of equitable defence that the bill ought to have been and was represented to him by the plaintiff to be drawn on 25th July, and that three months from 25th July had not elapsed before action brought, whereupon plaintiff made application to a judge in chambers to strike out the plea on the ground that "it was frivolous, and disclosed no defence in equity," and was by the judge referred to the full court. Plaintiff accordingly obtained a rule *nisi* from the full court on affidavits that the plea was "false in substance and in fact." The court thinking that the plea "did not disclose a full equitable defence" struck it out: *Drain* v. *Harvey*, 17 C. B. 257. The admissibility of an equitable pleading, whether plea or replication, may be determined in either of two modes. First, when the application is made for leave to plead more than one plea or replication one thereof being equitable, in which case the admissibility of the equitable pleading may be decided upon *in limine*. Second, where a party having the right to plead singly without leave pleads an equitable pleading, in which case his opponent may apply under the section here annotated to strike it out. Whenever it appears that the equitable pleading cannot be dealt with by a court of law, "so as to do justice between the parties," it may be disallowed or struck out. A court of law has no power to administer

INTERLOCUTORY MATTERS AND PROCEEDINGS.

Certified copies of proceedings may be obtained from any Deputy Clerk's office.

128. (*c*) Whenever the Plaintiff or Defendant in any suit instituted in either of the said Superior Courts, wishes to produce to either of such Courts or to any Judge thereof, the writ, declaration, plea, or any other proceeding filed in the cause in the office of any Deputy Clerk of the Crown, (*d*) the Plaintiff or Defendant may demand and receive from such Deputy Clerk a copy of the same, certified by the said Deputy to be a true copy of the original, and such copy so certified shall be received (*e*) by such Court or Judge, in all cases in lieu of the original, and as a proof thereof. (*f*) 2 Geo. IV. c. 1, s. 34.

TIME TO PLEAD, REPLY, &c.

Judges of the County Courts may

129. (*g*) In suits in either of the Superior Courts, the Judge or acting Judge of the County Court for the County

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conditional relief, such as dispensed by courts of equity through the medium of conditional injunctions. The equitable pleading will be sustained only when disclosing equitable grounds which in the opinion of the court would entitle the party pleading it to an absolute and unconditional injunction against the judgment obtained at law if no such pleading were allowed: see note *w* to section 48.

(*c*) Taken from our old King's Bench Act 2 Geo. IV. cap. 1, s. 34. The object of the enactment is to prevent the risk of loss of proceedings filed with the proper officer, by reason of their production in court, and so makes certified copies evidence in lieu of the originals and as proof thereof.

(*d*) In an action for a malicious arrest an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer and shown to have been used in the cause, was held sufficient to prove that it was made by defendant: *Spafford* v. *Buchanan et al*, 3 O. S. 391. The identity of defendant with deponent may be presumed *prima facie* from the name: *Wilson* v. *Thorpe*, 18 U. C. Q. B. 443; see also *Hamber* v. *Roberts*, 7 C. B. 861. If a party on motion before a judge, use the affidavit of another person, such affidavit is on any subsequent occasion admissible as evidence against him who used it: *Brickell* v. *Hulse*, 7 A. & E. 454; see also *Richards* v. *Morgan*, 12 W. R. 162. Even on a trial, when the person who swore the affidavit is present in court and not called: *Buckell* v. *Hulse*, 7 A. & E. 454.

(*e*) So far as this section is concerned, it is indispensable to the right of the party producing the copy of affidavit to be used under the section, that the copy produced by him should be certified as the section directs.

(*f*) The copy is not merely receivable "in lieu of the original," but "as a proof thereof." Hence, where the copy produced is of such a proceeding as contemplated by the section and certified as required by the section, it is unnecessary in the case of an affidavit to call the commissioner or other person to prove the making of the affidavit.

(*g*) Judges of county courts originally had jurisdiction only in respect of matters and things relating to suits pending in their own courts. But after a time

grant summonses and orders in certain matters relating to suits in the Superior Court.

in which the suit has been brought or the venue laid, (*h*) may, (*i*) upon the application of the Plaintiff or Defendant in such suit, grant summonses and orders for time to declare, plead, reply or rejoin, and for particulars of demand, or of set-off, and may grant summonses and orders, for payment of money into Court, for the allowance of Bail, or for security for costs; (*j*) and such Judge of the County Court may hear and determine such applications and grant such summonses, impose such terms, and make such orders as might be granted, imposed and made in the like cases by a Judge of one of the Superior Courts sitting in Chambers. (*k*) 16 Vic. c. 175, s. 17; 13 & 14 Vic. c. 52, s. 5; 20 Vic. c. 57, s. 21; 12 Vic. c. 63, s. 35.

Except in the County of York and

130. (*l*) The provisions of the last section shall not apply to any suit wherein the venue is laid in the County of York, (*m*) or to any suit wherein the Attorney for the De-

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power was conferred upon them by the legislature to act in aid of the judges of the superior courts of law in respect of suits pending in the superior courts. First, it was declared that they should have power to make orders for time to plead, reply or rejoin, for particulars of demand and set-off, and to compute: 12 Vic. cap. 63, s. 35; 13 & 14 Vic. cap. 52, s. 5. Next, to make orders for payment of moneys into court, for the allowance of bail and security for costs, and for the admission of documents in evidence: 16 Vic. cap. 175, s. 17. And then to make orders for copy or inspection of documents: 20 Vic. cap. 57, s. 21.

(*h*) There was a proviso to section 35 of 12 Vic. cap. 63, which prevented it having any operation in the county of York, for the reason that in the city of Toronto a judge of the superior courts sits daily in chambers at Osgoode Hall, and applications can be as conveniently made there as to the county judge of York and Peel. This proviso will now be found in section 130 of this act.

(*i*) "May." The county judges are not bound to entertain applications of the kind provided for in the section. It is entirely in the discretion of the judge whether he shall confine his attention to his own courts or not.

(*j*) It will be noticed that the power under 16 Vic. cap. 175, s. 17, to make orders as to the admission of documents in evidence, and under 20 Vic. cap. 57, s. 21, to make orders for copy or inspection of documents, has ceased and not been re-enacted by the section here annotated.

(*k*) An appeal lies from the order of a county judge made under this section to the full court, in the same manner and with the same consequences as if the order were that of one of the judges of one of the superior courts of law presiding in chambers: section 130.

(*l*) This is taken from two provisos to section 35 of repealed statute 12 Vic. cap. 63.

(*m*) Because it is presumed a judge of one of the superior courts of law daily sits in chambers at Osgoode Hall, in the county of York, and it is as convenient for attorneys being in that county to apply to any such judge as to the judge of the county court.

fendant, or in case of two or more Defendants, where the Attorney for any one or more of them, resides in a County different from that in which the Attorney for the Plaintiff, or if he prosecutes in person in which the Plaintiff, resides; (*n*) and either party interested may appeal from any such decision or order to the Court in which the action is pending, or to a Judge of one of the Superior Courts at Chambers, and such Court or Judge may affirm, reverse or modify such decision or order, or make such other order upon the subject matter of appeal, and the proceedings had thereon, and with or without costs, as to such Court or Judge seems meet. (*o*) 12 Vic. c. 63, s. 35; 20 Vic. c. 57, s. 21.

In other excepted instances.

With right to appeal to Superior Court or a Judge thereof.

EFFECT OF DEATH OR MARRIAGE UPON THE PROCEEDINGS IN AN ACTION. (*p*)

131. (*q*) The death of a Plaintiff or Defendant (*r*) shall

Death of plaintiff or defendant.

(*n*) Hence the last section is only applicable to cases where the attorneys, as well for defendant or defendants as for the plaintiff, reside in the same county.

(*o*) See note *w* to section 48.

(*p*) The amendments introduced by the following sections are intimately connected with the law of reviving judgments. The rule is that where a new person, who is not a party to an action, derives a benefit by or becomes chargeable to it, there must be some proceeding to make him a party. On this rule are founded the cases of survivorship, marriage, and death. At common law the death of either party at any time during the pendency of an action, *i. e.*, before judgment, abated the action. This was the law, although death happened after judgment by default or a verdict. In like manner, where the action was joint, the death of any one of the parties caused the action to abate. The first remedy applied by statute was to the effect that the death of a party between verdict and judgment should not be alleged for error so as such judgment was entered within two terms after verdict: 17 Car. II. cap. 8. Of this statute, section 139 of this C. L. P. Act is a copy. In furtherance of justice it was afterwards enacted that proceedings might be had by *sci. fa.*, either in favour of the representatives of a deceased plaintiff against defendant, or in favour of plaintiff against representatives of a deceased defendant, under certain restrictions: 8 & 9 Wm. III. cap. 11, s. 6. Then as to joint actions it was in the same statute enacted that a cause of action should not abate by reason of the death of one of several plaintiffs or defendants, but that upon suggestion of the death the action might be continued: section 7. Of this latter section, section 132 of the C. L. P. Act is a re-enactment. So if the legal responsibility of either party being a *feme sole* be altered, as by marriage, provision is by this act made for continuing the action notwithstanding the coverture: section 143. There are other provisions of a similar nature, all of which fully bear out the general intention of the legislature when passing the C. L. P. Act, viz., to simplify and expedite proceedings in the courts of common law.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 135.

(*r*) Provision is hereinafter made for the death of one or more of several plaintiffs or defendants (section 132), of a sole plaintiff (section 133), and of a sole defendant (section 134).

not cause the action (*s*) to abate, (*t*) but it may be continued as hereinafter mentioned. (*u*) 19 Vic. c. 43, s. 208.

If there be more than one plaintiff or defendant and the cause of action survives to the others.

132. (*v*) In case there be two or more Plaintiffs or Defendants and one or more of them dies, and if the cause of action (*w*) survives to the surviving Plaintiff or Plaintiffs, (*x*) or against the surviving Defendant or Defendants, (*y*) the action shall not be thereby abated, but such death being suggested on the record, (*z*) the action shall proceed at the

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(*s*) *The action, i. e., any* action.

(*t*) Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. Therefore where judgment was signed at the opening of the office at 11 a.m., and the defendant died at 9½ a.m. on the same morning, *held* that the judgment was regular: *Wright et al* v. *Mills*, 4 H. & N. 488; see also *Converse et al* v. *Michie*, 16 U. C. C. P. 167.

(*u*) The right to enter a suggestion of the death of a plaintiff and continue the action, only exists where the cause of action would before the act have survived to the personal representative: *Flinn* v. *Perkins*, 7 L. T. N. S. 364. An action by husband and wife, in the right of the wife, survives: *Sherrington* v. *Yates et al*, 12 M. & W. 855. But not so on an action for libel: *Ireland* v. *Champneys*, 4 Taunt. 884; or seduction under our statute: *Ball* v. *Goodman*, 10 U. C. C. P. 174. There is a method of compelling the continuance or abandonment of an action by the representatives of a deceased plaintiff: see sections 144, 145.

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 136. The origin of the section is 8 & 9 Wm. III. c. 11, s. 7.

(*w*) A writ of error was in England held to be an action within the meaning of 8 & 9 Wm. III. c. 11, s. 7; *Clarke* v. *Rippon et al*, 1 B. & Al. 586.

(*x*) Questions will arise in cases where husband and wife are joint plaintiffs and one dies, more frequently than in other cases: see section 75, and notes thereto.

(*y*) A joint contract or obligation may in certain cases be given in evidence against one or more of several joint contractors: see section 72 and notes.

(*z*) If a co-plaintiff die before issue joined, the death should be suggested in making up the issue: *Farr* v. *Denn*, 1 Burr. 362. If after issue joined, then the death should be suggested on the Nisi Prius record: *Rex* v. *Cohen*, 1 Stark. N. P. 511. It was in one case held after a suggestion on the issue roll, not to be necessary to transcribe the very words of the suggestion from the pleadings to the *Nisi Prius* record, but only enough to show the judge what issues he was to try and between whom: *Farr* v. *Denn*, 1 Burr. 362, *per* Denison, J. The courts have in furtherance of justice not only allowed suggestions to be amended but to be made *ex post facto*. Thus where one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both after a motion to set aside the proceedings for this irregularity, the court permitted the plaintiff to suggest the death as before interlocutory judgment and to amend the execution without paying costs: *Newnham et al* v. *Law*, 5 T. R. 577. The suggestion should be entered so as to bring the facts to the knowledge of the court in proper form, before any further proceedings are taken: *Pinkus* v. *Sturch et al*, 5 C. B. 474; *Larchin et al* v. *Buckle*, 1 L. M. & P. 740. Where there were several defendants, some of whom had died before issue joined and the survivors without a suggestion of death moved for judgment

suit of the surviving Plaintiff or Plaintiffs against the surviving Defendant or Defendants. (*a*) 19 Vic. c. 43, s. 209.

Death of a sole plaintiff

133. (*b*) In case of the death of a sole Plaintiff or sole surviving Plaintiff, the legal representative of such Plaintiff (*c*) may, (*d*) by leave of the Court or a Judge, (*e*) enter

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as in case of nonsuit, it was said by Wilde, C. J., "There is always a roll or the materials for making one up. It is essential that there should be some suggestion of the death before the surviving defendants can move for judgment as in case of nonsuit. If they are unable to discover a mode of making up such suggestion, they certainly are not in a position to make the present motion." And, *per* Williams, J., "The statute 8 & 9 Wm. III. cap. 11, does not say by whom the suggestion shall be entered:" *Pinkus* v. *Sturch et al*, 5 C. B. 474. Where the defendant obtained a rule for judgment as in case of nonsuit, the court refused to discharge it except upon the peremptory undertaking, notwithstanding the production of an affidavit stating the death of one of the plaintiffs subsequently to the delivery of the declaration: *Larchin et al* v. *Buckle*, 1 L. M. & P. 740. The affidavit was intitled in the names of all the plaintiffs, both deceased and surviving; and *semble*, *per* Maule, J., that it was wrongly intitled: *Ib.*

(*a*) The suggestion at Nisi Prius may be entered on the Nisi Prius record immediately after the *jurata*. "And now on, &c., before, &c., justices of our said lady the Queen, appointed to take the assizes in and for the county of, &c., at, &c., in the same county, comes the said A. B. and the said C. D. by their respective attorneys, but the said E. F. comes not, and thereupon the said A. B., according to the statute in such case made and provided, suggests and gives the said justices here to understand and be informed that after the defendants pleaded to the said declaration (*according to the fact*), and before this day, that is to say, on, &c., the said E. F. died, to wit, at, &c., and the said C. D. (the other defendant) there survived him, and which the said C. D. doth not deny, but admits the same to be true. Therefore let the said issue so joined as aforesaid be tried between the said A. B. and the said C. D." In this case a suggestion merely is made, because as no new person is introduced no writ of revivor is required. But the provisions of our Con. Stat. U. C. cap. 78, s. 6, must not be passed over without being noticed. It makes liable the representatives of a deceased joint contractor, although the other co-contractors be living; and provides for the issuing of a *sci. fa.* after judgment against the representatives of a deceased joint contractor, though there may be another defendant still living and against whom the judgment still remains in force.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 137.

(*c*) See note *u* to section 131.

(*d*) *May*, not must. It is in the power of the representatives either to continue or discontinue the action. Defendant has it in his power to force them to do the one thing or the other: sections 144, 145.

(*e*) In ordinary cases leave will not be granted without an affidavit, which may be to this effect—1. That this action was commenced by writ of summons, on, &c. 2. That the said plaintiff declared therein, &c. (*as the case may be—the state of the cause should be shown.*) 3. That the said plaintiff died on, &c. 4. That the said plaintiff by his last will and testament appointed me the executor thereof, and that I duly proved the same on, &c., and then became his legal representative, &c. (*according to the fact.*) The leave may be granted on an *ex parte* application: *Reischmuller* v. *Uberhorst*, 3 U. C. L. J. 48.

a suggestion of the death, and that he is such legal representative, (*f*) and the action shall thereupon proceed; (*g*) and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased Plaintiff, (*h*) and such Judgment shall follow upon the verdict, in favor of or against the person making such suggestion, (*i*) as if such person were originally the Plaintiff. 19 Vic. c. 43, s. 210.

Death of a sole defendant or of a sole surviving defendant may be suggested.

134. (*j*) In case of the death of a sole Defendant or sole surviving Defendant where the action survives, (*k*) the Plaintiff may make a suggestion of the death, either in any of the pleadings, if the cause has not arrived at issue, (or by filing a suggestion with the other pleadings, if it has so arrived,) and that a person named in such suggestion is the executor or administrator of the deceased, (*l*) and may thereupon serve

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(*f*) The suggestion may be in this form, "And hereupon, that is to say, on, &c., C. D. by leave of the court, &c., for this purpose first had and obtained, suggests and gives the court here to understand and be informed that on, &c., the plaintiff, A. B., departed this life, and that he, the said C. D., is the executor of the last will and testament of the said A. B. (*according to the fact*), and as such is the legal representative of the said A. B.

(*g*) *Thereupon proceed, i. e.* after entry of the suggestion, which is made a condition precedent to the further prosecution of the action.

(*h*) In a case where a suggestion was entered upon a Nisi Prius record without any authority from the court, and in a very informal manner, without any opportunity to the defendants to traverse the facts stated, a new trial was granted upon application of defendants: *Barnewall* v. *Sutherland et al*, 1 L. M. & P. 159.

(*i*) Suggestions are of two classes—those that may be traversed and those not traversable. It is a general proposition that matters of fact contained in a suggestion are traversable where the courts are not authorized to determine them. Suggestions are not traversable where a statute gives the court cognizance of the matters of fact stated, as for example, a statute declaring that a plaintiff recovering a verdict under a certain sum shall be entitled only to inferior court costs, or to no costs, and the fact is made to depend upon the judge's certificate: see *Gardner* v. *Stoddard*, Dra. Rep. 101. Another class of cases where the matter of suggestion belongs to the court, is where the court, having a discretionary power over its own proceedings, is called upon to depart from the usual course, on the suggestion of some matter which renders such departure essential or expedient for the purposes of justice, as where the venue is to be changed because an impartial trial cannot be had: *Watson* v. *Quilter*, 1 D. & L. 244.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 138.

(*k*) See note *u* to section 131.

(*l*) The object of the section is to place the personal representative in the cases provided for in the same position as if he had been the original party named upon the record, to substitute the one for the other, and so avoid the necessity for

such executor or administrator with a copy of the writ and suggestion, and of the said other pleadings, (*m*) and with a notice signed by the Plaintiff or his Attorney, requiring such executor or administrator to appear within ten days after service of the notice, (*n*) inclusive of the day of such service, and notifying him that in default of his so doing, the Plaintiff may sign Judgment against him as such executor or administrator. (*o*) 19 Vic. c. 43, s. 211.

Copy and notice to be served on the opposite party.

135. (*p*) The same proceedings may be had and taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which such action has been brought. (*q*) 19 Vic. c. 43, s. 211.

After such notice the proceedings to be the same as in actions relating to executors.

136. (*r*) In case of no pleadings before the death, the suggestion shall form part of the declaration, (*s*) and the

If no previous pleadings, the

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commencing a fresh action: *Benge* v. *Swaine*, 15 C. B. 792, *per* Jarvis, C. J. An action commenced against an intestate may be continued against an executor, *de son tort*: *Keena* v. *O'Hara*, 16 U. C. C. P. 435.

(*m*) The suggestion may be to the effect following: "And on, &c., the plaintiff comes and gives the court to understand and be informed that the said defendant, on, &c., died since the issuing of the writ of summons in this cause, and that C. D. is his executor, and the said A. B. now sues the said C. D. as such executor as aforesaid."

(*n*) This is consonant with the general rule that wherever a person not a party to the action is to be directly affected by it there must be a suggestion made, so that such person may either plead or demur before being subjected to execution: see *Bartlett et al* v. *Pentland*, 1 B. & Ad. 704.

(*o*) The notice may be in this form: "Take notice that I, on, &c., commenced an action against C. D., since deceased, by a writ of summons issued out of, &c., tested on that day, and that the document hereto annexed, marked A, is a true copy of that writ, and that proceedings were taken in that action against the said C. D., and that I have entered a suggestion on the said proceedings of the death of the said C. D., and that you are executor, &c. (*as the fact may be*), and that a copy of the suggestion made therein is hereunto annexed, marked B. And further take notice that you are required to appear in the said court to the said action within ten days after the service of this notice, inclusive of the day of such service, and that in default of your so doing, I, the plaintiff, may sign judgment against you as such executor as aforesaid."

(*p*) Taken from the latter part of section 138 of Eng. Stat. 15 & 16 Vic. cap. 76.

(*q*) *i. e.*, If the writ be specially indorsed judgment under section 15, but if not then proceedings under section 55.

(*r*) Taken from the latter part of section 138 of Eng. Stat. 15 & 16 Vic. cap. 76.

(*s*) See note *m* to section 134.

suggestion to form part of the declaration.

declaration, with a notice to plead, and the suggestion, may be served together, and the new Defendant shall plead to both at the same time, and within eight days after the service. (*t*) 19 Vic. c. 43, s. 211.

If plaintiff has declared and defendant has not pleaded.

137. (*u*) In case the Plaintiff had declared, but the Defendant had not pleaded before the death, the new Defendant shall plead at the same time to the declaration and suggestion within eight days after service of the suggestion; (*v*) and in case the Defendant had pleaded before the death, the new Defendant shall, within eight days after the service of the suggestion, plead thereto only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the Court or a Judge he be permitted to plead fresh matter in answer to the declaration. (*w*) 19 Vic. c. 43, s. 211.

If defendant has pleaded.

138. (*x*) In case the Defendant had pleaded before the death, but the pleadings have not arrived at issue, the new Defendant, besides pleading to the suggestion within eight days after the service thereof, shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; (*y*) and in case

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(*t*) The time limited for pleading is similar to that allowed in ordinary cases: see section 91.

(*u*) Taken from the latter part of section 138 of Eng. Stat. 15 & 16 Vic. cap. 76.

(*v*) The action is as nearly as possible to be carried on without interruption or abatement of any part of it: *Benge* v. *Swaine*, 15 C. B. 784.

(*w*) The section is very explicit. The representative must be governed by the state of a suit when he is made a party. 1. If before declaration, he will have eight days to plead both to the suggestion and to the declaration, and to the latter it is presumed any defence open to the deceased. 2. If after declaration he will be precisely in the same position. 3. But if after plea then he will not be allowed to plead fresh matter to the declaration unless by leave first obtained. 4. Whenever he may plead to the declaration, it is apprehended he may demur if there be ground of demurrer, though the right so to do is not in express words given: see *Bartlett et al* v. *Pentland*, 1 B. & Ad. 704. 5. The suggestion being traversable, no matter at what stage of the cause made, may be traversed independently of any other pleas pleaded.

(*x*) Taken from the latter part of section 138 of Eng. Stat. 15 & 16 Vic. cap. 76.

(*y*) The proceedings on the suggestion will of course be collateral to the proceedings in the cause, though the latter must necessarily be dependent upon the

the Plaintiff recovers, he shall be entitled to the like Judgment in respect of the debt or sum sought to be recovered, and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, as in an action originally commenced against the executor or administrator. (*z*) 19 Vic. c. 43, s. 211. If plaintiff recovers.

139. (*a*) The death of either party between verdict (*b*) and Judgment (*c*) shall not hereafter be alleged for error, (*d*) The death of either party between ver-

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result of the former. It is not declared that a separate notice of trial shall be necessary for each set of pleadings. The notice of trial being as to the trial of the *cause*, and both sets of pleadings forming only one cause, one notice would it is conceived be sufficient.

(*z*) "And in case the *plaintiff* recovers," &c. Some difficulty arose upon the construction of the Eng. C. L. P. Act, owing to the absence of all mention in the act about costs in the event of the *substituted defendant* succeeding on the trial. But upon much consideration it was held that the defendant, when successful, was as much entitled to costs as plaintiff would be if successful: *Benge* v. *Swaine*, 15 C. B. 784. Therefore where an administratrix had been made defendant, in an action commenced against the intestate, and she pleaded to the suggestion, the court would not allow the plaintiff afterwards to discontinue without payment of all the costs of the cause: *Ib.*

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 139. The words of this section are the same as those used in 17 Car. II. cap. 8, s. 1. The decisions under the one apply to the other: *Frewen* v. *Lethbridge*, 7 W. R. 442, *per* Martin, B. *Held* not to apply to the case of a party dying after an interlocutory, but before final judgment: *Ireland* v. *Champneys*, 4 Taunt. 884. For this provision is made by the following section (140). The death of either party *before* the assizes is not remedied by the statute: *Anon.*, 1 Salk. 8; though a death after the commission day of the assizes but before verdict is within the statute; for the assizes have relation to the first day thereof: *Jacobs* v. *Miniconi*, 7 T. R. 31. The English sittings in term are not, however, considered in the same light: *Taylor* v. *Harris*, 3 B. & P. 549; *Johnson* v. *Budge*, 3 Dowl. P. C. 207; but see *Cheetham* v. *Sturtevant*, 12 M. & W. 515.

(*b*) This section, unlike the preceding sections and the following one, is not restricted to such actions as executors might prosecute. It extends to verdicts in actions for torts as well as on contracts: *Palmer* v. *Cohen*, 2 B. & Ad. 966; *Kramer* v. *Waymark*, L. R. 1 Ex. 241; but does not extend to nonsuits in any action: *Dowbiggin* v. *Harrison*, 10 B. & C. 480. Where the court made absolute a rule *nisi* for entering a verdict and directing a nonsuit to be entered pursuant to leave reserved at the trial, and the plaintiff died between the term in which the rule *nisi* was granted and that in which it was made absolute, the court, in order to prevent an abatement of the suit, ordered the judgment of nonsuit to be entered as of the term preceding the death: *Moor* v. *Roberts*, 4 Jur. N. S. 241.

(*c*) The word "judgment" has been held to include a decree in equity: *Owen* v. *Curzon* 2 Vern, 237.

(*d*) Unless the case be within this section, wherever the fact of death appears upon the record, the remedy is by writ of error or arrest of judgment: Com. Dig. "Abatement," H. 32; see also *Berwick* v. *Andrews*, 1 Salk. 314.

dict and Judgment.

so as such Judgment be entered within two terms after the verdict. (*e*) 19 Vic. c. 43, s. 212.

Plaintiffs dying between interlocutory and final judgment.

140. (*f*) If the Plaintiff in any action dies after an interlocutory Judgment and before a final Judgment obtained therein, (*g*) the action shall not abate by reason thereof, if such action might have been originally prosecuted or maintained by the executor or administrator of the Plaintiff; (*h*) and if the Defendant dies after interlocutory Judgment and before final Judgment, the action shall not abate if such action might have been originally prosecuted or maintained against the executor or administrator of such defendant. (*i*) 19 Vic. c. 43, s. 213.

And if Defendant so dies.

(*e*) The judgment to be available must be entered within two terms after verdict. The courts will not allow judgment to be entered *nunc pro tunc*, unless the delay be that of the adverse party: *Bull* v. *Price*, 7 Dowl. P. C. 584; *Harrison et al* v. *Heathorn et al*, 1 D. & L. 529; *Lanman* v. *Lord Audley*, 2 M. & W. 535; *Blewett* v. *Tregonning*, 4 A. & E. 1002; *Bridges* v. *Smyth*, 8 Bing. 29; *Vaughan* v. *Wilson*, 4 Bing. N. C. 116: *Miles* v. *Bough*, 3 D. & L. 105; *Freeman* v. *Tranch*, 21 L. J. C. P. 214; *Miles* v. *Williams*, 9 Q. B. 47; *Neil* v. *McMillan*, 27 U. C. Q. B. 257; but certainly not where laches are imputable to the party interested: *Lawrence* v. *Hodgson*, 1 Y. & J. 368; *Copley* v. *Day*, 4 Taunt. 702; *Wilkins* v. *Cauty*, 1 Dowl. N. S. 855. The judgment if entered up within the time limited is equivalent to a judgment entered up in the life-time of the party: *Burnett* v. *Holden*, 1 Lev. 277; *Colebeck* v. *Peck*, 2 Ld. Rayd. 1280; *Saunders* v. *McGowran et al*, 12 M. & W. 221. But where the plaintiff dies after verdict, the court might grant a new trial on the application of the defendant, and would formerly in such case impose terms upon him to prevent his taking advantage of the plaintiff's death: *Griffith* v. *Williams*, 1 C. & J. 47. If a cause be referred to arbitration by order of *nisi prius*, it is no ground for setting aside the award that it was made after the death of one of the parties: see *James et al* v. *Crane et al*, 15 M. & W. 379; *Heathcote* v. *Wing*, 25 L. J. Ex. 23. So where after a verdict for plaintiff with leave to move for a nonsuit or verdict for defendant, defendant died before a motion could be made and the rule *nisi* was afterwards obtained in his name: *Held* that the rule might be still made absolute to enter a verdict for defendant, it appearing that the executors authorised the motion: *Freeman* v. *Rosher*, 13 Q. B. 780; see also *Moor* v. *Roberts*, 3 C.B. N.S. 844; *Wright* v. *Skinner*, 17 U.C. C.P. 317.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 140. The origin of the section is 8 & 9 Wm. III. c. 11, s. 6.

(*g*) Death before interlocutory judgment *actually* signed is not within the statute: *Wallop* v. *Irwin*, 1 Wils. 315.

(*h*) The operation of this section is restricted to actions which might be originally maintained by an executor or administrator, and in this respect differs from the preceding section.

(*i*) *Such defendant*, intending a sole defendant, but will, it is apprehended, equally apply to the death of a remaining defendant where the others have previously died. In England and in this province an action may be continued against a

A writ of Revivor may issue in case of plaintiff's death.

141. (*j*) The Plaintiff, or, if he dies after interlocutory Judgment, his executor or administrator, shall have a writ of Revivor in the form (A) No. 11, or to the like effect, against the Defendant, if living after such interlocutory Judgment, or if he has died, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by the Plaintiff, or by his executor or administrator. (*l*) 19 Vic. c. 43, s. 213.

Proceedings thereupon.

142. (*m*) If such Defendant, his executor or administrator, appears at the return of such writ, (*n*) and does not show or allege any matter sufficient to arrest the final judgment, (*o*) or if he makes default, the damages shall be assessed, (*p*) or the amount for which final judgment is to be signed shall be referred to the proper officer as in this Act provided; (*q*) and after the assessment had, or the delivery of the order with the amount endorsed thereon to the Plaintiff, his executor or administrator, final judgment shall be given for the Plaintiff, his executor or administrator, against the Defendant, his executor or administrator respectively. (*r*) 19 Vic. c. 43, s. 213.

Marriage of a woman

143. (*s*) The marriage of a woman Plaintiff or Defendant shall not cause the action to abate, but the action may not-

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surviving defendant: 8 & 9 Wm. III. c. 11, s. 7; Eng. C. L. P. Act, 1852, s. 136; section 132 of this act. But not in England against the representatives of a deceased co-defendant: *Fort et al* v. *Oliver*, 1 M. & S. 242. Though the contrary rule prevails in this province: Con. Stat. U. C. cap. 78, ss. 1, 2.

(*j*) Taken from the latter part of section 140 of 15 & 16 Vic. cap. 76.

(*l*) This is similar in terms to the form of *scire facias* under the old practice: *Smith* v. *Harmon*, 1 Salk. 315.

(*m*) Taken from the latter part of section 140 of 15 & 16 Vic. cap. 76.

(*n*) *i. e.* Within ten days after service thereof: see form in schedule.

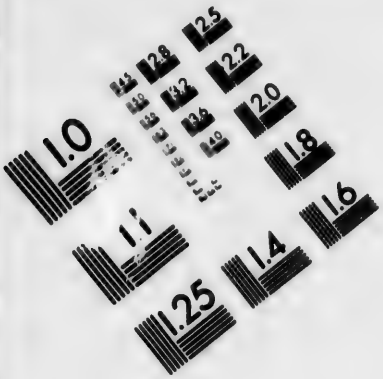
(*o*) No defence open to the deceased defendant but not made use of by him would be here admissible.

(*p*) According to the practice in force before this act, which is not altered by the act.

(*q*) *i. e.* Under section 161.

(*r*) The fruit of the judgment will be of course the execution, as to which see section 238 *et seq.*

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 41.



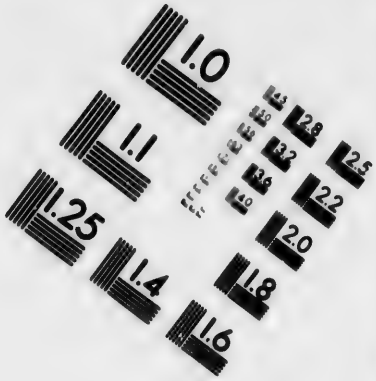
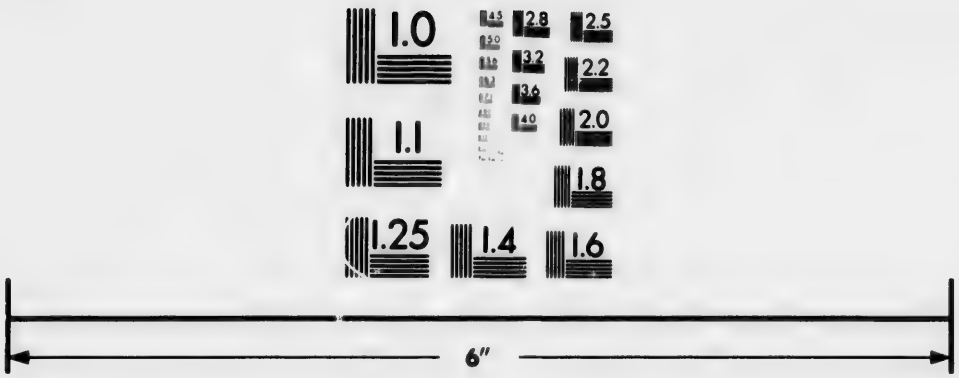
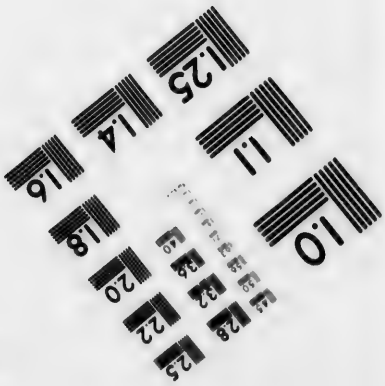


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plaintiff or defendant.

withstanding be proceeded with to judgment, (*t*) and such judgment may be executed against the wife alone, (*u*) or by suggestion, (*v*) or Writ of Revivor pursuant to this Act, (*w*) judgment may be obtained against the husband and wife and execution issued thereon; (*x*) and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any Writ of Revivor or sugge-

(*t*) This is in substitution of the rule at common law, which was quite the reverse of this enactment. The section does not apply in the case of a female defendant *after* judgment: *Morris* v. *Coates*, 25 L. T. Rep. 176.

(*u*) Unless the wife have separate property, it would be useless to issue an execution against her alone: *Evans* v. *Chester*, 6 Dowl. P. C. 140; *Edwards et ux*, v. *Martin et al*, 17 Q. B. 602; *Ivens* v. *Butler et ux*, 28 L. T. Rep. 232; *Thorpe* v. *Argles*, 1 D. & L. 851.

(*v*) Under section 302. The suggestion may be in this form—"And now on, &c., the plaintiff gives this honourable court to understand, &c., that on, &c. (*after the giving of judgment herein*), C. D. married one E. F., and that the said plaintiff is entitled to have execution of the judgment aforesaid against the said E. F. and C. D. his wife. Therefore it is considered by the court that the said plaintiff ought to have execution against the said E. F. and C. D. his wife."

(*w*) Plaintiff proceeded by writ of revivor to obtain execution against husband and wife on a judgment recovered against the latter before marriage. The declaration set out the writ in which the judgment was stated and prayed execution against both defendants upon it, and defendants demurred on the ground that no legal right of action was shown against them and that the proceeding by writ of revivor was inapplicable. *Held*, that the proceeding was proper and that the right of action need not be shown, but only a right *prima facie* to have execution on the judgment: *Aylesworth* v. *Patterson et ux*. 21 U. C. Q. B. 269.

(*x*) The principle that a judgment debt belongs to the husband if he marry a judgment creditor, or is payable by him if he marry a judgment debtor, in either case renders it necessary that he should be made a party to the judgment. The marriage of a *feme sole* never did, it seems, *ipso facto* abate a suit: *Lee* v. *Maddaza*, 1 Leon. 168. But might be pleaded in abatement: *Morgan* v. *Painter*, 6 T. R. 265; *Hollis* v. *Freer et al*, 5 Dowl. P. C. 47. And if not pleaded did not affect the suit: *Walker* v. *Golling*, 11 M. & W. 78. It is certainly no ground of nonsuit: *Jackson* v. *Hyde*, Q. B. Ont. E. T. 1869. Still the marriage of a *feme sole* plaintiff after judgment, rendered it necessary for her husband to join her in suing out a *scire facias* for execution: *Woodyer* v. *Gresham*, 1 Salk. 116. But the husband alone was entitled if so minded to issue the *scire facias*: *Ib.* So when a *feme sole* defendant married after judgment, a *scire facias* might be issued against both husband and wife on the judgment: *Ib.* And if after *scire facias* the wife died, the husband alone was liable to execution: *Ib.* But if the husband were not made a party to the judgment during the life time of his wife, he could not and cannot after her death have a *scire facias* unless he take out letters of administration to her estate: *Betts* v. *Kimpton*, 2 B. & Ad. 273. It was also held that if after the entry of judgment against a woman *dum sola* she married, plaintiff might if so disposed proceed against her without joining the husband: *Cooper* v. *Hunchin*, 4 East. 521. So in ejectment against a *feme sole* who married after judgment, plaintiff had the right to issue a writ of possession without noticing her husband: *Doe d. Tugger* v. *Butcher*, 3 M. & S. 557.

tion; (*y*) and if in any such action the wife has sued or defended by Attorney appointed by her when sole, such Attorney may continue the action or defence, unless his authority be countermanded by the husband, and the Attorney changed according to the practice of the Court. (*z*) 19 Vic. c. 43, s. 214.

Right of defendant in action which would have abated but for this Act.

144. (*a*) Where an action would but for this Act have abated by reason of the death of either party and in which the proceedings may be revived and continued under this Act, (*b*) the Defendant or person against whom the action may be so continued, may apply by summons (*c*) to compel the Plaintiff or person entitled to proceed with the action, to proceed according to the provisions of this Act within such time as a Judge having jurisdiction in the case may order. (*d*) 19 Vic. c. 43, s. 215.

When a suggestion of default may be made.

145. (*e*) In default of such proceeding, the Defendant or other person against whom the action might be so continued, (*f*) may enter a suggestion of such default and of the representative character of the person by or against whom the action might be proceeded with, (*as the case may*

(*y*) It is not stated whether the execution should be in the joint names of husband and wife, or in the name of one only. It is only provided that it may issue by the authority of the husband without any writ of revivor, &c. The general rule is that the execution must follow or correspond with the judgment.

It may be mentioned that a warrant of attorney to confess judgment given by a *feme sole* has been held to be revoked by her marriage before judgment: *Anon.* 1 Salk. 117; *aliter* if given *to* her: *Ib.*; also *Metcalfe et ux.* v. *Boote*, 6 D. & R. 46.

(*z*) No attorney can be changed without the order of a judge: R. G. pr. 4.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 92.

(*b*) See ss. 131 to 141, inclusive.

(*c*) *By summons, i. e.*, to a judge in chambers. The summons may be in this form—Upon reading, &c., let the plaintiff's attorney or agent (*or if dead*, "Let E. F. of, &c.," *the legal representative of the deceased*), attend judge's chambers tomorrow at twelve o'clock noon, to show cause why the plaintiff, (*or the said* E. F.) should not proceed with this action according to the provisions of the Common Law Procedure Act, within — days from the service hereof, or within such other time as may be ordered in that behalf.

(*d*) The order may be thus—Upon hearing, &c., I do order that the plaintiff (or E. F. *of*, &c.) do proceed with this action according to the provisions of the Common Law Procedure Act, within — days from the date hereof.

(*e*) Taken from latter part of section 92 of 17 & 18 Vic. cap. 125.

(*f*) See sections 131 to 141 inclusive.

be,) (*g*) and shall have judgment for the costs of the action against the Plaintiff, or against the person entitled to proceed in his room, (*as the case may be,*) and in the latter case, to be levied of the goods of the testator or intestate. 19 Vic. c. 43, s. 215.

JUDGMENTS BY DEFAULT, AND THE MODE OF ASCERTAINING THE AMOUNT TO BE RECOVERED THEREON. (*h*)

No rule or order to compute necessary.

146. (*i*) No rule or order to compute shall be used. (*j*) 19 Vic. c. 43, s. 141.

(*g*) The suggestion may be as follows—And now on, &c., C. D. suggests and gives the court here to understand and be informed that the defendant died after the said issue was joined (*according to the fact*), and that on, &c., an order was made by the honorable, &c., at the instance of the said C. D., that the plaintiff (*according to the fact*) should within, &c., proceed with this action according to the provisions of the Common Law Procedure Act. And the said C. D. further suggests and gives the court here to understand and be informed that the plaintiff (*as the fact may be*) did not, pursuant to the said order, within, &c., or at any other time after the making of the same, proceed with this action according to the provisions of the Common Law Procedure Act, and therein made default, and that the said C. D. is the executor of the last will and testament of the defendant (*as the fact may be*). And the said C. D. prays judgment for the costs of this action and of the said suggestion. Therefore it is considered that the said C. D. do recover against the plaintiff (*as the fact may be*) £— for the costs of the defence to this action and of the said suggestion.

(*h*) The sections following are founded upon the first report of the Common Law Commissioners, section 64, *et seq.* Their object is to save expense by simplifying proceedings consequent upon a judgment by default in actions where the cause of action is a money demand. Of such actions is that of debt, in which judgment by default has before this act been considered final, so as to entitle plaintiff to issue his execution without having recourse to any intermediate or ulterior proceedings. Between this form of action and the actions of assumpsit and covenant when brought for the recovery of a liquidated sum of money there is no real difference. Whatever the difference may have been it is lessened by this act, which declares that it shall be unnecessary in any writ of summons to state the form of action. In each of these forms of action, in which plaintiff seeks to recover a liquidated sum of money, and in which a reference to compute could formerly be obtained, judgment by default is made final. With respect to actions brought for the recovery of unliquidated sums of money in which often the amount sought to be recovered is substantially a matter of calculation, a new and simple mode of procedure is also enacted in the following sections.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 92. Founded upon the first report of the Common Law Commissioners, section 65.

(*j*) Speaking of the practice which prevailed before this Act and which is remedied herein, the commissioners remarked that "in every form of action except debt, an interlocutory judgment only is signed, and the amount to which plaintiff is entitled is ascertained by the verdict of a jury on a writ of inquiry or by a rule to compute, the latter of which is allowed only in certain cases of demands liquidated by a written contract, and is in substance an order of the court that it be referred to the master, to ascertain the amount to be recovered by the final judgment. It was described by the commissioners as being "an expensive proceeding, purely formal, involving affidavits, briefs to counsel and other costs,"

147. (*k*) **In actions where the Plaintiff seeks to recover a debt** (*l*) **or liquidated demand in money,** (*m*) **the true cause and amount of which has been stated in the special indorsement on the Writ of Summons** (*n*) **or in the declaration,** (*o*) **judgment by default shall be final.** (*p*) **19 Vic. c. 43, s. 142.**

Judgment by default final in certain cases.

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and further, as being "useless and injurious," and its abolition was therefore recommended.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 93.

(*l*) Actions of debt within Stat. 8 & 9 Wm. III. cap. 11, are not embraced by this enactment: section 148.

(*m*) This is an extension of the practice formerly applicable to actions of debt only. Henceforward actions for any liquidated demand, such, for example, as covenant or assumpsit, when brought for the recovery of a pecuniary demand of a liquidated nature, will be governed by that practice. Questions must arise as to when the amount sought to be recovered in an action is or is not "a debt or liquidated demand in money." One thing is clear that it must be such a demand as can be computed and specifically indorsed on the writ or mentioned in the declaration. In this respect the section is analogous to section 17 of Eng. Stat. 3 & 4 Wm. IV. cap. 42, which empowers the court or a judge "in any action depending in either of the superior courts for any *debt or demand* in which the money sought to be recovered *and indorsed on the writ of summons*, shall not exceed £20," to refer the cause for trial to the sheriff. Cases decided under this statute will greatly aid in the construction of the section here annotated, and may be conveniently noticed in this place. No case is within the statute unless the *whole* debt or demand of the plaintiff is of such a nature as might be indorsed on the writ of summons: *Jacquet* v. *Bower*, 7 Dowl. P. C. 331; *Mansfield* v. *Brearey*, 1 A. & E. 347; *Perry* v. *Patchett*, 2 Dowl. P. C. 667; *Lawrence* v. *Wilcock*, 8 Dowl. P. C. 681; *Roffey* v. *Shoobridge*, 9 Dowl. P. C. 957; *Hatton* v. *Macready*, 2 D. & L. 5. See also *Goodman* v. *Pocock*, 15 Q.B. 576; *Fewings* v. *Tindal*, 5 D. & L. 196. Actions for torts in which the damages claimed must necessarily be unliquidated, are clearly not within the meaning of the act: *Watson* v. *Abbott*, 2 Dowl. P. C. 215; *Smith* v. *Brown*, 2 M. & W. 851. No claim that is properly and strictly for unliquidated damages can be considered either a debt or demand such as contemplated: *Collis* v. *Groom*, 1 Dowl. N. S. 496; *Lismore* v. *Beadle*, *Ib.* 566; *Jones* v. *Thomas*, 6 Jur. 462. But a claim *ejusdem generis*, with a debt, and substantially of the same nature and character, may be considered as falling within the scope of the statute: *Price* v. *Morgan*, 2 M. & W. 53; *Allen* v. *Pink*, 4 M. & W. 140. Thus detinue for example, in which the writ is to recover the specific chattel, *or the value thereof*, sounding rather of contract than of tort. The sum at which the chattel is valued, confined and limited to a specific amount, may be indorsed on the writ of summons: *Walker* v. *Needham*, 1 Dowl. N. S. 220. Cases under the English bankruptcy acts as to proof of debts are also in point: see *Toppin* v. *Field*, 4 Q.B. 386; *Irving* v. *Manning et al*, 6 C. B. 391; *Earle* v. *Oliver*, 2 Ex. 71; *In re Willis*, 4 Ex. 530; *The South Staffordshire R. Co.* v. *Burnside*, 5 Ex. 129; *In re Hall*, 2 Jur. N. S. 1076. See further section 15, and notes thereto.

(*n*) No such reference to writs specially indorsed as here made is to be found in the corresponding English section. Writs must be specially indorsed pursuant to section 15, and can only be so indorsed to be effectual in cases where defendant is within the jurisdiction of the courts.

(*o*) See sections 56, 57.

(*p*) Actions in which judgment by default is not final are in part provided for by section 161.

Provisions of a certain British Act of 8, 9 Wm. 3, c. 11, to remain in force.

148. (*q*) Notwithstanding any thing in this Act contained, the provisions of the Act of the Parliament of Great Britain, passed in the Session held in the eighth and ninth years of the Reign of King William the Third, intituled, *An Act for the better preventing frivolous and vexatious suits,* (*r*) as to the assignment or suggestion of breaches, or as to judgment, shall continue in force in Upper Canada. 19 Vic. c. 43, s. 145.

Writs of Inquiry not to issue to Sheriffs.

149. (*s*) No Writ of Inquiry shall issue to a Sheriff in cases of judgment by default, (*t*) but except in cases where the judgment is final as aforesaid, (*u*) the damages, when to be assessed by a Jury, (*v*) shall be ascertained at the same

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(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 96. Founded upon the first report of the Common Law Commissioners, section 68. This section, though substantially the same as the English section whence it is adopted, is not by any means a copy.

(*r*) The statute 8 & 9 Wm. III. cap. 11, s. 8, is highly remedial and calculated to advance justice and to give relief to plaintiffs, up to the extent of the *damages sustained* and to protect defendants from the payment of more than is justly due: *Murray* v. *Lord Stair*, 2 B. & C. 94, *per* Best, J. It tempers the rigor of the common law, which held that in debt on bond the judgment for plaintiff should be the amount of the penalty contained in the bond, no matter how small the damage sustained in consequence of a breach however trivial. The statute has been held to be restricted to actions of debt, the reason being that in covenant and assumpsit there is no penalty that can stand as a continuing security for future breaches, but only a breach of an agreement for which adequate damages have been awarded: 1 Wms. Saunders 58, notes *b*, *c*, *d*; *Lowe* v. *Peers*, 4 Burr. 2225. A bond conditioned for the payment of a sum certain is not within the statute, for in order to ascertain the precise sum due in such a case, computation only is necessary, and the intervention of a jury is unnecessary: *Murray* v. *Lord Stair*, 2 B. & C. 90, *per* Abbot, C. J. Bail bonds are not within the statute: *Moody* v. *Pheasant*, 2 B. & B. 446. Plaintiffs are obliged in all cases within the statute to proceed under it: *Drage* v. *Brand*, 2 Wils. 377; *Hardy* v. *Bern*, 5 T. R. 636; *Rolet* v. *Rosewell*, *Ib.* 538. Payment into court cannot be pleaded to the condition of a bond within the Statute of William: see note *q* to section 99.

(*s*) Taken from our old King's Bench Act, 2 Geo. IV. cap. 1, s. 29.

(*t*) The writ was directed to the sheriff of the county in which the venue in the action was laid, stating the former proceedings in the action, "and because it is unknown what damages the plaintiff hath sustained," commanded the sheriff, or other officer having the execution of the writ, that by the oath of twelve honest and lawful men of his county he should diligently inquire the same, and return the inquisition into court.

(*u*) *i. e.* Where the plaintiff seeks to recover a debt or liquidated demand in money, the true cause and amount of which has been stated in the special endorsement on the writ of summons or in the declaration: section 147.

(*v*) There can be no assessment of damages where a verdict is found for the defendant on an issue going to the whole cause of action: *Prynne* v. *Carroll*, 10 U. C. Q. B. 519.

time and in like manner as if the parties had pleaded to issue, and the entries shall be made on the Roll accordingly. (*w*) 2 Geo. IV. c. 1, s. 20. When to be assessed by a Jury.

PROVISIONS FOR THE DETERMINATION OF QUESTIONS RAISED BY THE CONSENT OF THE PARTIES WITH OR WITHOUT PLEADING. (*x*)

150. (*y*) In case the parties to an action, (*z*) after writ issued and before judgment, (*a*) are agreed (*b*) as to the question or questions of fact, (*c*) to be decided between them, a Judge, by consent of parties, and upon being satisfied that they have a *bonâ fide* interest in the decision of the question or questions, and that the same is or are fit to be tried, (*d*) Parties may agree upon an issue of fact, and try it.

(*w*) The assessment roll should contain a copy of the declaration, memorandum of judgment by *nil dicit*, and after that part of the roll which reads "because it is unknown what damages the plaintiff hath sustained," should contain the ordinary memorandum of *venire* to the sheriff.

(*x*) The sections following are founded upon the first report of the Common Law Commissioners, section 22, and are in effect an extension of the principles contained in Con. Stat. U. C. cap. 22, s. 157, which is a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 25. Parties to an action could only avail themselves of this statute "after issue joined." Besides, the only provision thereby made, is for taking the opinion of the court upon a point of *law* without at all proceeding or incurring the expense of proceeding to a trial of the facts.

(*y*) Adopted from Eng. Stat. 15 & 16 Vic. cap. 76, s. 42.

(*z*) *To an action*, &c., applies to all descriptions of action whether *ex contractu* or *ex delicto*.

(*a*) Parties cannot avail themselves of this section unless and until writ of summons issued; but if issued, they may avail themselves of it at any time before judgment.

(*b*) *Are agreed.* An agreement is defined to be "*aggregatio mentium*," or the union of two or more minds on a thing done or to be done, and is therefore not to be understood in the loose, incorrect sense in which it is sometimes used as synonymous to promise or undertaking. If either party dissent from the course pointed out by the section here annotated, there can be no "agreement." Compulsory references by order of a judge are in some cases permitted: see section 158 *et seq.*

(*c*) Provision is made for the disposal of questions of law by section 154 of this act.

(*d*) *i. e.* The question or questions of fact to be decided, &c. The judge before making the order must be satisfied that the parties have a *bona fide* interest in the question or questions to be decided. The manifest object being to prevent the time of the court being employed in the determination of gambling, or other transactions of a like character, in which neither party can be said to have an actual and *bona fide* interest. "Courts of justice are constituted for the purpose of deciding *really existing questions of right between the parties*, and are not bound to answer whatever impertinent questions parties think proper to ask them in the form of a wager at law:" *Henkin* v. *Guerss*, 12 East. 247, *per* Lord Ellenborough; see also *Lord Wellesley* v. *Withers*, 4 El. & B. 750. Judges in England have

Form of stating questions and trial of issue thereon.

may order (*e*) that such parties may proceed to the trial of such question or questions of fact without formal pleadings, (*f*) and such question or questions may be stated for trial in an issue in the form (A) No. 8, (*g*) and the issue may be entered for trial and tried accordingly in the same manner as an issue joined in an ordinary action, (*h*) and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the Court, as in other actions. 19 Vic. c. 43, s. 77.

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ordered wager actions to be struck out of the docket and have in the most positive terms refused to try such actions: see *Henkin* v. *Guerss*, 12 East. 247, and *Brown* v. *Leeson*, 2 H. B. 43. It would appear that it is not sufficient for the parties to have *some* interest in the question, the question itself must be one really and *bona fide* in controversy between them: see *Doe d. Duntze* v. *Duntze*, 6 C. B. 100. This, like applications under the Interpleader Acts, is discretionary, not compulsory upon the court: see *Belcher et al* v. *Smith*, 2 Moo. & S. 184.

(*f*) The dispensing with formal pleadings will be a saving of costs to the parties, besides being one mode of avoiding the risk of defective pleading. In a case such as intended by this section, in which both parties are agreed as "to the question or questions to be decided," there cannot be any necessity for formal pleadings. The design of formal pleadings is to accomplish what the parties here do by consent, viz., develope the subject of decision by the production of an issue or issues.

(*g*) The form of issue given in the schedule is an exact copy of that in the English section. It is not unlike that made use of in interpleader cases. One party affirms and the other denies, and it is for the jury to decide between them. Between the proceedings to be had pursuant to this section and those necessary in interpleader cases there is a very strong resemblance: see Con. Stat. U. C. cap. 30, which is a transcript of Eng. Stat. 1 & 2 Wm. IV. cap. 58. In some respects the decisions under the interpleader practice will be in point under this new practice. In framing the special case the parties should be careful to state facts as contradistinguished from mere evidence: *Palmer* v. *Johnson*, 2 Wils. 163.

(*h*) All issues of fact in any civil action, when brought in either of the superior courts of common law or in any of the county courts in Ontario, and every assessment or enquiry of damages in every such action, may, and in the absence of notice to that effect shall be heard, tried and assessed by a judge of the said courts without the intervention of a jury. The notice requiring trial, assessment or enquiry by a jury may be given to the court and to the opposite party by any of the parties to the suit. The party requiring the jury must file the notice with his last pleading and serve the notice. The parties present at the trial may consent to the notice being waived. When the consent is endorsed on the record, the judge is required to proceed to the trial of the issues or assessment of the damages without the intervention of a jury. The judge, however, may in his discretion direct that under any circumstances the action shall be tried or damages assessed by a jury.

The notice requiring a jury may be in this form:—"The plaintiff, (or one or more of the plaintiffs,) or the defendant, (or one or more of the defendants, as the case may be,) requires that the issues in this cause be tried (or the damages assessed) by a jury." A copy of the notice must be attached to the record: Stat. Ont. 32 Vic. c. 6, s. 18.

151. (*j*) The parties may, if they think fit, enter into an agreement in writing, (*k*) which shall be embodied in the said or any subsequent order, (*l*) that upon the finding of the Jury in the affirmative or negative of such issue or issues, a sum of money to be fixed by the parties, (*m*) or to be ascertained by the Jury upon the issue or issues and evidence submitted to them, (*n*) shall be paid by one of such parties to the other of them, either with or without the costs of the action. (*o*) 19 Vic. c. 43, s. 78.

And may enter into agreement to pay money or not, according to the result.

152. (*p*) Upon the finding of the Jury (*q*) upon any such issue, judgment may be entered for the sum agreed or ascertained as aforesaid, with or without costs, (*as the case*

Judgment may be entered and execution

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 43. This section appears to apply only to actions where the claim is for debt or damages, *i. e.* some claim for which compensation in money is demanded.

(*k*) This provision is by no means compulsory. It is optional for either party to dissent.

(*l*) Not necessary, it seems, to embody the agreement in the issue or Nisi Prius record. Though it is usual in feigned issues, nominally, at all events, for the parties to fix some sum of money, which is made to depend upon the finding of the jury for one party or the other, these feigned issues alleging a pretended wager are still legal: see *Luard et al* v. *Butcher et al*, 2 C. B. 858.

(*m*) *To be fixed by the parties*, &c. The principle of this provision is not new. It is the same that allows parties in an agreement to fix a certain sum to be paid by one party to the other as "liquidated damages and not as a penalty," upon default made in the doing of something stipulated to be done, &c.

(*n*) The venue in this event would be *tam triandum quam inquirendum*.

(*o*) *Either with or without costs of the action*. This expression must mean that the agreement to be entered into between the parties may, as regards the costs of the action, stipulate either that they shall or shall not follow the result of the trial. In case no agreement be entered into as to the costs, they will follow the event: section 156. In a special case stated under the Eng. C. L. P. Act, 1852, section 46, (s. 154 of ours,) the plaintiff claiming two sets of fixtures, the court gave judgment in his favour for the one and for the defendant as to the other, and no agreement having been made between the parties as to costs, ruled that the plaintiff was entitled to the general costs of the proceedings, and the defendant to whatever costs he could satisfy the master had been incurred solely in respect of that part of the case in which he succeeded. The defendant subsequently brought error on the judgment, but so far from succeeding the court of error reversed that portion of the judgment which was in his favor and gave judgment for the plaintiff for the whole, but with no direction as to the costs which the court below had directed to be taxed to the defendant, and *held* that the court below had no power after the partial reversal of their judgment to order those costs to be taxed to the defendant: *Elliott* v. *Bishop*, 10 Ex. 522.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 44.

(*q*) See note *h* to section 150.

Issued, &c., upon the finding.

may be,) and execution may issue upon such judgment forthwith, (*r*) unless otherwise agreed, (*s*) or unless the Court or a Judge otherwise orders for the purpose of giving either party an opportunity for moving to set aside the verdict or for a new trial. (*t*) 19 Vic. c. 43, s. 79.

Proceedings may be recorded, &c.

153. (*u*) The proceedings upon any such issue (*v*) may be recorded at the instance of either party; (*w*) and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action. (*x*)

Effect of Judgment.

19 Vic. c. 43, s. 80.

Parties may agree upon a

154. (*y*) The parties may, (*z*) after writ issued and be-

(*r*) The form of execution need not, it is apprehended, vary from forms in common use. As to executions generally, see sections 258, 259.

(*s*) As to when parties can be said to have agreed, see note *b* to section 150.

(*t*) One object that a judge might have in refusing to allow execution forthwith, would be "to allow either party an opportunity for moving to set aside the verdict or for a new trial." If the cause were tried out of term, then the motion for a new trial or to set aside the verdict would require to be within the first four days of the term following such trial: R. G. pr. 40. The courts have refused to allow the motion after the expiration of the four days: see *Orser* v. *Stickler*, Tay. U. C. R. 42. The new rule is most express to the same effect—"No motion for a new trial, &c., *shall be allowed*, after the expiration, &c.:" R. G. pr. 40. The analogy between proceedings here mentioned and an arbitration fails, because an arbitrator has no power to order a verdict to be entered up unless expressly authorized. In ordinary cases a provision is made that the arbitrator shall be at liberty to enter a verdict, and that no error shall be brought. If the clause be omitted in the submission, it will be presumed that the parties did not intend to give that authority to the arbitrator nor any power beyond that of proceeding by attachment for non-performance of the award: *Hutchinson* v. *Blackwell*, 8 Bing. 332, *per* Tindal, C. J.

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 45.

(*v*) Our Interpleader Act enacts that all rules, matters, orders, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, &c., with a note in the margin expressing the true date of entry: Con. Stat. U. C. c. 30, s. 14.

(*w*) Where a judgment on an interpleader issue was entered up in the ordinary manner instead of having been recorded as the act directs, such judgment was set aside: see *Dickinson* v. *Eyre*, 7 Dowl. P. C. 721.

(*x*) *Same effect as any other judgment, &c. Qu.* Would an appeal from such a judgment lie to the court of error and appeal: see *Snook* v. *Mattoch*, 5 A. & E. 239; *King* v. *Simmonds et al*, 7 Q. B. 298; *Thorpe* v. *Plowden*, 2 Ex. 387; *Wilson* v. *Kerr et al*, 18 U. C. Q. B. 470.

(*y*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 46.

(*z*) *May.*—Not imperative: Con. Stat. U. C. c. 2, s. 16; sub-s. 2.

fore judgment, (*a*) by consent and by order of a judge, (*b*) without any pleadings, (*c*) state any question or questions of law (*d*) in a special case for the opinion of the special case without pleadings.

(*a*) See note *a* to section 150.

(*b*) No special case could, under the old practice, be set down without leave: *The Kennet and Avon Navigation Co.* v. *G. W. Railway Co.* 2 D. & L. 115.

(*c*) It is clear that this section only enables the parties to state a question without pleadings which they might have raised *with pleadings*, but does not entitle them to ask a question on speculation: *Lord Wellesley* v. *Withers*, 4 El. & B. 759, *per* Parke, B. The court, it seems, may refuse to answer a question stated for their opinion unless it relate to something for which an *action will lie*: *Ib.* There would be no object in requiring the case to be stated "*after* writ," unless the section were limited to a question to which a writ might apply: *Ib. per* Cresswell, J. Where under the old practice a judge at *nisi prius* refused to try a wager case on an appeal to the full court against his decision, it was supported: *Henkin* v. *Guerra*, 12 East. 247. Lord Ellenborough remarked that although there was nothing immoral in the *subject* of the wager, yet he considered the proceeding as an extremely impudent attempt to compel the court to give an opinion upon an abstract question of law, not arising out of pre-existing circumstances in which the parties had an interest: *Ib.* 248; see also *Doe d. Duntze* v. *Duntze*, 6 C. B. 100. Where it is intended to take the opinion of a court upon points of *law* it would appear to be necessary for the parties to admit all facts necessary to raise these points. The courts have refused to hear special cases framed under Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 25, where it was expressed therein that the court should draw all necessary inferences as might be done by a jury, with liberty to either party to turn the special case into a special verdict: see *Engstrom* v. *Brightman*, 5 C. B. 419; *Cocks* v. *Purday*, 6 C. B. 69. If the parties desire to escape the costs of a trial of issues upon pleadings, their proper course is to state a case under section 150 of this act. An amendment of the case stated may be allowed when necessary: see *Lord Wellesley* v. *Withers*, 4 El. & B. 760, *per* Jervis, C. J.

(*d*) Questions of *fact* may without pleadings be stated in the form of a special case under section 150. Questions submitted to the court under the section here annotated must be of law unmixed with fact. If matters of fact necessarily enter into the consideration of the questions, the court may order a trial of them: see *Aldridge* v. *The G. W. Railway Co.* 1 Dowl. N. S. 247; also see *Brockbank* v. *Anderson et al*, 13 L. J. C. P. 102. In one case the court decided questions of fact "without thereby intending to create a precedent:" *Price et al* v. *Quarrell et al*, 12 A. & E. 788, *per* Denman, C. J. In another case the court granted a rule *nisi* for defendant to admit certain facts necessary to raise the questions stated in a special case: *Buckle* v. *Hollis*, 2 Chit. R. 398. The court will not go behind a special case in order to inquire what took place before the case was signed: see *Pike* v. *Carter*, 3 Bing. 87. Where therefore in a special case after trial under the old practice, judgment was given for the defendant on a supposed state of facts collected by the court from a document appended to the case, but in truth the reverse of the real facts, the court refused to stay proceedings or reconsider the case without defendant's consent. They persisted in the refusal, notwithstanding it was made to appear that a statement of the real facts was contained in the case, when agreed on by the defendant's junior counsel and engrossed and signed by the plaintiff's leading counsel, but afterwards struck out by the plaintiff's counsel because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case: *Ib.* 85. Unless expressly authorised by the parties, the court will not infer the existence of material facts not stated from other

Court. (*e*) 19 Vic. c. 43, s. 81.

And may agree to pay or not to pay money according to the decision upon such case, &c.

155. (*f*) The parties may, if they think fit, enter into an agreement in writing, (*g*) which shall be embodied in the aforesaid or any subsequent order, that upon the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money (*h*) fixed by the parties, (*i*) or to be ascertained by the Court, or in such manner as the Court may

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facts stated in the special case: *Doe d. Taylor et al* v. *Crisp*, 8 A. & E. 797. If an award be part of the case the court will not, it seems, allow facts to be argued which are not stated on the face of the award: *Taylor* v. *Marling et al*, 4 Jur. 1161. And the court will not in general allow the case to be amended unless upon consent of parties: see *The Mersey Dock and Harbour Commissioners* v. *Jones*, 29 L. J. C. P. 239; *Notman et al* v. *The Anchor Assurance Co.* 6 C. B. N.S. 536; *Ganthony* v. *Witten*, 17 L. T. N. S. 117; see however *Carpenter* v. *Parker*, 3 C. B. N.S. 206.

(*e*) The case should, it is apprehended, be signed; especially as it may be stated immediately "after writ" and when there are no pleadings in the cause. Upon the authority of *Price et al* v. *Quarrell et al*, 6 Jur. 604, s. c. 11 L.J. Q.B. 84, it is laid down in Chit. Arch. 12 Edn. 453, that "it is not absolutely necessary that the case should be signed by counsel; but that anything which shows consent to a case as stated is sufficient." The authority cited does not fully bear out the dictum In the *Jurist* Lord Denman is reported as having said "The practice is that anything which shows *consent* to a case, &c." but in the *Law Journal* his words are very differently reported: "I am informed that according to the practice anything which evinces the *consent of counsel* to the case is sufficient," &c. The signature of plaintiff in person, who intended to argue his own case, though he had a counsel retained, has been held sufficient: *Udney* v. *The East India Co.* 13 C.B. 742. The Common Pleas in one case refused to receive a special case from chancery without the signature of counsel, though signed by the master in chancery, who settled the case: *Roy* v. *Champneys*, 3 Dowl. P. C. 105. A verdict was taken by plaintiff subject to a special case to be prepared by a barrister. The case was accordingly prepared, but defendant refused to procure the signature of his counsel thereto. A rule was thereupon issued that unless defendant within a week caused the case to be settled and signed by counsel, the *postea* should be delivered to plaintiff: *Doe d. Phillips* v. *Rollings*, 2 C. B. 842; also see *Jackson et al* v. *Hall*, 8 Taunt. 421. Under somewhat similar circumstances the court allowed a case to be set down without the signature of defendant's counsel: *Price et al* v. *Quarrell et al*, 6 Jur. 604, s. c. 11 L. J. Q. B. 84. See a case set out at length in *Lord Wellesley* v. *Withers*, 4 El. & B. 750.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 47.

(*g*) Form of agreement see Chit. F. 10 Edn. 466.

(*h*) The judgment contemplated by this section appears to have reference to money demands or demands for which satisfaction in money is sought, and not to actions for the recovery of property, real or personal. Only actions which operate *in personam* are embraced; actions *in rem* and proceedings auxilliary thereto are not contemplated. If the enactment had gone further it would be in accordance with the report of the commissioners, who recommended that the judgment should "be moulded to meet the circumstances of each particular case": see first report, section 22.

(*i*) See note *m* to section 151.

direct, shall be paid by one of such parties to the other of them, either with or without costs of the action, (*j*) and the judgment of the Court may be entered for any sum so fixed or ascertained, (*k*) with or without costs, (*as the case may be,*) and execution may issue upon such judgment forthwith, (*l*) unless otherwise agreed or unless stayed by proceedings in error or appeal. (*m*) 19 Vic. c. 43, s. 82.

Costs when there is no agreement about them.

156. (*n*) In case no agreement be entered into as to the costs of any such action, (*o*) the costs shall follow the event, (*p*) and be recovered by the successful party. (*q*) 19 Vic. c. 43, s. 83.

(*j*) If there be no directions as to costs they may abide the event of the suit: section 156.

(*k*) Judgment may be entered and execution issued from the office in which first process was sued out: section 246.

(*l*) As to the issue of execution, see section 238 *et seq.*

(*m*) *Unless stayed by proceedings in error or appeal.* The implication is that proceedings in error or appeal may be had upon a special case submitted to and adjudicated upon by the courts under this section, and that when such proceedings are had execution shall be stayed in the court below. The words used are "error *or* appeal." "Error," strictly speaking, relates to matters of fact as well as law. Error may be brought on a single point in a case leaving the remainder of the case in the court below. But an appeal intends the removal of all proceedings from one court of inferior jurisdiction to another of appellate and superior jurisdiction. No writ of error lies to any other than a court of record. There may be an appeal from any inferior court, though not of record. Thus we speak of an appeal from a magistrate to the quarter sessions. Error besides only lies to impeach a judgment in its nature a record of the lower court. The error to be brought under this section must be upon a matter of law, but no express provision is made for entering the proceedings of record. With respect to matters of fact there is such a provision: section 153. The enactment of the provision in the one case and the omission of it in the other leaves the intention of the legislature ambiguous: see *Thorpe* v. *Plowden*, 2 Ex. 387; *Hughes et al* v. *Lumley et al*, 4 El. & B. 358.

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 48.

(*o*) *Such action, i. e.* the action first mentioned in section 150 of this act. "In case the parties to *an* action," &c. This provision is enacted with especial reference to cases upon questions of fact under section 150, and the agreement to be entered into in respect thereof under section 151. As also to cases upon questions of law under section 154, and the agreement to be entered into in respect thereof under section 155.

(*p*) Where under the old practice the parties agreed to state a special case but made no provision for costs, and though the case was drafted it was never in fact agreed upon, the costs of such abortive case were held not to be costs in the cause: *Foley* v. *Botfield*, 16 M. & W. 65.

(*q*) *Successful party.* Who is the "successful party" within the meaning of this section when both parties succeed—plaintiff as to part and defendant as to

After issue joined, the parties may agree upon a special case for the opinion of the Court.

157. (*r*) After issue joined (*s*) in any action or information, (*t*) the parties may, by consent and by order of a Judge of the Court in which the action is depending, (*u*) state the facts of the case, in the form of a special case, for the opinion of the Court, (*v*) and agree (*w*) that a judgment shall be entered for the Plaintiff by confession, or for the Defendant of *Nolle Prosequi*, immediately after the decision of the case, or otherwise, as the Court may think fit, and judgment shall be entered accordingly. (*x*) 7 Wm. IV. c. 3, s. 17.

PROVISIONS FOR THE MORE EXPEDITIOUS DETERMINATION OF MATTERS OF MERE ACCOUNT, (*y*)

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part? Certainly the party who succeeds upon the real and substantial issue that involves the cause of action. If there be several issues, some decided for plaintiff and some for defendant, and those for plaintiff entitle him to recover his debt, damages, or property, or any part thereof, he will be entitled to the general costs of the cause. So, *vice versa*, if the issues found for defendant go the whole cause of action: see section 110 of this act. In a special case stated under the preceding section plaintiff claimed certain fixtures being trade fixtures and tenant's fixtures. As to the former he succeeded, but as to the latter he failed. No provision was made for costs. *Held* that plaintiff was entitled to the general costs of the cause, and defendant to the costs of the part found for him, which in truth were nothing: *Elliott* v. *Bishop*, 10 Ex. 522.

(*r*) Taken from our old statute 7 Wm. IV. cap. 3, s. 17. The origin of which was Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 25.

(*s*) *After issue joined*, &c. The preceding sections, 150 and 154, when applicable, enable the parties to state the special case after "writ issued."

(*t*) Includes actions for tort as well as on contract, and, not only so, but embraces informations as well as actions.

(*u*) *Qu.* May not the order be made by *any* judge in chambers, though not of the court in which the action is pending: Con. Stat. U. C. c. 10, s. 9.

(*v*) The form may be that in form (A.) No. 8, *mutatis mutandis*.

(*w*) *Agree.* See note *b* to section 150. It is not stated here that the agreement should be in writing, but it is presumed that a written agreement is intended.

(*x*) In other words, the agreement as to the form of the judgment shall be carried out.

(*y*) The Common Law Commissioners, in their report, observed that there was a large class of cases in which the intervention of a jury was positively mischievous, from their inability to deal with such cases. Of this class of cases matters of "mere account" form a very great portion. The inability of juries to deal with claims of this nature has in modern times manifested itself in a manner most convincing by the frequent verdicts taken subject to references to arbitration. This appears to have been the natural and most convenient channel through which to conduct such cases to judgment. The legislature, acting upon the principle that each court should have compiete jurisdiction in matters of which it has cognizance, has in the enactments following widened the channel and thus adapted the machinery of the common law courts to the wants of suitors.

158. (*z*) If at any time after the writ has issued, (*a*) it be, upon the application of either party, (*b*) made to appear to the satisfaction of the Court or a Judge, (*c*) that the matters in dispute consist wholly or in part of matters of mere account, (*d*) which cannot conveniently be tried in the ordi- The Court or Judge, on the application of either party, may refer the whole or any part to

(*z*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 3. Founded upon the second report of the Common Law Commissioners, section 2.

(*a*) The section only applies to cases where an action or suit has been commenced by writ: *Bradford* v. *Maningham*, 3 F. & F. 88.

(*b*) The application of course must be by affidavit. As either party may apply, and as the application if successful may materially affect the rights of the opposite party, the party to be affected should have notice of the proceedings before order made. A summons or rule to show cause is necessary.

(*c*) The Eng. C. L. P. Act extends to courts of equity: *In re Aitkens*, 6 W. R. 145.

(*d*) *That the matters in dispute consist wholly or in part of mere matters of account.* These words are susceptible of two modes of interpretation—1. Either "that where the matters in dispute consist wholly of matters of account, the *whole* may be referred, and that where it consists in part of matters of mere account, such *part* only may be referred;" or, 2. "That where the matter in dispute consists wholly or in part of matters of mere account, the reference may be either of the whole matter in dispute *or* part only, as the court or judge may think fit." The latter appears to be the true construction. The matter to be decided or referred is the *matter in dispute* and not the *matter of mere account*, of which the matter in dispute may consist: *Browne et al* v. *Emerson*, 17 C. B. 361. Where therefore the claim in a cause consisted of a long account for goods sold, money paid, &c., and the defendant had a similar set-off, the court ordered the *whole cause* to be referred, although some of the items on each side were disputed between the parties, and so were not mere matters of account but of liability: *Ib.*; see also *Reece* v. *Chaffers*, 11 W. R. 307. When a case consists of simple items of account to be proved, and the question in dispute is only the amount, it is proper that there should be a reference under this section: *Angell* v. *Felgate*, 5 L. T. N. S. 322; *Pell* v. *Addison*, 2 F. & F. 291; *Goodred* v. *Seale*, 2 F. & F. 382; *Biggulay* v. *Borthwick*, 10 C. B. N. S. 61; *Credin* v. *Credin*, 3 Ir. Jur. N. S. 252. The case does not cease to be a matter of account because one party seeks to impugn the correctness of the account on the ground of fraud: *Insull et ux.* v. *Moojen*, 3 C. B. N. S. 359; *Imhof et al* v. *Sutton*, L. R. 2 C. P. 406. An action by an engineer for professional services, depending partly on his right to commission and partly on the propriety of charges for work done, was referred under this section: *Murray* v. *The Sunderland Dock Co.* 1 F. & F. 179. In such a case a cross claim for security may also be referred: *Jones* v. *Beaumont*, 1 F. & F. 336. Where the question was the right to dismiss a servant and not merely the amount to be paid for wages, there should be no reference: *Smith* v. *Allen*, 3 F. & F. 156; see further *McDonnell* v. *Jameson*, 2 Ir. Jur. N.S. 100; *Prior* v. *Perry*, 2 Ir. Jur. N.S. 422. It is not *every case* involving in part matters of mere account that ought to be referred under this section. The rule is well laid down in the case of *The Taff Vale Railway Co.* v. *Nixon et al*, 1 H. L. Cas. 111, and was probably the origin of the section under consideration. The court refused to refer an action against the drawer of a bill of exchange as a matter of mere account: *Pellatt* v. *Markwich*, 3 C. B. N.S. 760. If it appears to the court that defendant intends to set up defences wholly independent of mere matters of account, which defences should be disposed of by a jury, no reference will be

an Arbitrator, Officer, or County Judge.

nary way, (*e*) the Court or Judge may, upon such application, if they or he think fit, decide such matter in a summary manner, (*f*) or order (*g*) such matter, either wholly or in part, to be referred to an Arbitrator appointed by the parties, (*h*) or, in cases in the Superior Courts, to an officer of the Court, (*i*) or in country causes, in the Superior Courts, (*j*)

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made under this section: *Evans* v. *Jackson et al*, 3 U. C. L. J. 88. If the matter in dispute does not consist of matters of mere account within the section, and an order be made for a reference, the remedy is by application to the court or the judge to have the order set aside: *Cummins* v. *Birkett*, 3 H. & N. 156. Unless the party complaining has by his conduct waived his right to move against the order: *Barton* v. *Hubertus*, 16 U. C. C. P. 440; *Newman* v. *The Niagara District Mutual Fire Insur. Co.* 25 U. C. Q.B. 435; *Ringland* v. *Lowndes*, 10 Jur. N. S. 850; *Davies et al* v. *Price*, 11 L. T. N.S. 203. When once an order has been made under this section the referee is bound to decide the case as an arbitrator, according to all the ordinary modes: *Insull et ux.* v. *Moojen*, 3 C. B. N.S. 359. In cases where the amount of damages sought to be recovered is "substantially a matter of calculation" there is an entirely different mode of procedure: see section 161 of this act. As to the duty of an attorney to avail himself of the provisions of this section when applicable: see *Chapman* v. *Van Toll*, 8 El. & B. 396.

(*e*) This section is made to include cases "which cannot be *conveniently* tried in the ordinary way": see *Pellatt* v. *Markwell*, 6 W. R. 254. No new right is given, but a new mode of procedure is enacted for the more convenient trial of such cases. It is for the court or a judge to decide upon the convenience or inconvenience of the "ordinary way" of trial; the decision when made being compulsory upon the parties. The section cannot be held to apply to a case carried down to trial in the "ordinary way." Section 160 gives power to deal with such a case, and though the words of the section under consideration are not restrictive as to the time of application, yet if it could be made to a judge in chambers after the cause is entered for trial, it might lead to great confusion in practice. Taking therefore the two sections together, the most reasonable construction to put upon them is that the legislature intended that the judge having possession of the record at *nisi prius* should be *the* judge to deal with it: see *Shae* v. *O'Neil*, 2 U. C. L. J. 229.

(*f*) If the court or a judge undertake the burden of deciding the case in a "summary manner," the ordinary affidavit will not be sufficient. All the facts necessary to be known to a just decision must be laid before the court.

(*g*) The order should not embrace "all matters in difference:" *Kendil et al* v. *Merrett*, 18 C. B. 173.

(*h*) An arbitrator so appointed should it is apprehended govern himself by the practice relating to arbitrations and the proceedings upon such reference should be conformable to the established practice in such cases: section 163. Plaintiff, who brought an action against defendant for the amount of a bill of costs in chancery and who had signed judgment by default, applied for a reference to the master; but upon request of defendant's counsel the reference was made under this section to an arbitrator skilled in chancery costs: *Duggan* v. *Bright*, 2 U. C. L. J. 211.

(*i*) An officer of the court, if appointed, must of necessity have all the powers of an arbitrator as regards the attendance of witnesses, production of evidence, &c.

(*j*) Causes in which the venue is laid in the county of York are *town* causes. All others are *country* causes: see section 226.

to the Judge of any County Court, (*k*) upon such terms as to costs and otherwise as such Court or Judge thinks reasonable; (*l*) and the decision or order of such Court or Judge, or the award or certificate of such referee, may be enforced by the same process as the finding of a Jury upon the matter

Enforcing such order or decision under it.

(*k*) *Judge of any county court.* The exact import of these words, when the venue is laid in one county and a reference is sought to the judge of a different county has been under consideration. In an action in which the venue was laid in the county of A, application was made by plaintiff for a reference to the judge of B, in which county the principal witnesses of plaintiff were resident, but *held*, *per* Burns, J. that a reference could not be made to any other judge than the one in whose county the venue was laid, unless by consent of parties: *Cotton* v. *McKenzie*, 2 U. C. L. J. 214; see also *McEdward* v. *McEdward*, 3 U. C. L. J. 75. It is presumed that upon a reference to a judge of a county court under this section, he would be empowered of himself to decide all matters both of law and of fact that might arise out of the case before him. In a reference of a building contract, it was held that the referee might, without the consent of parties, send a surveyor to view the work, in order to inform his mind as to the work done, &c., but not to the exclusion of the witnesses of the parties: *Gray* v. *Wilson*, L. R. 1 C. P. 50. The judge to whom the reference is made is bound to act on the reference: *Cummins* v. *Birkett*, 3 H. & N. 156; *Insull et ux.* v. *Moojen*, 3 C. B. N. S. 361; *Clark* v. *Ware*, 17 L. T. N. S. 144. In references under this clause the position of the referee and of the court appears to be the same as in case of reference by consent: see *Hogge* v. *Burgess*, 3 H. & N. 293; *Hodgkinson* v. *Fernie et al*, 3 C.B. N.S. 189; *Baguelly* v. *Marthwick*, 4 L.T. N.S. 245; *Gibbon* v. *Parker*, 5 L. T. N.S. 584.

(*l*) An order made under this section, but silent as to costs, does not confer upon the arbitrator any power to deal with the costs: *Bell* v. *Postlethwaite*, 33 L. & Eq. 131. If the parties mean to give such power they should provide for it in the order: see *Leggo* v. *Young et al*, 16 C. B. 635, *per* Maule, J. As to the form of order now used in England as regards costs, see 16 C. B. 635, note. Where under this section a "cause" was referred but no provision for costs made in the order, and it was awarded "that the defendant should pay to the plaintiff £159 0*s*. 9*d*. in full of all demands in the above-mentioned action." *Held* that the master could not upon the award tax to plaintiff either the costs of the cause or of the reference, in addition to the sum specifically mentioned in the award: *Ib*. It was also held that a letter written to the plaintiff by the umpire who made the award (in which letter he expressed an opinion that the costs of the action and of the reference should be paid by defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order was silent as to costs,) could not be referred to as part of the award so as to give plaintiff a right to the costs: *Ib*. Although the rule or order be silent as to costs, the court or judge has still power to reform the rule or order by inserting a clause providing for the costs *nunc pro tunc*, and then the costs will follow according to the just and ordinary course of law: *Bell* v. *Postlethwaite*, 33 L. & Eq. 181. Where plaintiff having obtained an order for a reference to the master under Eng. C. L. P. Act, 1854, s. 3, and the master declined it, and plaintiff thereupon obtained an order to rescind the former order and proceed to trial, *held* that he was not entitled to costs in these proceedings as costs in the cause: *Gribble* v. *Buchanan*, 18 C. B. 691. Where by the terms of an order granted under the section, the costs of the reference are directed to abide the event, and the event is partly in favor of plaintiff and partly in favor of defendant, no costs are payable on either side: *Ib*. Though the reference be to a county judge, the costs

referred. (*m*) 19 Vic. c. 43, s. 84; 19 Vic. c. 90, s. 10. See 8 Vic. c. 13, s. 47.

Any incidental question of law may be decided by

159. (*n*) If it appear to the Court or Judge that the allowance or disallowance of any particular item or items (*o*) in such account (*p*) depends upon a question of law fit to be

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before the referee are not for that reason to be taxed on the county court scale: *Edwards* v. *Edwards*, 5 C. B. N. S. 536; see also *Wheatcroft* v. *Foster*, 27 L. J. Q. B. 277. But where the amount of the award is within the pecuniary jurisdiction of an inferior court, in the absence of a certificate for full costs inferior court costs only can be taxed: see *Smith* v. *Edge*, 2 H. & C. 659; *Cowell* v. *The Amman Colliery Co.* 6 B. & S. 333; *Robertson* v. *Sterne*, 13 C. B. N. S. 248; *Moore* v. *Watson*, 2 L. R. C. P. 314.

(*m*) The decision may be enforced by the same process as the finding of a jury upon the matter referred, and this appears to exclude the idea that it can be enforced in a summary or other than the ordinary mode: see *Talbot* v. *Fisher*, 2 C. B. N. S. 471. A letter from the arbitrator contemporaneous with the award is no part of his decision or award: *Holgate et al* v. *Killick*, 7 H. & N. 418. Judgment must be signed before the issue of a *fi. fa.* to enforce the award: *Kendil et al* v. *Merrett*, 4 W. R. 594. A case, though referred under this section, remains under the control of the court: *Edwards* v. *Edwards*, 5 C. B. N. S. 536; and therefore amendments may be made: *Gibbs* v. *Knightly*, 2 H. & N. 34; *Thompsett et ux.* v. *Bowyer*, 9 C. B. N.S. 284; and a court of equity may entertain a bill for discovery in aid of an arbitration had under this section: *British Empire Shipping Co.* v. *Somes*, 29 L. T. Rep. 178.

(*n*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 4.

(*o*) It will be observed that this section supports the law as explained in note *d* to the preceding section, and in which a distinction was made between the matters in dispute and mere matters of account, of which the matters in dispute may in whole or in part consist. If the liability to pay the items or an item of the plaintiff's claim be brought in question, it is manifest that the items so disputed are no longer "mere matters of account." The *liability* to pay the items is one thing, the liability admitted or proved, the *amount* of the liability, is another. The decision of the "matters in dispute" must of necessity involve both the one and the other. It has been held that "the matters in dispute, whether consisting wholly or in part of mere matters of account," should be referred: see note *d* to section 158. This involves the allowance or disallowance of particular items, which will depend upon the adjudication of certain questions either of fact or of law. The proper and most convenient modes of deciding such questions when raised as independent issues, are (according to the nature of the case) by the court or a jury. To facilitate these modes of decision the above section has been framed. It is easy to conceive cases in which the allowance or disallowance of particular items may depend upon the solution of questions either of fact or of law. Suppose, for example, that plaintiff claims interest upon his account from a certain fixed period. Defendant may insist as to the interest that the same has been paid, which will raise an issue in fact. Or he may insist that plaintiff has no right to charge interest, which will give rise to an issue in law: see *Mowatt* v. *Lord Londesborough*, 3 El. & B. 307, 4 El. & B. 1. This and many other examples, such as the operation of the Statutes of Limitation, &c., will occur to the mind. To these and the like cases when made "to appear to the Court or a Judge," the section applies.

(*p*) *Such account, i. e.* the matters in dispute mentioned in the preceding s

decided by the Court, or upon a question of fact fit to be decided by a Jury, such Court or Judge may direct a case to be stated or an issue or issues to be tried; (*q*) and the decision of the Court upon such case, and the finding of the Jury upon such issue or issues, shall be taken and acted upon by the Arbitrator as conclusive. (*r*) 19 Vic. c. 43, s. 85; 19 Vic. c. 90, s. 11. the Court, or one of fact by a jury upon a special case or issue.

160. (*s*) In all actions involving the investigation of long accounts (*t*) on either side, (*u*) the Judge (*v*) may at and In actions involving long

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tion, which may "consist wholly or in part of mere matters of account." This and the preceding section must be taken together.

(*q*) This is in aid of the reference, and, though a recent provision, is seldom found necessary in practice.

(*r*) The powers of an arbitrator depend almost wholly upon the submission, reference, or other authority under which he is entitled to act. He is, as a general rule, the final judge both of law and fact. In respect to a reference made at the trial he usually stands in place of the jury, and his award is looked upon as their verdict. At times he is clothed with many of the powers of a judge at Nisi Prius. Occasionally some of the functions of the court in *banc* devolve upon him. But where under this section the court decides a question of law or a jury finds a fact, he is no longer the judge of the law or fact, but must accept the decision of the court or finding of the jury as binding for the purposes of the reference.

(*s*) Partly founded on Eng. Stat. 17 & 18 Vic. ch. 125, s. 6; but in effect an extension of the principles involved in section 158 of this act. That section empowers the court or a judge when satisfactorily shown that the matters in dispute consist wholly or in part of mere matters of account to dispense with trial by jury, but does not apply to causes actually carried down for trial: *Robson* v. *Lees*, 6 H. & N. 258. This section begins where the latter ends, and enables the presiding judge at Nisi Prius in his discretion to direct references in whole or in part of actions "involving the investigation of long accounts."

(*t*) The words "involving the investigation of *long* accounts," &c., are if possible more general than those of section 158, which are "matters in dispute consisting wholly or in part of *mere* matters of account." Whether any weight is to be attached to the word "long" in the one case in contradistinction to "mere" in the other, is doubtful; for the latter section has been held to authorize a reference not only of matters of mere account but of the *matters in dispute* either in whole or in part, and which may in whole or in part consist of matters of account: section 161. It is for the presiding judge to determine whether the case will involve the investigation of "long accounts" within the meaning of the statute. As to what is a long account—whether one of fifty items, or twenty, or ten, or five—the judge must determine, subject to have his order reviewed by the court in banc in those cases only in which it can be said that he plainly did not exercise any discretion, but applied the clause in a case which he could not possibly imagine came within it: *Wells* v. *Gzowski et al*, 14 U. C. Q. B. 553.

(*u*) *i. e.* Either of *demand* by plaintiff or of *set-off* by defendant.

(*v*) After entry of the record at nisi prius, the judge presiding and he alone is authorised to refer it.

accounts, Judge may direct a reference as to part and a verdict as to other parts, &c., or leave the whole to the jury.

during the trial (*w*) direct a reference of all issues of fact in the cause, or of such of the said issues and of the accounts and matters involved in all or any such issues as he thinks fit, (*x*) taking the verdict of the Jury upon any issue or issues not so referred, and directing a verdict to be entered generally, on all or any of the issues, for either party, subject to such reference, (*y*) or he may leave all or any issues of fact to be found by the Jury, referring only the amount of damages to be ascertained; (*z*) and if the parties agree upon the arbitrators (not more than three), the names of those agreed on shall be inserted in the order of reference, (*a*) but if the parties cannot agree, the Judge shall name the Arbitrator or Arbitrators, and appoint all other terms and conditions of the reference to be inserted in such order, (*b*) and the award may be moved against, as in ordinary cases, (*c*) within the first four days of the Term next after the making thereof. (*d*) And the Judge directing any reference under

Appointment of arbitrators in referred cases.

As to motions to set aside award.

(*w*) "At *and* during," which may mean at any time before verdict rendered.

(*x*) The power is to refer all the issues *or* such of the issues, together with the accounts *and* matters involved in all or any of the issues, as the judge may see fit.

(*y*) It is intended in one way or the other to dispose of *all* the issues on the record: *Wells* v. *Gzowski et al*, 14 U. C. Q.B. 553; see also *Newman* v. *The Niagara Dist. Mut. Fire Assur. Co.* 25 U. C. Q.B. 435. If, in the exercise of a sound discretion, all be referred, then the verdict will be a general one for one or other of the parties subject to the reference. If part only be referred, then as to that part such will be the verdict. As to the remaining part not referred, the verdict of the jury is to be a final determination, so far at least as respects the reference, but without prejudice to the right of either party to move against the verdict: *Postea*, N. R. Sch. No. 8.

(*z*) In which case the verdict of the jury will decide the cause of action, and be in the nature of interlocutory judgment. The cause of action decided the amount of damages to be recovered in respect thereof to be thereupon found by the arbitrators.

(*a*) It is no more necessary now than formerly that the agreement should be in writing. The consent of counsel acting in court will, it is apprehended, be conclusive upon the parties. It may afterwards be reduced to writing.

(*b*) Indorsements would, it is presumed, be a sufficient compliance: see *Carter* v. *Mansbridge*, Barnes, 55. The use of the word "insert" negatives the idea of an oral order of reference: see *Ansell* v. *Evans*, 7 T. R. 1.

(*c*) See section 165, and notes thereto.

(*d*) The court unless restricted by this section might entertain the application after the time limited, but such indulgence will be rarely admitted: see note *v* to section 165. The time is "within the first four days of the term next after the *making thereof*." The time for moving to set aside awards under section 165 is "within the first *six* days" next following the *publication of the award to the par*

this section may direct such reference (if he sees fit to do so) in like manner as he has power to do under the two last preceding sections; and every Arbitrator appointed under this section shall be subject to the provisions of the said section, and shall have the powers expressed in the one hundred and sixty-first section, and be subject to the same regulations as are mentioned and provided in regard to Arbitrators in and by the one hundred and sixty-third section of this Act. (*e*) 19 Vic. c. 43, s. 156; 20 Vic. c. 58, s. 3; 20 Vic. c. 57, s. 12; 8 Vic. c. 13, s. 47.

How the amount of damages shall be ascertained when the Court is of

161. (*f*) In actions in which it appears to the Court or a Judge (*g*) that the amount of damages (*h*) sought to be recovered by the Plaintiff, (*i*) is substantially a matter of calculation, (*k*) it shall not be necessary to assess the damages

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ties." Between these two modes of expression there is a distinction to be observed. The general rule is, that an award is published and made so soon as the arbitrator has made a complete award and is *functus officio*: *Henfree* v. *Bromley*, 6 East. 309; *Macarthur* v. *Campbell*, 5 B. & Ad. 518; and that no express notice of the award *to the parties* is necessary to impose the duty of obedience: *Child* v. *Horden*, 2 Bulst. 143; *Gable* v. *Moss*, 1 Bulst. 44; *Bell* v. *Twentyman*, 1 Q. B. 766; *Hodsden* v. *Harridge*, 2 Wms. Saund. 62 (4); *Potter* v. *Newman*, 4 Dowl. P. C. 504; *Brooke* v. *Mitchell*, 6 M. & W. 473. The words "publication of the award *to the parties*," as used in section 165, seem to be taken from Eng. Stat. 9 & 10 Wm. III. c. 15: Watson on Awards, 3rd Edn. 132; and it appears to be considered that under that statute the time does not begin to run until the party has expressed notice of the award: note *x* to section 165. It would seem that under the section here annotated *knowledge* of the award having been made would be sufficient notice, though there is certainly a conflict of authority: see *Brooke* v. *Mitchell*, 6 M. & W. 473; *Hemsworth* v. *Brian*, 7 M. & G. 1009; *Macarthur* v. *Campbell*, 5 B. & Ad. 518; *Musselbrook* v. *Dunkin*, 9 Bing. 605. The distinction necessary to be observed is between the general rule under which the parties must *take* notice of the making of the award and the statute of Wm. III., under which notice must be *given* to the parties.

(*e*) The last part of this section was introduced to meet difficulties which presented themselves in *Wells* v. *Gzwoski et al*, 14 U. C. Q. B. 553.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 94. Founded upon the first report of the Common Law Commissioners, section 67.

(*g*) Relative powers: see note *w* to section 48.

(*h*) The section appears to extend to cases of unliquidated as well as liquidated demands.

(*i*) Eng. Act reads "sought" instead of "ought to be," the words in this act. The words "*ought* to be recovered" will bring in the consideration as to the proper measure of damages in each case. The distinction between ours and the English act should be borne in mind when reading decisions under the latter.

(*k*) It is not possible to lay down a rule that will satisfactorily govern all cases as to when a demand sought is "substantially a matter of calculation." The word

opinion that it is substantially a

by a Jury, (*l*) but the Court or a Judge may direct (*m*) that the amount for which final judgment is to be signed, (*n*) shall

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"substantially" has been introduced into the definition, because it is intended that the section shall have a very extended application. In all cases where a matter could be referred to the master to compute what was due before the passing of the C. L. P. Act, it can now, it is apprehended, be referred to the master to ascertain the amount for which final judgment is to be entered, and apparently this power extends much further. Under the statute the courts will now direct the damages to be ascertained by the master in cases where they would not have done so before the C. L. P. Act: *Crooks* v. *Dickson*, 1 U. C. L. J. N. S. 207, *per* Richards, C. J. An action for damages for the non-repair of a house is put by the commissioners as an example of their meaning. To such and "the like" cases the act is designed to apply. Thus in an action of covenant for rent an order by a judge in chambers directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially endorsed from the date of the writ was held to have been properly made, though no interest was claimed in the declaration: *Crooks* v. *Dickson*, 1 U. C. L. J. N. S. 207. In an action for goods sold and delivered after interlocutory judgment, if any dispute is likely to arise as to quality or price, there may be a reference under this section: *Hutchison* v. *Sideaways*, 14 U. C. Q.B. 472. The fact of defendant being out of the jurisdiction is no objection to a reference under this section: *Crooks* v. *Dickson*, 1 U. C. L. J. N.S. 207. There is a discretion that rests in the court or judge, to refuse an application under this section, where the claim, though substantially a matter of calculation, is of an intricate nature, involving more than mere computation: see further *Messin* v. *Lord Massareene et ux*, 4 T. R. 493; *Maunsell* v. *Lord Massareene*, 5 T. R. 87; *Nelson* v. *Sheridan*, 8 T. R. 395; *Denison et al* v. *Mair*, 14 East. 622.

(*l*) The English act reads "to issue a writ of inquiry," instead of "to assess the damages by a jury." Our practice is different: see section 149.

(*m*) The power to make the directions here authorized must be invoked upon a proper application supported by affidavit. In a case decided under this section the affidavit read thus, "that this action is brought to recover the sum of, &c., for goods sold and delivered, and interest thereon; that a writ of summons, copy of declaration (on common counts only), bill of particulars, and notice to plead, have been duly served at intervals; that interlocutory judgment was signed on, &c., for want of a plea; that the amount claimed can be correctly ascertained by a reference thereof to the judge of the county court of the county of Hastings," &c.: *Lewis* v. *Hamden, MS.* Cham. Oct. 28, 1856, Burns, J. The order may be as follows: "I do order that the amount for which final judgment is to be signed in this action shall be ascertained by," &c. The application may be made notwithstanding the death of plaintiff after the signing of interlocutory judgment: sections 140, 141, also 8 & 9 Wm. III. cap. 11, s. 6. The reason that such is and should be the law is well explained in *Berger* v. *Green*, 1 M. & S. 229. "It is perfectly clear that final judgment may be signed notwithstanding the death of the party, and that the court will not set it aside on account of his death before it was signed. This is an application (computation) merely to inform the court for what damages judgment might be signed, and if this preliminary step were not necessary, the party might at once sign final judgment. If then the court would permit final judgment to be signed, notwithstanding the death of the party, they will hardly on that account refuse this rule, which is only a means of getting final judgment:" *Ib. per* LeBlanc, J.

(*n*) To entitle a party to proceed under this section it must appear that interlocutory judgment has been in fact signed. The right of action being thereby admitted the amount of damages sustained in consequence thereof is the only

matter of calculation.

be ascertained—if the proceedings be carried on in the principal Office at Toronto, by the Clerk of the Crown and Pleas of the proper Court (*o*)—or, if the proceedings be carried on in the Deputy Clerk's Office in any County, then by the Judge of the County Court of such County (*p*)—or, if the proceedings be carried on in any County Court, then by the Clerk thereof; and the attendance of witnesses and the production of documents before such Clerk of the Crown, or Judge or Clerk of the County Court, may be compelled by *subpœna*, in the same manner as before a Jury upon an assessment of damages; (*q*) and such Clerk of the Crown or Judge or Clerk of the County Court, respectively, may appoint the day for hearing the case, and may adjourn the inquiry from time to time, as occasion requires; (*r*) and such Clerk of the Crown, or Judge or Clerk of the County Court, (*as the case may be,*) shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order with such endorsement to the Plaintiff, (*s*) and such and the like proceedings may thereupon be had, as to taxation of costs, signing judgment, and otherwise,

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thing to be ascertained. The taking of the enquiry and entering final judgment are only the conclusions and necessary consequences of the interlocutory judgment. The court itself if so pleased might insist upon entering judgment, assess the damages, and give final judgment thereupon: *Holdipp* v. *Otway*, 2 Wms. Saund. 107, note 2.

(*o*) *i. e.* Of the court in which the action has been instituted.

(*p*) In an action on a promissory note, commenced in the office of a deputy clerk of the crown, to which there was no defence and interlocutory judgment had been signed before this act came into force, the matter was referred to the judge of the county in which the proceedings had been commenced: *Allan* v. *Skead*, 2 U. C. L. J. 213, *per* Burns, J.

(*q*) The moment the court has pronounced interlocutory judgment it may award a writ of inquiry: *Russen* v. *Hayward*, 5 B. & Al. 752. Consequently there is nothing to hinder an application for a reference under this section being made on the day when interlocutory judgment is signed. It has been held that there cannot be separate rules to compute against joint defendants: *Field* v. *Pooley et al*, 3 M. & G. 765. In such cases therefore, there should be one reference only under this act. In some respects, particularly as regards the attendance of witnesses or production of documents, the practice under this section will resemble the practice as to arbitrations: see notes to section 163.

(*r*) Notice of assessment must be served: see *Curruthers* v. *Rykert et al*, 7 U. C. L. J. 184.

(*s*) This manifestly intends references only upon application of plaintiffs after judgment, signed by default.

as upon the finding of a Jury upon an assessment of damages. (*t*) 19 Vic. c. 43, s. 143; 19 Vic. c. 90, s. 14.

Arbitrator may make award in the form of a special case.

162. (*u*) Upon any compulsory reference under this Act, (*v*) or upon any reference by consent of parties (*w*) where the submission is or may be made a rule or order of any of the Superior Courts of Law or Equity, (*x*) and

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(*t*) In England there is a rule to the effect that "on a reference to the master to ascertain the amount for which final judgment is to be signed; the master's certificate shall be filed when the judgment is signed:" No. 171 H. T. 1853.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 5.

(*v*) *i. e.* Under section 158 or 160 of this act.

(*w*) *Or upon any reference by consent of parties.* By this expression is meant such references as might be or were commonly made before the passing of this act. Disputes between parties of whatever nature, provided an action at law or suit in equity will lie by one party against the other, may as a general rule be the subject of a reference by consent: for instance, all matters in dispute concerning any personal chattel or personal wrong. Thus, breaches of contract generally, breaches of promise of marriage, trespasses, assaults, charges of slander, differences respecting partnership transactions or the purchase price of property, and questions relating to tolls. Things in realty as well as personalty may be submitted, and if there be an award of the possession of the realty, the court may enforce such award as if it were a judgment in ejectment: section 174. Practically, therefore, no distinction any longer exists in this respect between realty and personalty. It is in the power of an arbitrator by his decision to give to the party in whose favor he awards, a *right* to the property in dispute, whether personal or real. As to realty see *O'Dougherty* v. *Fretwell*, 11 U. C. Q. B. 65; *The Great W. Railway Co.* v. *Baby et al*, 12 U. C. Q. B. 106; *McPherson* v. *Walker*, 1 Prac. R. 30, *per* Draper, J.; *Doe d. McDonald* v. *Long*, 4 U. C. Q. B. 146; *Doe d. Galbraith* v. *Walker*, E. T. 2 Vic. *MS.* R. & H. Dig. "Arbitration and Award," IV. (3) 9.

(*x*) This is made to depend upon the Eng. Stat. 9 & 10 Wm. III. cap. 15, s. 1, and section 176 of this act. Though both enactments are very general in their purport, the latter (which see) is the more extensive. It was not, before the statute 9 & 10 Wm. III., in the power of parties out of court by any agreement either before or after award to bring themselves into court and create a jurisdiction to issue process of contempt: *Nichols* v. *Chalie*, 14 Ves. 265; *Lyall et al* v. *Lamb*, 4 B. & Ad. 468; *Steers* v. *Harrop*, 1 Bing. 133. The statute enacts that the submission may be made a rule "of any court of record." These words have been held to include the English court of Chancery: *Pawnall* v. *King*, 6 Ves. 10. The statute also enacts that the parties shall "insert" their consent to make the submission a rule of court in the submission itself. It has therefore been held that a *parol* submission cannot be made a rule of court under the statute: *Ansell* v. *Evans*, 7 T. R. 1. And though it is enacted that the consent shall be "inserted," still in a case where the consent clause was no part of the condition of the bond, but was written *under* it before execution and not signed, the submission was made a rule of court: *Carter* v. *Mansbridge*, Barnes, 55. *Semble.* Where the submission at the time of the execution thereof does not contain the consent, a clause added several months afterwards will not supply the defect so as to admit of the submission being made a rule of court: *In re Thirkell et al*, 2 U. C. Q.B. 173. If the consent be inserted and properly executed, it is not in the power of either party

upon any compulsory reference under this Act, or by consent of parties in any cause in a County Court made by rule or order of such Court, (*y*) the arbitrator (*z*) may, if he thinks fit, (*zz*) and if it is not provided to the con- Effect thereof.

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to revoke his submission without leave of the court: see section 179, which is a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 39. The statute limits no time within which the application to enforce the award must be made. It has been held that it is no objection to the making of a submission a rule of court that all the proceedings taken under such submission were null and void: *Anon*, 10 Jur. 525. An objection to the validity of an award, even though apparent on its face, is no objection to making the submission a rule of court: *Hemming* v. *Swinnerton*, 5 Hare, 350. Where two parts of a deed of submission were executed, and the arbitrator indorsed the enlargements of the time for making the award on one part, the court compelled the party in whose possession that part was to make it a rule of court: *In re Smith* v. *Blake*, 8 Dowl. P. C. 130; see also *Lord Boston* v. *Mesham*, *Ib.* 867. Where it was necessary to make a submission a rule of court before moving to set it aside, and the party in whose favor the award was, refused to produce the submission, the court permitted a copy to be made a rule of court for the purpose: *In re Plews and Middleton*, 6 Q. B. 845. As to a reference from nisi prius, the order does not belong to either party; but the party holding it holds it for the benefit of both parties, and is bound to produce it when required: *Bottomley* v. *Buckley et al*, 4 D. & L. 157. Where the making of a submission a rule of court was delayed, until the time limited for setting aside the award had elapsed, the court ordered the party who delayed it to allow the opposite party to move to set it aside *nunc pro tunc*: *Ib.*; see also *In re The Midland Railway Co. and Heming*, 4 D. & L. 788.

(*y*) Thus making the practice in this respect in the county courts and superior courts of law uniform.

(*z*) The arbitrator appointed to act, whether of the legal profession or not, and whether the matter referred to him involve questions of law or of fact, is, it appears, authorised in his *discretion* to decide such questions: see *Jupp et al* v. *Grayson*, 1 C. M. & R. 523; *Young* v. *Walter*, 9 Ves. 364; *Perriman* v. *Steggall*, 9 Bing. 679; *Holmes* v *Higgins*, 1 B. & C. 74; *Campbell* v. *Twemlow*, 1 Price, 81; *Wilson et al* v. *King*, 2 C. & M. 689; *Hall* v. *Ferguson et al*, 4 O. S. 392. If he decline of himself to decide questions of law, he is enabled by the section under consideration to state his award "in the form of a special case for the opinion of the court." But there is no obligation on him to do so: *Gibbon* v. *Parker*, 5 L. T. N. S. 584. In questions of perplexity an arbitrator will feel the propriety of adopting this latter course, rather than rely upon his own judgment. But supposing he resolves himself to decide incidental points of law, it does not follow that if he proceed upon a mistaken view of a clear principle of law the court will not set aside his award: *Richardson et al* v. *Nourse et al*, 3 B. & Al. 239, *per* Abbott, C. J. In this respect there is no difference between compulsory references and references by consent: *Hogge* v. *Burgess*, 3 H. & N. 293; *Hodgkinson* v. *Fernie et al*, 3 C. B. N.S. 189; *Baguelly* v. *Marthwick*, 4 L. T. N.S. 245. Under such circumstances the court, if there be no sufficient reason for setting aside the award, may remit the matters in dispute "to the reconsideration and redetermination of the arbitrator:" section 164. But will only so remit where there is power to set aside the award: *Hogge* v. *Burgess*, 3 H. & N. 293; *Latta* v. *Wallbridge*, 7 U. C. L. J. 207.

(*zz*) This section is one which enables the arbitrator to state a case, but does not make it obligatory upon him to do so. He may do so if he "see fit," that is, he is not bound to do so if he do *not* see fit. Where, by the terms of an order of

trary, (*a*) state his award as to the whole or any part thereof, (*b*) in the form of a special case for the opinion of the Court, (*c*) and when an action has been referred, (*d*) judgment, if so ordered, may be entered according to the opinion of the Court. (*e*). 19 Vic. c. 43, s. 80; 19 Vic. c. 90, s. 12; 8 Vic. c. 13, s. 47.

Proceedings before arbi-

163. (*f*) The proceedings upon any such arbitration as

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reference made before the C. L. P. Act, an arbitrator was at *liberty* to raise any point at law for the opinion of the court: *Held* that he was not *bound* to do so: *Wood* v. *Hotham*, 5 M. & W. 674; *Miller et al* v. *Shuttleworth*, 7 C. B. 105; see preceding note to this section.

(*a*) It might be inferred from this section, taken alone, that an *express* provision to the contrary would be requisite; but this section and that of section 176 of this act are *in pari materia*. Indeed, as relates to "references by consent," both provisions occupy a common ground. The latter section provides that every agreement or submission to arbitration by consent may be made a rule of court, "*unless such agreement contain words purporting that the parties intend that it should not be made a rule of court.*" The intention of the instrument, even in the absence of express provision must govern in either case.

(*b*) "*As to the whole or any part thereof*," *i. e.* of the matters referred.

(*c*) It has been considered before the C. L. I Act that an arbitrator could not, without leave expressed in the order of reference or submission, state a case for the opinion of the court: *Bradbee* v. *The Governors of Christ's Hospital*, 2 Dowl. N. S. 164; *sed qu.* see *Wood* v. *Hotham*, 5 M. & W. 674. It has always been usual for well-drawn submissions and orders of reference to contain a clause to the effect that the arbitrator might in his discretion state any point of law on the face of his award for the opinion of the court. And it has been held that if it clearly appear upon the reading of an award that the arbitrator intended to leave a particular question of law open, the court will consider it: *Sherry* v. *Oke et al*, 3 Dowl. P. C. 349. Where an arbitrator to whom a cause was referred by order of reference directed a verdict for a certain sum to be reduced to a lesser sum, if the court should be of opinion that it ought to be so, a motion for that purpose was said by Parke, B., to be in substance a motion to set aside the award: *Anderson* v. *Fuller*, 7 Dowl. P. C. 52. Form of special case under this enactment see N. R. Form 4.

(*d*) Besides mere matters of account which may under sections 158 or 160 of this act be compulsorily referred at any time after writ, it may be mentioned that where there is a cause depending, a rule of court or a judge's order, or on the trial an order of nisi prius referring the cause to arbitration, may at common law be drawn up on consent of the parties: Russell Arb. 3rd Ed. 72, referring to *Lucas* v. *Wilson*, 2 Burr. 701; *Harrison* v. *Smith*, 1 D. & L. 873.

(*e*) The opinion of the court obtained under such circumstances is in effect the decision of the arbitrator, and therefore, notwithstanding the statement of the special case by the arbitrator, the judgment of the court upon the matter referred is final, and entitles the successful party to enter his judgment and issue execution. Form of judgment see N. R. Forms 12, 28.

(*f*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 7. The object of this section is to make the proceedings contemplated conformable as far as circumstances will permit to proceedings before arbitrators appointed by consent of

aforesaid shall, except otherwise directed by this Act or by the submission or document authorizing the reference, be conducted in like manner and be subject to the same rules (*g*)

trator, and his power to be as upon reference by consent.

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parties. Also to assimilate all subsequent proceedings to the existing practice upon a reference by consent.

(*g*) The mode in which proceedings upon a reference to arbitration should be conducted must, in the absence of express directions in the rule or order of reference, depend much upon the discretion of the arbitrator: see *Tillam* v. *Copp*, 5 C. B. 211. It rests with him to appoint the time and place of meeting, and it is the duty of the parties to attend to his appointment: *Fetherstone* v. *Cooper*, 9 Ves. 67. When the time and place has been appointed, and the parties or their attorneys (see *Allan* v. *Brown*, Tay. U. C. R. 335) informed thereof, (*In re Johnson and Municipality of Gloucester*, 12 U. C. Q. B. 135) they must attend with all necessary witnesses. If either party absent himself after being notified to attend, it is in the power of the arbitrator to proceed *ex parte*: see *Wood* v. *Leake*, 12 Ves. 412; *Harcourt* v. *Ramsbottom*, 1 J. & W. 512; *Scott* v. *Van Sandau*, 6 Q. B. 237. But to warrant him in so proceeding there ought to be a very strong case: see *Gladwin* v. *Chilcote*, 9 Dowl. P. C. 550; *Proudfoot* v. *Trotter et al*, 6 O. S. 163. Either party may be represented by counsel, and it would be prudent for the party who intends to engage counsel to notify the opposite party of such his intention. This course will both prevent surprise at the hearing and at the same time remove all suspicion of a desire to take undue advantage. It will be proper for the arbitrator to regulate the proceedings of parties, such as examination of witnesses, address of counsel, &c., by analogy to the practice of the courts under similar circumstances. The discretion of the arbitrator, when there is a cause in court, is at all times subject to the supervision of the court in which the cause was commenced. The court has power not only to review his decision but to set aside his award, if it be made to appear that he has acted unfairly towards either party: *Great Western Railway Co.* v. *Baby et al*, 12 U. C. Q. B. 106. For instance, if he refuse to receive evidence tendered to him by either party, though he may be of opinion that he has sufficient evidence before him: see *Phipps* v. *Ingram*, 3 Dowl. P. C. 669; *Hamilton* v. *Wilson*, 4 O. S. 16; *In re Bull* v. *Bull*, 6 U. C. Q. B. 357; *In re McMullen et al*, 2 U.C.Q.B. 175; *Grisdale* v. *Boulton*, 1 U.C.Q.B. 407. Yet if he refuse the evidence as being inadmissible, it appears his decision will rarely if ever be disturbed: see *Symes* v. *Goodfellow*, 4 Dowl. P. C. 642. In some cases it may appear very indispensable that an arbitrator should within proper limits be allowed to deviate from the ordinary rules which govern courts of justice; for instance, he may properly and conveniently take the examination of a sick or infirm person at the house of such person: *Tillam* v. *Copp*, 5 C. B. 214, *per* Maule, J. But the deviation must not be an unnecessary or a glaring departure from well established rules of practice. Thus an arbitrator has no power privately to examine a party to a reference upon his own behalf. Such a proceeding would be contrary to the rules for the regulation of evidence, adopted both by courts of law and equity: *In re Hick et al*, 8 Taunt. 694; *Dobson et al* v. *Groves et al*, 6 Q. B. 637; *Davis* v. *Birdsall et al*, 2 U. C. Q. B. 199; see also remarks of McLean, J., in *Boyle* v. *Humphrey et al*, 1 Prac. R. 188. If the order of reference require the arbitrator to take evidence upon oath, he would not be justified in receiving the affidavits of parties not attending: see *Banks* v. *Banks*, 1 Gale, 46. If *liberty* be given to him so to examine the parties, he may or may not do so in the exercise of his discretion: see *Smith* v. *Goff*, 3 D. & L. 47. It is in the power of the court or a judge from time to time, if necessary, to remit the matters referred or any part thereof to the redetermination of the arbitrator: see section 164 of this act. It is also in the power of the court either to allow a revocation of the submission or reference: see *James* v. *Attwood*, 7 Scott, 841; *Faviell* v. *The Eastern*

and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, (*h*) the production of

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Counties Railway Co. 6 D. & L. 54; or to enlarge the time for making the award: *Jones et al* v. *Russell*, 5 U. C. Q.B. 303; see also section 172, and notes thereto. An arbitrator, if he award the payment of a sum of money, may as a general rule name a day for the payment. The rule is different where a cause only is referred, or where a reference is made for no other purpose than to make an estimate or fix a price, or where the terms of the submission contain something restricting the arbitrator in this respect: *Addison* v. *Corbey*, 11 U. C. Q. B. 433. An arbitrator should at all times be careful neither to overstep the bounds of propriety, nor with reference to the subject matter of his award to exceed the authority conferred upon him by the submission or reference. If he do, although the excess may in some cases be rejected as surplusage, in others it may be a ground for setting aside his award: see the following cases—*Aitcheson* v. *Cargey*, 2 Bing. 199; *Tattersall* v. *Groote*, 2 B. & P. 131; *Shaw* v. *Turton*, 4 O. S. 100; *Brown* v. *Watson*, 6 Bing. N. C. 118; *Boodle* v. *Davies*, 3 A. & E. 200; *Morley* v. *Newman*, 5 D. & R. 317; *Hutchinson* v. *Blackwell*, 8 Bing. 331; *Jackson et al* v. *Clarke*, 13 Price, 28; *Cayme* v. *Watts*, 3 D. & R. 224; *Gray* v. *Gwennap*, 1 B. & Al. 106; *Harding* v. *Forshaw*, 4 Dowl. P. C. 761; *Donlan* v. *Brett*, 3 A. & E. 344; *Watson* v. *Black*, H. T. 4 Vic. *MS.* R. & H. Dig. "Arbitration and Award," III. (2) 2; *Cock* v. *Gent*, 13 M. & W. 364; *Mathew* v. *Davis*, 1 Dowl. N. S. 679; *Hawkyard et al* v. *Stocks et al*, 2 D. & L. 937; *Round* v. *Hatton*, 10 M. & W. 660; *Eastern Counties Railway Co.* v. *Robertson*, 6 M. & G. 38; *In re Tandy*, 9 Dowl. P. C. 1044; *Boyes* v. *Bluck*, 13 C. B. 652; *Law et al* v. *Blackburrow*, 14 C. B. 77; *Hill* v. *Hill et al*, 11 U.C. Q.B. 262; *Great Western Railway Co.* v. *Hunt*, 12 U. C. Q.B. 124; *same Plaintiffs* v. *Dougall*, *Ib.* 131; *same Plaintiffs* v. *Dodds*, *Ib.* 133; *In re Miller and Great Western Railway Co.* 13 U. C. Q.B. 582; *Faulkner* v. *Saulter*, 1 Prac. R. 48; *In re Haley et al*, *Ib.* 173. If there be any just cause for setting aside an award the party aggrieved must take good care to move within the time limited by statute or rule of court: see *Crooks* v. *Chisholm et al*, 4 O. S. 123, *per* Robinson, C. J.

(*h*) The court, if not empowered at common law (see *Wansell* v. *Southwood*, 4 M. & R. 359; *Webb* v. *Taylor*, 1 D. & L. 676) to command the attendance of witnesses and production of documents before an arbitrator upon an order of reference, has full power so to do by statute: see section 180 of this act. The courts of common law are not deprived by the statute of their concurrent jurisdiction to swear the witnesses: *James* v. *Attwood*, 5 Bing. N. C. 628. And the arbitrator, on the other hand, may swear the witnesses, notwithstanding the order of reference directs them to be sworn before the judge of assize: *Hodsoll* v. *Wise*, 4 M. & W. 536; see section 182. If the witness whose attendance is necessary be a prisoner in close custody the court may grant a *habeas corpus*, in order that he may be brought before the arbitrator: *Graham et al* v. *Glover et al*, 5 El. & B. 591; *Marsden* v. *Overbury*, 18 C. B. 54. Where it is requisite to resort to the above compulsory proceeding, an order for the attendance of the witnesses may be obtained either upon motion in practice court or on application to a judge in chambers grounded on affidavit. The affidavit should set forth the existence of the reference either shortly in words or by verifying a copy of the rule or order authorizing the same—the names of the witnesses and the county in which they reside, or if their residence be not known, should set forth facts sufficient to satisfy the court or the judge that they cannot at the time of the making of the affidavit be found. If a document be required to be produced it should be properly described as in a *subpœna duces tecum*. It should also be stated that the attendance of the witness or production of the document is material. The rule or order will be absolute in the first instance. The court in granting it acts in a ministerial rather than in judicial capacity: *In re The Guarantee Society and Levy*, 1 D. & L. 907.

documents, enforcing (*i*) or setting aside the award, or other-

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The rule or order when obtained, and a copy of the arbitrator's appointment should, if possible, be served on the witness, and his reasonable expenses tendered to him at the time of the service thereof. To bring him into contempt the originals should be shown to him. The parties, their attorneys, counsel, and witnesses, in going to, attending to, and returning from the arbitration, are privileged in the same manner as on a trial at law: *Webb* v. *Taylor*, 1 D. & L. 676; *Spence* v. *Stuart*, 3 East. 89; *Randall* v. *Gurney*, 3 B. & Al. 252; *Ricketts* v. *Gurney*, 1 Chit. R 682. A voluntary attendance when the witness might be compelled to attend is equally privileged: *Webb* v. *Taylor*, 1 D. & L. 676. The privilege holds good during the adjournment of the arbitration from one period to another of the same day, or when the adjournment is from day to day; but not when many days are to elapse before the next meeting: *Spencer* v. *Newton*, 6 A. & E. 623. Provision may be made for the examination of the witnesses upon oath: see section 182 of this act.

(*i*) There are two modes of enforcing an award upon "a reference made by consent under a rule of court or judge's order." *First*, the ordinary common law remedy by action. *Second*, the extraordinary statutable one of process of attachment. Of these two, the party aggrieved should make an election. He will not be allowed to pursue both remedies at one and the same time: see *Stock Huggens and DeSmith* cases, temp. Hardwicke, 106. The adoption however of one remedy does not, it seems, necessarily exclude the other: *Reg.* v. *Hemsworth*, 3 C. B. 753, *per* Wilde, C. J.; *Dexter* v. *Fitzgibbon*, 4 U. C. L. J. 43. Process of attachment for non-payment of *money* is now abolished: Con. Stat. U. C. 24, s. 13. But if the award direct the doing of an act other than payment of money, it is apprehended an attachment may still be obtained.

First. Proceeding by action. This remedy may be adopted whether the submission be by writing not under seal: see *Hodsden* v. *Harridge*, 2 Wms. Saund. 62 b. n.: bond; see *Winter* v. *White*, 3 Moore, 674; *Ferrer et al* v. *Oven*, 7 B. & C. 427: judge's order; see *Still et al* v. *Halford*, 4 Camp. 17; *Stalworth* v. *Inns*, 13 M. & W. 466; *Wharton* v. *King*, 1 M. & Rob. 96: order of nisi prius; see *Bonner* v. *Charlton*, 5 East. 139: rule of court; see *Tremenhere* v. *Tresillian*, 1 Sid. 452; *Carpenter et al* v. *Thornton*, 3 B. & A. 52: or order of equity; see *Dowse* v. *Coxe*, 3 Bing. 20.

The form of action to be followed in the different cases vary with reference to the mode of submission. Though no longer compulsory to mention the form of action in any writ of summons: section 9; yet it will be found convenient to adhere to the long established division of actions. This too would appear to be the view of the judges in framing our new rules: see Forms 29, 30, to New Rules.

I. *Assumpsit.*—The submission implies mutual promises to perform, and for non-performance of these promises this action will lie: see *Hodsden* v. *Harridge*, 2 Wms. Saund. 62 b. n.; *Brown* v. *Tanner*, McCl. & Y. 464; *Purslow* v. *Baily*, 2 Ld. Rayd. 1039; *Tilford* v. *French*, 1 Sid. 160; *Squire* v. *Grevette*, 2 Ld. Rayd. 961; *Lupart* v. *Welson*, 11 Mod. 170; *Mansell* v. *Burredge et al*, 7 T. R. 352; *Charles* v. *Carroll*, 9 U. C. Q. B. 357.

II. *Case.*—If the award impose a duty upon one of the parties, for instance, that he clean and keep clean a certain drain, it would appear that in the event of non-feazance the opposite party, if prejudiced thereby, might maintain this form of action: see *Sharpe* v. *Hancock*, 7 M. & G. 354.

III. *Covenant.*—If the submission be by deed, this form of action may be maintained for non-performance of any part of the award: see *Tait et al* v. *Atkinson*, 3 U. C. Q.B. 152; *Tomlin* v. *Mayor, &c., of Fordwich*, 6 N. & M. 594; *Charnley* v. *Winstanley*, 5 East. 266; *Marsh* v. *Bulteel*, 5 B. & Al. 507.

IV. *Debt.*—If the submission be by bond, this form of action will lie to recover the penalty upon breach of the condition of such bond: see *Ferrer et ux.* v. *Oven*, 7 B. & C. 427; *Boyd et al* v. *Durand*, 5 O. S. 122; *Hughes* v. *the Mutual Fire Insur-*

ance Co. of the Dist. of Newcastle, 9 U. C. Q.B. 387; *Lossing* v. *Horned*, Tay. U. C. R. 83; *Beasley* v. *Stegman*, Tay. U. C. R. 498; *Skinner* v. *Holcomb*, E. T. 5 Vic. *MS.* R. & H. Dig. "Arbitration and Award," VI. (2) 11; *Purslow* v. *Baily*, 2 Ld. Rayd. 1039. This action will also lie to recover a sum of money awarded upon a submission whether made by rule of court, deed, or writing not a deed: see *Hodsden* v. *Harridge*, 2 Wms. Saund. 62 b. n.; *Baker* v. *Booth*, Draper's Rep. 68; s. c. 2 O. S. 373; *Purslow* v. *Baily*, 2 Ld. Rayd. 1039; *Sutcliffe* v. *Brooke*, 14 M. & W. 855.

As to the time for entering a verdict subject to a reference upon which an award has been made: see *Laurie* v. *Russell*, 1 Prac. R. 36; *O'Toole et al* v. *Pott*, 7 E. & B. 102; *Allen* v. *Boice*, 10 U.C. L.J. 70; *Blanchard* v. *Snider*, 28 U.C. Q.B. 210.

Second. Proceeding by attachment. Whenever the submission is by or can be made a rule of court, and the award be not for the payment of money, the remedy by attachment may be adopted: Stat. 9 & 10 Wm. III. cap. 15. If for payment of money there may be writs of *fieri facias* and *venditioni exponas*: Con. Stat. U.C. cap. 24, s. 19; *Clifton* v. *Durand*, 3 Prac. R. 60; *In re Thomas and Brooke*, *Ib.* 78; *The Niagara and Detroit Rivers Railway Co.* v. *Buckwell*, *Ib.* 82; *Regina* v. *Simpson*, *Ib.* 339. When an award has been made a rule of court, a party who fails to perform what the award orders is considered as disobedient to a rule of court as much as if the award were part of the rule, and is consequently guilty of a contempt of that court by which the rule has been made. The process therefore by which the courts punish contempts, being an attachment, will, in cases other than awards directing payment of money, be issued against him to compel his obedience to the directions of the arbitrator under a penalty in ordinary cases of imprisonment until he comply. But if the period of imprisonment be limited, the party undergoing such imprisonment is not thereby exonerated from the performance of the award: *The Queen* v. *Hemsworth*, 3 C. B. 745. This case is in many respects a most important one. In it the several steps towards bringing a party into contempt and the pains thereof, together with all necessary forms of procedure, are carefully mentioned. Though an award find one party indebted to the other, if there be no order to pay the money there can be no attachment. If there be no order to do a thing, it stands to reason that a party cannot be attached for disobeying it: see *Edgell* v. *Dallimore*, 3 Bing. 634; *Scott et al* v. *Williams*, 3 Dowl. P. C. 508; *Thornton* v. *Hornby*, 1 Dowl. P. C. 237; *In re Seaward* v. *Howey*, 7 Dowl. P. C. 318; *Snook* v. *Hellyer*, 2 Chit. R. 43; *In re Skeete et al*, 7 Dowl. P. C. 618; see *Doe d. Clarke et al* v. *Stillwell et al*, 8 A. & E. 645. This remedy, whether *fi. fa.* or attachment, will not be allowed unless the party sought to be attached has had full and distinct notice of the duty that is required of him: *Clifton* v. *Durand*, 3 Prac. R. 60; *In re Thomas and Brooke*, *Ib.* 78; *The Niagara & Detroit Rivers Railway Co.* v. *Buckwell*, *Ib.* 82; *The Queen* v. *Simpson*, *Ib.* 339. The duty—the whole and entire duty—with which it is sought to charge the party, must be distinctly ascertained by the award: *Graham* v. *Darcey*, 6 C. B. 540, *per* Wilde, C. J. If the award in its meaning be doubtful, the summary remedy will be refused: *Heatherington* v. *Robinson*, 7 Dowl. P. C. 192; see also *Stalworth* v. *Inns*, 2 D. & L. 428; *In re Manley and Anderson*, 2 Prac. R. 106. So if the validity of the award be doubtful: *Reynolds* v. *Burkhart*, 1 Prac. R. 213. And the party applying will be left to his remedy by action upon the award: see *Graham* v. *Darcey*, 6 C. B. 537. When it is considered that it is the summary process of the court that is asked, it is necessary that the materials upon which it is invoked should be perfect and show that the party is truly entitled to ask for what he does: *In re McLean* v. *Kezar*, 1 Prac. R. 126, *per* Burns, J. The original award when practicable should be brought into court and the rule drawn up on reading it: *Ib.* 125. The affidavit should deny payment "of any part" of the sum awarded: *Masecar* v. *Chambers et al*, 4 U.C.Q.B. 171. The rule is properly a four day and not a six day rule: *Jones* v. *Reid*, 1 Prac. R. 247. It will not be made absolute in the first instance, though the parties consent by their counsel: *Stewart* v. *Crawford*, Tay.

wise, (*j*) as upon a reference made by consent under a rule of one of the Superior Courts of Common Law or the order

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U. C. R. 409. If it be altogether refused, the court will rarely if ever reserve leave to move again: *Reynolds* v. *Burkhart*, 1 Prac. R. 213. The summary remedy is always discretionary with the court. It was refused in a case where it appeared that subsequently to the award the parties entered into a new arrangement: *Thompson et al* v. *Macklem*, 1 Prac. R. 293. The execution by defendant of an assignment in trust for creditors is no answer to an attachment for non-performance of an award: *McKenzie* v. *McKenzie*, 2 Prac. R. 157.

(*j*) It is enacted "that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties:" Stat. 9 & 10 Wm. III. cap. 15, s. 2. It may be mentioned that this statute is declaratory only, and does not therefore affect the common law jurisdiction of the courts to set aside an award made in an action *under a submission by rule or order*. Hence in these latter cases the limitation of the statute as to the time within which a party should apply to set aside an award does not apply: see remarks of Coleridge, J., in *Reynolds* v. *Askew*, 5 Dowl. P. C. 682; see further *Hobbs* v. *Ferrars*, 8 Dowl. P. C. 779; *Allenby* v. *Proudlock et al*, 4 Dowl. P. C. 54; *Paxton* v. *The Great North of England Railway Co.*, 8 Q. B. 938; and remarks of Burns, J., in *Laurie* v. *Russell*, 1 Prac. R. 36: see also section 165 of this act. The application to set aside an award under the statute can only be made when the submission to the award is or can be made a rule of court: *Mitchell* v. *Staveley*, 16 East. 64, *per* Bayley, J.; *Veale* v. *Warner*, 1 Wms. Saund. 327 c. notes; *Cumming* v. *Allen*, Tay. U. C. R. 205. An award cannot be set aside upon the merits except under clear and extraordinary circumstances: *Winter* v. *Lethbridge*, 13 Price. 533; *Scobell* v. *Gilmour*, 5 U. C. Q. B. 48; see also *Thirkell* v. *Strachan*, 4 U. C. Q. B. 136. It is now held that the decision of an arbitrator, whether lawyer or layman, is binding on the parties both in matters of law and matters of fact, unless there has been fraud or corruption on his part, or there be some mistake in law apparent on the face of the award or of some paper accompanying and forming part of the same: *Hodgkinson* v. *Fernie et al*, 3 C. B. N.S. 189; *Hogge* v. *Burgess*, 3 H. & N. 293; *Baguelly* v. *Marthwick*, 4 L. T. N.S. 245; *Gibbon* v. *Parker*, 5 L. T. N.S. 584; *Latta* v. *Wallbridge*, 7 U. C. L. J. 207; *McDonald* v. *McDonald et al*, 7 U.C. L. J. 297; *Severn et al* v. *Cosgrove*, 2 U. C. L. J. N.S. 11; *Godfrey* v. *Broderick*, 14 Ir. C. L. R. App. xxxiii. And yet the court will interfere if it be made to appear that either party has not had an opportunity of explaining or examining into the whole matter submitted: *Small* v. *Rogers*, H. T. 4 Vic. *MS.* R. & H. Dig. "Arbitration and Award," V. 6. Or that the arbitrator has unintentionally committed a gross mistake: *In re Hall and Hinds*, 2 M. & G. 847; *Flynn* v. *Robertson*, L. R. 4 C. P. 324. The court, however, will not intend matter for the purpose of setting aside the award; such matter must be shown affirmatively: *Tracey* v. *Hodgest*, 7 U. C. Q. B. 5. The application will seldom be entertained unless something can be alleged amounting to a perverse construction of the law or misconduct on the part of the arbitrators: *Phillips* v. *Evans*, 12 M. & W. 309; *Hagger* v. *Baker*, 14 M. & W. 9; *Jones* v. *Corry et al*, 5 Bing. N. C. 187; *Doe d. Oxenden* v. *Cropper*, 10 A. & E. 197; or some ground appearing on the face of the award, on a statement annexed to it, or on something in an authentic shape before the court: see *Kent* v. *Elstob et al*, 3 East. 18; *Chace et al* v. *Westmore*, 13 East. 357; *Sharman* v. *Bell et al*, 5 M. & S. 504; *Payne* v. *Massey*, 9 Moore, 666; *Richardson et al* v. *Nourse et al*, 3 B. & Al. 237; *Bouttilier* v. *Thick*, 1 D. & R. 366; *Municipality of the Town-*

of a Judge thereof. (*k*) 19 Vic. c. 43, s. 87; 19 Vic. c. 90, s. 13.

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ship of Kingston v. *Day*, 1 Prac. R. 142; *Price* v. *Jones*, 2 Y. & J. 114; *Symes* v. *Goodfellow*, 2 Bing. N. C. 532; see further *Delver* v. *Barnes*, 1 Taunt. 48; *Phillips* v. *Evans*, 12 M. & W. 309; *Hagger* v. *Baker*, 14 M & W. 9; *Doe d. Madkins et al* v. *Horner et al*, 8 A. & E. 235; *Fuller* v. *Fenwick*, 3 C. B. 705; *Faviell* v. *The Eastern Counties Railway Co.* 17 L. J. Ex. 223, 297. Still the court has a discretion to decline setting aside an award on grounds which, if fatal, could be taken advantage of by way of defence in an action on the award, or on resisting a motion for an attachment: *In re Smith et al* v. *George et al*, 12 U. C. Q. B. 370. Whenever a certain fact is relied on to set aside an award, that fact must be distinctly sworn to: *Slack* v. *McEathron*, 3 U. C. Q. B. 184. An award cannot be set aside on the ground that the submission was obtained by fraud; the application should be to set aside the order: *Sackett* v. *Owen*, 2 Chit. 39; and will not be set aside because the style of the cause in which it is intitled is not set out correctly and at length, provided it can be sufficiently identified by reference to the body of the award as being in the cause referred: *Creighton* v. *Brown et al*, 1 Prac. R. 331. In the rule nisi for setting aside an award, it must be stated that the award is drawn up "on reading the award" or a "copy of it:" *Wilkins* v. *Peck*, 4 U. C. Q. B. 263. The affidavits filed and necessary to bring the party into contempt should be specifically referred to: *Dickey et al* v. *Mulholland*, 2 Prac. R. 169. But such an objection is well answered by showing that among "the affidavits and papers filed," on reading which the rule was drawn up, there is a copy of the award verified by affidavit: *Tracey* v. *Hodgest*, 7 U. C. Q. B. 5. The rule must state the several objections intended to be insisted upon when moving it absolute: R. G. pr. 141; *Boodle* v. *Davies*, 4 N. & M. 788; *Whatley* v. *Morland*, 2 C. & M. 347; *Allenby* v. *Proudlock et al*, 4 Dowl. P. C. 54; *Staples* v. *Hay*, 1 D. & L. 711; and should be drawn up on reading the rule of reference: *Christie* v. *Hamlet*, 5 Bing. 195. Where an award is set aside for irregular proceedings on the part of the arbitrator, such as the examination of witnesses in the absence of parties, it will be set aside without costs: *Campbell* v. *Boulton*, M. T. 6 Vic. *MS.* R. & H. Dig. "Arbitration and Award," VII. 3, *per* Jones, J.

(*k*) Arbitrators acting under a deed of submission have no power to award as to costs, unless the power be given by the deed: *Wilson* v. *Doolan*, 5 Ir. Jur. O. S. 135. But the excess if severable does not vitiate the award: *In re the Corporation of Northumberland and Durham and the Corporation of Cobourg*, 20 U. C. Q. B. 283. The subject of costs is one of no ordinary perplexity to arbitrators and others concerned in arbitraments. For the convenient understanding of it, a distinction may be drawn between "costs of the cause," "costs of the reference," and "costs of the award." Each of these may be separately defined. Costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the cause, if any, after the award. Costs of reference comprise the expenses of the whole inquiry incurred by the parties before the arbitrator, whether with respect to the matters in the cause or matters out of it, as for instance, the costs of a brief in the cause referred, prepared after the reference for the purpose of the arbitration. These costs if left to the discretion of the arbitrator, may, it seems, be fixed by him and awarded in an entire sum: *Laurie* v. *Russell*, 1 Prac. R. 65. But if a very extravagant sum be awarded, the court would undoubtedly interfere to prevent extortion and injustice: *Towsley* v. *Wythes*, 16 U. C. Q. B. 139. Costs of the award comprise the amount of the arbitrators' charges, which are usually paid to him when the award is taken up. On an award in favour of defendant "with the usual costs," it was held that defendant was entitled to the costs of the reference and the award: *Daniel* v. *Maher*, Hayes, 366. The fee of the arbitrator, whether named by him or not

is subject to taxation by the master: see *Miller* v. *Robe et al*, 3 Taunt. 461; *Fitzgerald* v. *Graves et al*, 5 Taunt. 342; *Laurie* v. *Russell*, 1 Prac. R. 65. But held that the court has no general authority to make an order on an arbitrator to refund so much of his fee as exceeds the amount allowed on taxation: *Dossett* v. *Gingell*, 2 M. & G. 870. The fees of arbitrators are now regulated by Stat. 29 Vic. cap. 32.

The power of awarding costs appears to be necessarily consequent on the authority conferred upon the arbitrator if he be authorised "to determine the cause." The reason why in references to arbitration a provision is frequently inserted that costs shall abide the event, is that the arbitrator might not have it in his power to withhold costs from the party who is in the right. It has been considered as a restriction of a power which he otherwise would have: *Roe d. Wood* v. *Doe*, 2 T. R. 644, *per cur.* approvingly cited in *Whitehead et al* v. *Firth*, 12 East. 167; see also *Anon.* Lofts. R. 34. This rule is confined to costs as between party and party; it does not extend to costs between attorney and client: *Whitehead et al* v. *Firth*, 12 East. 167. The arbitrator has no power of himself to tax costs in the cause: *Morris* v. *Morris*, 27 L. T. Rep. 103, *per* Compton, J. But may fix the costs of drawing up the award and his own fees: *Boyle* v. *Humphrey et al*, 1 Prac. R. 187. Where the cause and "all matters in difference" were referred, but the submission which was by bond said nothing of costs, *held* that the costs of the cause, being matters in difference, the arbitrator had power over them, but not over the costs of the reference: *Firth* v. *Robinson*, 1 B. & C. 277. If the reference and award be silent as to costs, each party pays his own costs of reference and the costs of the award are to be borne equally: *Glen* v. *The Grand Trunk Railway Co.* 2 Prac. R. 377. Where an award is made as to costs without power to do so, if the amount be separable the award is only bad *pro tanto*: *Faulkner* v. *Saulter*, 1 Prac. R. 48; *In re The Corporation of Northumberland and Durham and the Corporation of Cobourg*, 20 U. C. Q. B. 283. Where the reference was of "all matters in dispute, costs to abide the event," *held* that the arbitrator had no power over the costs of the reference: *Strutt* v. *Rogers*, 7 Taunt. 214. Where the terms of a rule of reference direct costs to abide the event, the legal event is meant. The losing party is liable to pay such costs as he must have paid had the cause pursued its ordinary course and a verdict had passed against him. The costs of the arbitration cannot, it seems, be included unless by express direction: *Hale* v. *Matthison*, 3 O. S. 78. Where owing to the misconduct of a party to the reference arbitrators do not make their award, but the award is made by an umpire in favour of one of the parties, costs will not be granted to the other party on a summary application under a clause in the rule of reference "that if either party shall by affected delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just:" *Proudfoot* v. *Trotter et al*, 1 U.C. Q.B. 398. If a general power as to costs be delegated to the arbitrator, he will have full authority over costs of the reference: see *Wood* v. *O'Kelly*, 9 East. 436; *Bradley* v. *Tunstow*, 1 B. & P. 34; *Fitzgerald* v. *Graves et al*, 5 Taunt. 342. In the absence of any specific direction the costs will follow the verdict: *Mackintosh* v. *Blyth*, 1 Bing. 270, *per cur.* Where an order of nisi prius was silent as to costs, it was held that the arbitrator had no authority to adjudicate upon them, and that each party should bear his own expenses and the half of the award: *Taylor* v. *Lady Gordon*, 9 Bing. 573, *per* Tindal, C.J. Where after a payment into court by defendant there was a reference without mention of costs, *held* that the arbitrator had no power over the costs incurred before the payment into court; for defendant by the payment had admitted that he was in error up to the time of the payment: *Stratton* v. *Green*, 8 Bing. 437. Where there is a reference by judge's order to arbitration and the costs of the action and of the reference are left in the discretion of the arbitrator, the costs of making the submission a rule of court are in the discretion of the court: *Carter* v. *The Burial Board of Tong*, 5 H. & N. 523; and will not be given unless there

When the reference is made a rule of Court, case may be remitted to the arbitra-

164. (*l*) In case in any reference to arbitration, whether under this Act or otherwise, the submission be made a rule of any Court of Upper Canada, (*m*) such Court or a Judge thereof (*n*) may, at any time, and from time to time, (*o*) remit (*p*) the matters referred, or any or either of them, (*q*)

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be a previous demand of the money: *Ib.*; see also *Martin* v. *Stinson et al*, 7 U. C. L. J. 184. If a cause at nisi prius has been referred to arbitration, and in consequence of any default the proceedings of the arbitration become nugatory, the party ultimately successful is not in general entitled to the costs of the abortive proceedings: *O'Driscoll* v. *Macartney*, 9 Ir. Law Rep. 570.

(*l*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 8. The object of this section is to confer upon the courts a convenient power which formerly was only exercisable when expressly given by the submission, rule, or order of reference between the parties. A court of equity may act under this section: *In re Warner and Powell*, L. R. 3 Eq. 261.

(*m*) It is clear that this section applies to the various references mentioned in the act, such as compulsory references under section 158, and references by consent under sections 162 and 163: see *In re Morris and Morris*, 6 El. & B. 383.

(*n*) *Court or Judge*—Relative powers: see note *w* to section 48.

(*o*) *From time to time*, &c., intending a second, third, or more references if necessary: see *In re Manley and Anderson et al*, 2 Prac. R. 351. As to the necessity for this provision, see *Nickalls* v. *Warren*, 6 Q. B. 615. A man whose cause is referred ought not to be in a worse position than if his cause were tried in the ordinary manner: *Holland* v. *Judd*, 3 C. B. N. S. 826. The jurisdiction cannot be ousted by inserting a prohibitory clause in the consent: *Coleman* v. *The Cork & Youghal Railway Co.* 13 Ir. C. L. R. 368.

(*p*) The application to remit must be made within the same time as an application to set aside an award: *Doe d. Banks et al* v. *Holmes*, 12 Q. B. 951; and see *Browne* v. *Collyer*, 20 L. J. Q. B. 426; *Zachary* v. *Shepherd*, 2 T. R. 781; *Doe d. Mays* v. *Cannell*, 22 L. J. Q. B. 321. The power to remit will not in general be exercised unless the award be egregiously wrong or not sanctioned by the evidence: *In re Brown and Overholt*, 2 Prac. R. 9; *Wells* v. *Gzoweki et al*, 16 U.C.Q.B. 42; *Cleary* v. *Cleary*, 10 Ir. C. L. R. 329; *In re Smith and Ranney*, 2 Prac. R. 82. Reference back refused on the ground of the discovery of new evidence: *McClain* v. *Maitland*, 2 Prac. R. 279. Refused unless the court could, if so disposed, set aside the award: *Hogge* v. *Burgess*, 3 H. & N. 293; *Latta* v. *Wallbridge*, 7 U. C. L. J. 207. Where on an application for an attachment it appeared that defendant had not attended the arbitration, through some misapprehension, the matters were referred back under a power contained in the submission: *Bleecker* v. *Loyall*, 2 Prac. R. 14. Where the submission gives the arbitrator power over costs, the court, on sending the award back to him, may direct that the costs of the rule shall be in his discretion: *Pearson* v. *Overell*, 12 W. R. 709; see also *McRae* v. [illegible] 2 E. & B. 946.

(*q*) [illegible]d of referring back the whole matter in dispute because of a defective [illegible] part, that part may be referred back and the remainder retained, as [illegible] remainder the arbitrator is *functus officio*. There is a great difference between referring back an award altogether and referring back a particular part of it. If an award generally and not a part thereof be referred back, the arbitrator may be called upon to hear the whole case again: see remarks of Denman, C. J. in *Nickalls* v. *Warren*, 6 Q. B. 618. If the award be sent back for a specific

to the reconsideration and redetermination of the arbitrator or arbitrators or umpire, as the case may require, (*r*) upon such

tors for reconsideration, &c.

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purpose, and the arbitrator need no assistance from either side, he is not bound to give notice to the parties: *Howett* v. *Clements*, 1 C. B. 128; *In re Huntley* v. *The Churchwardens of the Parish of Brinbrooke et al*, 1 El. & B. 786. This holds good especially if neither party, after a reference back by consent, require the arbitrator to hear fresh evidence: see *Baker* v. *Hunter*, 4 D. & L. 696. If the award be sent back only to alter such things as make it bad upon the face of it, and not to vary at all the substance of the decision, it is clearly not necessary for the arbitrator to resummon the parties: *Morris* v. *Morris*. 27 L. T. Rep. 103. Where plaintiff was described in an award by the wrong Christian name, the court sent back the award for correction: *Howett* v. *Clements*, 1 C. B. 128. If an award be good as to three points but bad as to one, and is sent back to the arbitrator as to that one alone, the arbitrator, it seems, cannot alter his decision as to the remaining two: *Johnson* v. *Latham*, 20 L. J. Q. B. 238, *per* Erle, J. The amended award need not recite the order by which the award was referred back: *Baker* v. *Hunter*, 4 D. & L. 696. In one case it was held that the party disputing the validity of an award might apply to the court to refer back the award, and that the court might do so as when setting aside an award under like circumstances: *Bradley et ux.* v. *Phelps*, 6 Ex. 897. Where a letter, alleged to have been written by one of the parties to a reference, was not discovered until after award made, but which the arbitrator swore would, if discovered in time, have materially affected his decision, the award was referred back: *Burnard* v. *Wainwright*, 19 L. J. Q. B. 423. And where the rule of reference provided that "in the event of any application being made on the subject of the award," the court should have power to remit such award, *held* that a rule for the payment of the money was an "application" within the meaning of the provision, and empowered the court to remit the award: *Johnson* v. *Latham*, 19 L. J. Q. B. 329. Where an arbitrator upon a reference from nisi prius found a sum due to plaintiff within the jurisdiction of the inferior courts, but expressed an opinion that the cause was a proper one to be tried in the superior courts, *held* that there was no power to refer back for the arbitrator's certificate as to the costs, but that the proper course was to lay his award before the judge at nisi prius, who would exercise his discretion: *Webber* v. *Lee*, 1 D. & L. 534. It is a rule of extended application that the court cannot receive affidavits to explain the intention of the parties to a written instrument, if such affidavits are in contradiction of the instrument sought to be explained. Where therefore upon a reference by order of nisi prius, the parties agreed that a statement of certain sums admitted to be due to the plaintiff should be annexed to the order, and one of these was £750, but by mistake of a copying clerk was written £450; *held* that the mistake was in effect the mistake of the plaintiff, and could not be amended: *Wynn* v. *Nicholson*, 6 D. & L. 717. The arbitrator should make his award within three months after he shall have entered on the reference: see section 171 of this act. Where the costs which an award had directed defendant to pay had been taxed, but the award was, as to one part of it, referred back to the arbitrator, *held* that a second taxation of costs was necessary: *Johnson* v. *Latham*, 20 L. J. Q. B. 236. If under the original reference the arbitrator has power over the costs of the reference and of the award, that power continues as to the costs of the award when referred back: *McRae* v. *McLean*, 2 El. & B. 946. If an arbitrator, when an award has been referred back to him, hear fresh evidence, and thereupon amend his award so as to supersede part of his former award, the costs of proving the part so superseded should, it seems, be divided between the parties: *Blair* v. *Jones*, 6 Ex. 701.

(*r*) *As the case may require*, *i. e.* as to the whole matters referred, or any part thereof, in the discretion of the court or the judge to whom application is made under this section.

terms as to costs and otherwise as to the said Court or Judge may seem proper. (*s*) 19 Vic. c. 43, s. 88.

Period within which application to set aside award must be made.

165. (*t*) All applications to set aside any award made on a compulsory reference, (*u*) shall be made (*v*) within the first six days (*w*) of the term next following the publication of the award to the parties, (*x*) whether the award be made in Vacation or in Term; (*y*) and if no such application be

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(*s*) It is in the power of the court or judge to impose costs or give such directions when referring back the award as may at the time of the application be thought necessary. If the application be granted "upon payment of costs," the payment of the costs will be a condition precedent to the re-determination.

(*t*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 9.

(*u*) The words of this section, which are restricted to awards made upon compulsory references (sections 158, 160), are not so extensive in meaning as those used in section 163, which relate to awards made under section 162 of this act. It is not necessary that the judge's order referring a cause under section 158 should be under a rule of court before applying under this section to set aside the award: *Watson* v. *Bennett*, 5 H. & N. 831.

(*v*) The obvious intention is to lay down a rule limiting the time for moving to set aside the awards mentioned in this section. That rule is imperative. Where a rule *nisi* is obtained before the last day of the term in which the award must be moved against, the court may allow additional affidavits to be filed after that day: *In re Wheeler and Murphy et al*, 2 Prac. R. 32.

(*w*) Computation of time: see R. G. pr. 166.

(*x*) What is the meaning of the word "publication?" "*I think that word satisfied by the award having been made and notice having been given to the parties* that it is within their reach upon payment of just and reasonable expenses. And I concur in thinking that the award cannot be said to be ready when it is only to be had on submitting to a wrongful demand:" *Musselbrook* v. *Dunkin*, 9 Bing. 606, *per* Tindal, C. J. The part italicised of this definition has been upheld, but the remainder has been denied: *Macarthur* v. *Campbell*, 5 B. & Ad. 518; see also remarks of Coleridge, J. in *Reynolds* v. *Askew*, 5 Dowl. P. C. 682. The accepted definition appears to be this—An award is published when the parties have *notice* that it is ready, without reference to the circumstance whether the charges are reasonable or not. The notice, it seems, should be such as to enable the parties to obtain a knowledge of the contents of the award: *Brooke* v. *Mitchell*, 8 Dowl. P. C. 392; *Dexter* v. *Fitzgibbon*, 4 U. C. L. J. 43. It is not now any excuse for not applying to set aside an award within the proper time, that the parties had been prevented from obtaining a knowledge of the contents by the arbitrator withholding the award until payment of extortionate fees: *Moore* v. *Darley*, 1 C. B. 445; *Macarthur* v. *Campbell*, 5 B. & Ad. 518. But it has been held under the old practice that the courts have no general jurisdiction over fees paid to arbitrators under protest: *Dossett* v. *Gingell*, 2 M. & G. 870; see new Stat. 29 Vic. cap. 32.

(*y*) *Qu.* If an award be made during term but too late to be moved against within the first six days of such term, when must the application be made? The meaning of the section under consideration is not very clear upon the point. The doubt is as to whether a party desiring to move against an award must move within the first six days of term, or within the first six days of term

made, or if no rule be granted thereon, or if any rule granted thereon be afterwards discharged, such award shall be final between the parties. (*z*) 19 Vic. c. 43, s. 89.

When an award may, by order of a Judge, be enforced, after the ex-

166. (*a*) Any award made on a compulsory reference may, by authority of a Judge, (*b*) on such terms as to him seems reasonable, be enforced (*c*) at any time after six days (*d*) from the time of publication, (*e*) notwithstanding

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next after publication, if award made during term. If the section will bear the latter construction, then, for example, an award made on the fourth or fifth day of a term must be moved against on or before the tenth or eleventh day of the same term. But if the contrary construction be the true one, then the party wishing to move would have the first six days of the term next following the term in which publication was made. The latter seems to be the better opinion. See *Laurie v. Russell*, 1 Prac. R. 36; *In re Burt*, 5 B. & C. 668. Though the section under consideration is restricted to awards made upon *compulsory* references, a general view of the time within which awards may be set aside may be here introduced. Awards for the purpose of the inquiry may be divided into three classes—1. Those under Stat. 9 & 10 Wm. III. cap. 15; 2. Those under the section here annotated; 3. Those not embraced in either of the said statutes. As to the first, the application must be made before the last day of the term next after publication: *In re Burt*, 5 B. & C. 668. As to the second, within the first six days of the term next after publication: section 165. As to the third, within the first four days of the term next after publication (being the period allowed for moving new trials), unless there is good reason for further delay: see *Rawsthorn* v. *Arnold*, 6 B. & C. 629; *Emet* v. *Ogden*, 7 Bing. 258; *Musselbrook* v. *Dunkin*, 9 Bing. 605; *Burgess* v. *The Guardians of the Mitchelstown Union*, 4 Ir. C. L. R. 566; *Laurie* v. *Russell*, 1 Prac. R. 36, *per* Burns, J.; *In re Mathews and Webster*, *Ib.* 75; *In re Cumming and Graham*, *Ib.* 122; *Murphy et al* v. *Cotton et al*, 14 U. C. Q. B. 426; *Todd* v. *McBlain*, 4 Ir. C. L. R. 190. And if the reason for delay be *not* satisfactory, the consent of the opposite party will not facilitate the application: *In re the North British Railway Co.* v. *Trowsdale*, L. R. 1 C. P. 401.

(*z*) It is apprehended that the word "final" must be understood *sub modo*. The award mentioned in this section, if not moved against within the proscribed time, may be taken to be so far final that it cannot afterwards be set aside in a summary manner; but if the same award be sued on at common law for the purpose of enforcing it, it is presumed that all the usual defences would be open to defendant. It cannot be that an intentional or inadvertent omission to move against the award will debar the party who might have moved and taken the initiative, from objecting to an award void or defective upon which he is sued, and against which at common law he may have a good defence.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 10.

(*b*) *By authority of a judge*, intends an application to the judge to be, it is presumed, supported by affidavit. *Qu.* Is the order absolute in the first instance? The practice here enacted seems to be analogous to that of obtaining speedy execution, and therefore leads to the inference that the order may go in the first instance.

(*c*) As to the mode of enforcing awards in general: see note *i* to section 163.

(*d*) The time mentioned in the English act is "*seven* days."

(*e*) When award said to be published: see note *x* to section 165.

piration of six days.

that the time for moving to set it aside has not elapsed. (*f*) 19 Vic. c. 43, s. 90.

When parties to any instrument agree that any difference between them shall be referred to arbitration, the Court or a Judge may stay proceedings on application of defendant and proof of certain matters.

167. (*g*) Whenever the parties or any of the parties to any deed or instrument in writing made or executed, since the twenty-first day of August, one thousand eight hundred and fifty-six, (*h*) or after this Act takes effect, (*i*) have agreed, or agree (*j*) that any existing or future differences between them or any of them shall be referred to arbitration, (*k*) and any one or more of the parties so having agreed or any person or persons claiming through or under him or them, (*l*) nevertheless commences an action at Law or a suit in Equity against the other party or parties or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, (*m*) then upon the application of

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(*f*) See note *y* to section 165.

(*g*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 11.

(*h*) When C. L. P. Act, 1856, came into force.

(*i*) 5th December, 1859.

(*j*) One party cannot make an agreement. There must be the *aggregatio mentium* of at least two persons. The word "agreement" is often used as synonymous with promise. In this sense it appears to be used here. And yet the party promising or agreeing must be one of the parties to a deed or instrument. Without the promise of the other party or parties to the instrument there would be a want of mutuality and therefore no agreement. The submission intended is manifestly one by consent of parties. The section does not apply to a subsequent agreement of parties to refer, where there is no such agreement in the original stipulation or instrument: *Blythe* v. *Lafone*, 1 E. & E. 435; but see *Mason* v. *Haddan*, 6 C. B. N. S. 526; *Hattersley* v. *Hatton*, 3 F. & F. 116. A submission though of prospective disputes has been held to be proper to be made a rule of court: *Parkes* v. *Smith*, 19 L. J. Q. B. 405.

(*k*) Differences of law as well as of fact are within the section: *Randegger* v. *Holmes et al*, L. R. 1 C. P. 679.

(*l*) *Semble*, assignees of a bankrupt are not persons claiming through or under the bankrupt, within the meaning of the corresponding English section: *Pennell et al* v. *Walker*, 18 C. B. 651.

(*m*) The agreement so made shall be binding not only upon the parties to the instrument but upon their representatives, that is to say—all persons claiming through or under the parties to the instrument in respect of the matter in dispute. The words of the section do not seem to require that the action should be brought upon the very point which is in difference between the parties. It is only necessary that it should be brought in respect of some of the matters agreed to be referred. To bring a case within the section, it is enough if there be a matter in dispute between the parties which they have agreed to refer, and an action also in respect of a matter agreed to be referred, although the action may

the Defendant or Defendants, or any of them, (*n*) after appearance and before plea or answer, (*o*) and upon the Court or Judge being satisfied (*p*) that no sufficient reason exists why such matters ought not to be referred to arbitration according to such agreement as aforesaid, (*q*) and that

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have been brought in respect of some claim arising out of the same contract, which as a matter of legal right is not substantially disputed. Where a charter party contained a clause that if any difference of opinion should arise between the parties, either in principle or detail, the same should be referred to arbitration; and an action having been brought upon that charter party by the shipowner for the freight agreed upon, and a cross action by the charterers for damages alleged to have been occasioned by the unseaworthiness of the vessel, the charterer being willing to refer, the court, upon his application, made absolute a rule to stay all proceedings in the action by the shipowner: *Russell* v. *Pellegrini*, 28 L. T. Rep. 121. And yet the question to be referred must be one arising out of the agreement, and reasonably presumed to have been contemplated: *Wallis* v. *Hirsch*, 28 L. T. Rep. 159. Where it appears to the court that a question of fraud is *bona fide* raised, they will not stay proceedings in order to refer the case: *Ib.* In an action on a charter party against a surety for freight, the defendant was not allowed a reference of a claim for compensation for a breach of warranty of the capacity of the vessel, that being a claim of which the principal, the charterer, only could take advantage, and not the surety: *Daunt et al* v. *Lazard*, 27 L. J. Ex. 399; see also *Lury et al* v. *Pearson et al*, 1 C. B. N.S. 639.

(*n*) The application can only be made in one court—that being the court in which the action is brought—and if an order be made in that court, it is not in the power of either party to avoid it by bringing an action in any other court: see *Doe d. Carthew et al* v. *Brenton*, 6 Bing. 469; see also *Parkin* v. *Scott*, 1 Taunt. 565. It may be made, apparently, by a defendant, whether within or without the jurisdiction, for there is nothing in the context to manifest a contrary intention.

(*o*) Until appearance defendant is not a party to the suit. If after appearance he plead to the merits, he waives the privilege by this section conferred upon him. The application, therefore, must be "after appearance" and "before plea or answer."

(*p*) As to the mode of satisfying the court or a judge see note *v* to section 44.

(*q*) This provision is one entirely new in principle. The effect of the enactment is to drive the parties from the court to the arbitrators chosen or to be chosen by themselves—perhaps long before the existence of difficulties between them. It has been over and over again held that neither courts of law nor equity could be ousted of jurisdiction by agreement of the parties: *Kill* v. *Hollister*, 1 Wils. 129; *Thompson et al* v. *Charnock*, 8 T. R. 139; *Lowes* v. *Kermode*, 8 Taunt. 146; *Dicas* v. *Jay*, 6 Bing. 519; see also *Harris* v. *Reynolds*, 7 Q. B. 71; and *Scott* v. *Avery*, 8 Ex. 487; *Avery* v. *Scott*, *Ib.* 497. Parties cannot by contract oust the courts of their ordinary jurisdiction—*i. e.* they cannot agree that no court shall have jurisdiction in case of a breach of the contract; but it is quite legal and often beneficial for them to agree that no cause of action shall arise out of the contract, until an arbitrator or private tribunal shall have first adjudicated on the subject matter and settled the sum payable; for in that case there is no ousting of jurisdiction, there being no jurisdiction possible until the sum has been ascertained by the arbitrator: *Scott* v. *Avery*, before House of Lords, 28 L. T. Rep. 207; s. c. 5 H. L. C. 811; *Horton* v. *Sayer*, 4 H. & N. 643; *Braunstein* v. *The Accidental Death Assur-*

the Defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, (*r*) the Court in which such action or suit has been brought or a Judge thereof may make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such Court or Judge may seem fit, (*s*) but such rule or order may, at any time

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ance Co. 1 B. & S. 782; *Lee* v. *Page*, 30 L. J. Ch. 857. The fair result of the authorities is, that if the contract is in such terms that a reference to a third person or to a board of directors is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the courts of jurisdiction or deprive the party of his action: *Elliott* v. *The Royal Exchange Assurance Co.* L. R. 2 Ex. 243, *per* Kelly, C. B.; see also *Griggs* v. *Billington*, 27 U. C. Q. B. 520. To a declaration for work done and materials supplied, the defendant pleaded, except as to £145 3s. 1d. parcel of the money claimed, that the plaintiff ought not to be admitted to allege that at the commencement of the suit any more than the said sum of £145 3s. 1d. was due by the defendant to the plaintiff, because that after the accruing of the causes of action in the declaration mentioned and before this suit, a dispute having arisen as to the amount due, an agreement was made to refer the question of how much was due to the award of an arbitrator, and to be bound by his award, and that the arbitrater, having heard all the evidence, awarded that the amount due from the defendant to the plaintiff in respect of the said causes of action was £145 3s. 1d. On a demurrer to this plea: *Held*, that the plea was good without any allegation of payment or tender of the amount awarded to be due, being pleaded only to the amount claimed in the declaration beyond the sum so awarded to be due: *Cummings* v. *Heard*, 20 L. T. N. S. 975.

(*r*) The effect of the section is not to make the agreement to refer a good defence, but a ground of application for the stay of proceedings. Mutuality must be shown. In the first place it must be made to appear that the party suing had agreed to refer, and that he is suing in breach of that agreement. In the next place it must appear that the party applying was a party consenting to the intended reference.

(*s*) The court will not allow the action to proceed upon a mere suggestion of fraud on the part of defendant, but will require it to appear that the plaintiff meant to rely upon some matter of fraud relevant and material to the issue: *Hirsch et al* v. *Im Thurn et al*, 4 C. B. N. S. 569. No order will be made where the object of defendant is merely to delay the plaintiff: *Lury et al* v. *Pearson et al*, 1 C. B. N. S. 639. Courts have always had power to stay an action brought against good faith: *Cocker* v. *Tempest*, 9 Dowl. P. C. 307, *per* Parke, B. The power of each court over its own process is unlimited: it is a power incident to all courts, both superior and inferior. The exercise of the power is certainly a matter for the most careful discretion, and when there are conflicting statements of facts, it is in general better not to try the question between the parties by affidavit: *Ib. per* Alderson, B. A court of equity may, on the ground of want of *bona fides*, order a bill to be taken off the file: *Robson* v. *Dodds*, 20 L. T. N.S. 968. Even if the court should refuse to stay proceedings under this section, and indeed

afterwards, be discharged or varied as justice requires. (*t*) 19 Vic. c. 43, s. 91.

Provision for supplying the place of a single arbitrator or umpire dying, refusing to act, &c., when the reference does not show an intention that his place

168. (*u*) If in any case of arbitration, the document authorizing the reference (*v*) provides that the reference shall be to a single arbitrator, (*w*) and all the parties do not, after differences have arisen, (*x*) concur in the appointment of an arbitrator, or if any appointed arbitrator refuses to act, (*y*) or becomes incapable of acting, (*z*) or dies, (*a*) and the terms of the document do not shew the intention that such vacancy should not be supplied, (*b*) and the parties do not concur in

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even if defendant neglect to avail himself of its provisions, it would appear that he may, notwithstanding, sue plaintiff for having violated his agreement to refer to arbitration: *Livingston* v. *Ralli*, 24 L. J. Q. B. 269; see also *Wade* v. *Simeon*, 3 D. & L. 27.

(*t*) *i. e.* Either by the judge who made the order or by the court *in banc*: see *Shaw et al* v. *Nickerson*, 7 U. C. Q. B. 541; see also note *w* to section 48.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 12.

(*v*) *Document*, *i. e.* The submission or agreement between the parties, evidenced by writing, mere verbal submissions not being apparently within the section.

(*w*) *i. e.* An arbitrator not named in the document authorising the reference.

(*x*) Manifestly intending a document executed before differences have arisen, but in anticipation of such differences: see *Collins* v. *Collins*, 7 W. R. 115; see also *In re Lord*, 1 K. & J. 90; s. c. 24 L. J. Ch. 145; *Bos et al* v. *Helsham et al*, L. R. 2 Ex. 72; *In re the Liquidators of the Anglo Italian Bank and de Rosaz*, L. R. 2 Q. B. 452; *In re Hopper and Wrightson*, L. R. 2 Q. B. 367.

(*y*) No man, not being a judge or other such public officer, can be compelled to act as an arbitrator or mediator between parties against his will: *Crawshay* v. *Collins*, 3 Swanst. 90. As to neglect to act after having accepted the office, see *Willoughby* v. *Willoughby*, 9 Q. B. 923. As to wilful delay, see *Bradley et ux.* v. *Phelps*, 6 Ex. 897.

(*z*) It has been said that neither natural nor legal disabilities render a person incapable of being an arbitrator; for every person is at liberty to *choose* whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those *whom he has himself selected*: Russell Arb. 3 ed. 105. Supposing this to be the true doctrine, it will be observed that it is restricted to cases where the disability, &c., was in existence and manifest when the arbitrator was appointed, and to cases where the arbitrator has been appointed by the parties themselves. If the arbitrator be appointed by the court, or, though appointed by consent, if after his appointment a natural or legal disability happen to him, it follows that the parties will not be necessarily bound to continue him.

(*a*) As to the death of one of several arbitrators, see *Crawshay* v. *Collins*, 3 Swanst. 90; *Cheslyn* v. *Dalby*, 2 Y. & J. 170. As to the death of one of the parties to a reference, see *Lewin et al* v. *Holbrook*, 2 Dowl. N. S. 991; *Bowen* v. *Williams*, 6 D. & L. 235.

(*b*) A clause may be inserted in any submission to provide for the contingencies noticed in this section: see *Bythewood*, by Jarman, vol. 1, 538, 619. If there be no express stipulation, then of course this section is applicable.

should not be supplied.

appointing a new arbitrator, (*c*) or if, where the parties or two arbitrators are at liberty to appoint an umpire (*d*) or third arbitrator, (*e*) such parties or arbitrators do not appoint an umpire or third arbitrator, (*f*) or if any appointed umpire or third arbitrator, refuses to act, (*g*) or becomes incapable of acting, (*h*) or dies, (*i*) and the terms of the document authorizing the reference do not shew the intention that such vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, (*j*) then and in every such instance, (*k*) any party may serve the remaining parties or the arbitrators (*as the case may be*) with a written notice

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(*c*) It has been held that the death of an arbitrator defeated a reference and opened up the whole matter between the parties, so as to place them in the same position as if no reference had ever been made or agreed upon. Under these circumstances it was allowable for either party to abandon the submission: *Harper et al* v. *Abrahams*, 4 Moore 3. And yet such conduct has never been looked upon indifferent to that of a clear breach of faith: *Ib.* To prevent it the section under consideration has been enacted. It has been held under the old practice that no action would lie for refusing to nominate an arbitrator pursuant to a covenant in that behalf: see *Tattersall* v. *Groote*, 2 B. & P. 131; see also *Scott* v. *Avery*, 8 Ex. 487; *Avery* v. *Scott*, *Ib.* 497.

(*d*) Arbitrators are not at liberty to appoint an umpire unless express authority to do so be given them by the submission or other instrument of reference: see *Little et al* v. *Newton*, 9 Dowl. P. C. 437. Under a reference to arbitration to be held "in the usual manner," after each party has chosen an arbitrator, a judge in chambers will not, because of a difference as to the umpire between the two arbitrators chosen in the first instance and before the arbitrators have themselves proceeded to settle the matters in dispute, appoint the umpire desired: *Rowe* v. *Colton*, 3 U. C. L. J. 116.

(*e*) A third arbitrator must be appointed before the arbitration proceeds. An umpire may be and usually is appointed after the arbitrators have entered upon the reference and are unable to agree. There are other distinctions between the two, unnecessary to be mentioned here: see *Bates* v. *Townley et al*, 1 Ex. 572.

(*f*) The appointment of a third arbitrator or umpire may be a condition precedent to the right of the arbitrators to act. The provision under consideration contemplates some such case.

(*g*) The refusal to act by an umpire named by the arbitrators does not make the arbitrators incapable of naming another person. Their power continues until they have named some one who accepts the office: see *Oliver* v. *Collings*, 11 East. 367; *Trippet* v. *Eyre*, 3 Lev. 263. This enactment appears to be directed to the case where arbitrators refuse to make an effective appointment.

(*h*) See note *z* to this section.

(*i*) See note *a* to this section.

(*j*) A special clause may be introduced into the submission to meet this case.

(*k*) *i. e.* In the several instances detailed in the early part of this section.

to appoint an arbitrator, umpire or third arbitrator; (*l*) and if within seven clear days after service of such notice (*m*) no arbitrator, umpire or third arbitrator be appointed, any Judge of either of the Superior Courts of Law, or of the Court of Chancery, or of any County Court, if the case be in such County Court, may, upon summons to be taken out by the party who served such notice, (*n*) appoint an arbitrator, umpire, or third arbitrator (*as the case may be*), and such arbitrator, umpire or third arbitrator may act in the reference and make an award as if he had been appointed by consent of all parties. (*o*) 19 Vic. c. 43, s. 92.

A Judge to appoint another in default of the proper party.

169. (*p*) When the reference is or is intended to be to two arbitrators, one appointed by each party, (*q*) either party in case of the death, (*r*) refusal to act (*s*) or incapacity of any arbitrator appointed by him, (*t*) may substitute a new arbitrator, (*u*) unless the document authorizing the reference shews the intention that the vacancy should not be supplied, (*v*) and if on such a reference one party fails to appoint an arbitrator either originally or by way of substitution as

When the reference is to two arbitrators and one party neglects to appoint, the other may, after certain notice, &c., appoint his arbitrator to act alone,

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(*l*) No particular form of words is necessary; the notice must of course be varied to accord with the facts of the case. As to the service of the notice, &c., see R. G. pt. 131 *et seq.*

(*m*) The period of seven clear days appears to be a very common one with the English legislature for such appointments in the case of public companies. See Eng. Stat. 8 & 9 Vic. cap. 18, s. 28; 8 & 9 Vic. cap. 16, ss. 130, 131.

(*n*) As to the powers of a judge see note *w* to section 48.

(*o*) An umpire may, it seems, be appointed under this section, though the instrument of reference were executed before this act came into force: see *In re Lord*, 24 L. J. Chan. 145; s. c. 1 K. & J. 90. See further, *In re Liquidators of the Anglo-Italian Bank and Francois de Rosatz*, L. R. 2 Q.B. 452; and *De Rosay* v. *the Anglo-Italian Bank Limited*, L. R. 4 Q.B. 462.

(*p*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 13.

(*q*) *Reference*—intended to apply to submissions by consent of parties. The instrument of reference being the "deed or instrument in writing" mentioned in section 167 of this act.

(*r*) See note *a* to preceding section.

(*s*) See note *y* to preceding section.

(*t*) See note *z* to preceding section.

(*u*) The appointment may be made by either party whose first arbitrator dies, or refuses to act, &c.

(*v*) In which event either of the remaining arbitrators would be entitled to act or else the reference would lapse.

unless the reference provides that the vacancy should not be supplied.

aforesaid, (*vv*) for seven clear days (*w*) after the other party has appointed an arbitrator, and has served the party so failing with notice in writing to make the appointment, (*x*) the party who has appointed an arbitrator may appoint such arbitrator to act as sole referee in the reference, (*y*) and an award made by him shall be as binding on both parties as if the appointment had been by consent; but the Court or a Judge may revoke such appointment on such terms as seem just. (*z*) 19 Vic. c. 43, s. 93.

Two arbitrators may always appoint an umpire, unless the reference forbid it.

170. (*a*) When the reference is to two arbitrators and the terms of the document which authorizes it do not shew the intention that there should not be an umpire, or do not provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, (*b*)

(*vv*) It has been usual in ordinary submissions to provide by express stipulation that if either party fail or neglect to appoint an arbitrator within a specified time, the other may upon proper notice do so for him.

(*w*) See note *m* to preceding section.

(*x*) As to service of notice, &c., see R. G. pr. 131 *et seq.*

(*y*) It is important to note the effect on the part of either party to appoint an arbitrator. In such case the arbitrator appointed by the other may proceed as sole referee.

(*z*) *Court or judge:* see note *w* to section 48.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 14.

(*b*) When two arbitrators differ between themselves, the power to call in an umpire is a most useful and necessary one. If the two arbitrators each nominate a person to be umpire, and they agree that either is a proper person for the office, they may choose between the two by lot: *Neale* v. *Ledger*, 16 East. 51. *Contra*, where the appointment is by lot without any exercise of judgment: *In re Cassell*, 9 B. & C. 624; *The European and American Steam Shipping Co.* v. *Crosskey et al*, 8 C.B. N.S. 397. If the arbitrators agree on the umpire they need not be together when they sign the formal appointment: *In re Hopper and Wrightson*, L. R. 2 Q. B. 367. The appointment of an umpire need not be in writing, unless so required by the reference: *Ray* v. *Durand*, 1 Cham. R. 27. It is not the office of the umpire, when appointed, to decide between the two arbitrators, but to decide between the parties to the reference. The powers of arbitrators are often terminated by the appointment of an umpire. It is his duty to decide all matters referred, including those upon which the arbitrators are unable to agree. This appears to be one of the leading distinctions between an umpire and third arbitrator: see *Tollit* v. *Saunders*, 9 Price, 612; *Reynolds* v. *Gray*, 1 Ld. Rayd. 222; *Mitchell* v. *Harris*, *Ib.* 671; *Bates* v. *Cooke*, 9 B. & C. 407; *Soulsby* v. *Hodgson*, 1 W. Blac. 463; *Beck* v. *Sargent*, 4 Taunt. 232; and generally see 2 Saund. 133, note 7; see also *Heatherington* v. *Robinson*, 7 Dowl. P. C. 192; *Harlow* v. *Read*, 3 D. & L. 203; *Greene* v. *Bracken*, 2 Ir. C. L. R. 176. An award of umpirage is valid, though

unless they are called upon by notice as aforesaid to make the appointment sooner. (*c*) 19 Vic. c. 43, s. 94.

Award to be made within a certain period.

171. (*d*) The arbitrator acting under any such document (*e*) or compulsory order of reference as aforesaid, (*f*) or under any order referring the award back, (*g*) shall make his award under his hand, (*h*) and (unless such document or order respectively contains a different limit of time) (*i*) within three months (*j*) after he has been appointed, and has entered on the reference (*k*) or has been called upon to act by a no-

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made before the time limited for the award of the arbitrators: *Ray* v. *Durand*, 1 Cham. R. 27; but see section 173 and notes thereto.

(*c*) *i. e.* Under section 168.

(*d*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 15.

(*e*) *i. e.* The document in sections 168, 169 and 170 of this act.

(*f*) *i. e.* Under section 158, and probably under section 160.

(*g*) *i. e.* Under section 164.

(*h*) *i. e.* The award must not only be in writing but signed: see *Everard* v. *Paterson*, 6 Taunt. 625. Consequently the award to be made in any of the cases enumerated in the commencement of this section must be made in writing signed by the arbitrator making it. Still it is apprehended that this section is only cumulative, and that it does not deprive the parties to a submission from requiring a form of award different to that in this section prescribed. If, for example, the submission provide that the award be under the hand *and seal* of the arbitrator, an award not sealed may not be considered a sufficient compliance: see *Henderson* v. *Williamson*, 1 Str. 116. And yet it is doubtful whether, in the example supposed, the omission to affix the seal would at this day invalidate the award. In such cases there is ample discretion reposed in the courts to cause formal omissions to be rectified, which in one case they did not hesitate to exercise. In an old case where the submission called for an award indented, an award both in writing and sealed, but not indented, was held to be bad: see *Hinton* v. *Croy*, 3 Keb. 512. In a later case the court refused to entertain a similar objection: see *Gatliff's* v. *Dunn*, Barnes, 55.

(*i*) Every well-drawn submission contains a provision fixing a period within which it is declared that the award shall be made.

(*j*) Where the declaration on an award shewed the submission to have been made on a certain day and the award a few days thereafter, the court held that it appeared sufficiently to have been made within the proper time: *Reid* v. *Reid*, 16 U. C. C. P. 247. If there be a limitation as to time, and the parties to the reference go on with it after the time limited has expired, and make no objection till after award made, they cannot afterwards raise the objection that the time expired before the making of the award: *Tyerman* v. *Smith*, 6 E. & B. 719; *Watson* v. *Bennett*, 5 H. & N. 831; *Earl of Darnley* v. *The Proprietors &c. of the London, Chatham and Dover Railway*, L. R. 2 H. L. 43. *Contra*, if the party object, though continuing to attend: *Ringland* v. *Lowndes*, 17 C. B. N. S. 514; *Davies* v. *Price*, 34 L. J. Q. B. 8; s. c. 11 L. T. N.S. 203; but see *Barton* v. *Hubertus*, 16 U. C. C. P. 440.

(*k*) The appointment of an arbitrator, when by consent, dates from the submis-

tice in writing from any party, (*l*) but the parties may by consent in writing (*m*) enlarge the time for making the award. (*n*) 19 Vic. c. 43, s. 95.

Period may be enlarged.

172. (*o*) The Court of which such submission, document

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sion or other document of reference: see *Antram* v. *Chace et al*, 15 East. 209. The award may be made on the same day that the document authorizing the reference has been executed: see *Earnardiston* v. *Fowler*, 10 Mod. 204. The three months do not begin to run until the arbitrator has entered on the reference: *Baker* v. *Stephens*, L. R. 2 Q. B. 523.

(*l*) This notice of course to be effective only when the document of reference has been executed by all the parties, if from the reading of the instrument it appear that the consideration to each party is the accession of all parties.

(*m*) The specific mode of enlargement, viz., by *writing*, is pointed out. It must, as regards all references coming within the meaning of the section, be carefully observed: see *Burley* v. *Stephens et ux*, 1 M. & W. 156.

(*n*) The right of the parties to a reference by consent to enlarge the time for making an award has never been questioned. The enlargement, if there be a period limited by the instrument of reference for making the award, should be made within that period. The consent must be mutual: *Ruthven* v. *Ruthven*, 5 U. C. Q. B. 273. And the enlargement ought to be indorsed at the time it purports to be signed: s. c. *Ib.* 276. But the parties by their conduct, such as attending meetings, &c., have at common law been held to authorize and assent to enlargements made by the arbitrator: see *Leggett* v. *Finlay*, 6 Bing. 255. Where the parties conducted themselves as if there were a good enlargement, an irregular enlargement was held to be thereby waived: *Hallett* v. *Hallett*, 5 M. & W. 25; see also *Ruthven* v. *Ruthven*, 5 U. C. Q. B. 276; *Browne* v. *Collyer*, 20 L. J. Q. B. 426; *Hull* v. *Alway*, 4 O. S. 375. It is usual in well-drawn submissions to give the arbitrator himself power when necessary to make enlargements. That power is considered as running from time to time so as to feed future enlargements: see *Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658; *Leggett* v. *Finlay*, 6 Bing. 255. The arbitrator has not the power unless express authority be conferred upon him: *In re Morphett and Witherden*, 2 D. & L. 967. If the enlargement be made pursuant to agreement in the instrument of reference contained, the enlargement is part of the submission. When two parts of a deed of submission to arbitration were executed, and the arbitrator endorsed the enlargements of the time for making his award on one part, the court compelled the party in whose possession that part was to make it a rule of court: *In re Smith and Blake*, 8 Dowl. P. C. 130. It seems clear that when the time for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by judge's order, should, with a view to an attachment, be made a rule of court, as well as the original submission: *Masecar* v. *Chambers et al*, 4 U. C. Q. B. 171. Where a cause was referred under a judge's order containing a proviso that the arbitrator should make his award on or before a day appointed, but if not then prepared to enlarge the time, "as he might require and a judge of the court might think reasonable and just," *held* that the time was duly enlarged by a judge's order obtained after the time limited for making the award had expired: *Reid* v. *Fryatt*, 1 M. & S. 1. *Per cur.* "Such a term ought never to have been inserted in the order of reference:" *Ib.* 3. If an arbitrator be authorized to enlarge the time by judge's order, an enlargement by himself alone is insufficient: *Mason* v. *Wallis*, 10 B. & C. 107.

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 15.

or order has been or may be made a rule or order, (*p*) or any Judge thereof, (*q*) may, for good cause to be stated in the rule or order, (*r*) for enlargement, from time to time, (*s*) enlarge the term for making the award, (*t*) and if no other period of enlargement be stated in the consent or order for enlargement, it shall be deemed an enlargement for one month. (*u*) 19 Vic. c. 43, s. 95.

173. (*v*) In case an umpire has been appointed, (*w*) and in case the arbitrators have allowed their time to expire with- When the umpire shall act.

(*p*) Before application can be made under this provision, it would seem that the submission (if the reference be by submission), must be made a rule of court: see *Lambert et al* v. *Hutchinson*, 2 M. & G. 858.

(*q*) *Qu. Any* judge in chambers: Con. Stat. U. C. c. 10, s. 9.

(*r*) The rule or order cannot be made *ex parte;* it must be *nisi*, and to show cause: *Clarke* v. *Stocken*, 5 Dowl. P. C. 32. The omission to state the "good cause" in the rule or order is only an irregularity: *Re Burdon et al*, 31 L. T. Rep. 164.

(*s*) See note *n* to section 171.

(*t*) Neither the court nor a judge had power at common law to enlarge the time for making an award: see *Halden* v. *Glasscock*, 5 B. & C. 390. The power was for the first time conferred by Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 39, of which our 7 Wm. IV. cap. 3, s. 29 was a copy (now section 179 of this act). The power of enlargement may be exercised after the expiration of the three months: *Watson* v. *Beavan* 8 W. R. 612; see also *Johnson* v. *Collie*, 24 L. J. Q. B. 63; *In re Ward and the Secretary of State for War*, 32 L. J. Q.B. 53; *Johnston* v. *Anglin*, 5 Prac. R. 62; and even after award made: *Watson* v. *Bennett*, 3 L. T. N.S. 20; *Browne* v. *Collyer*, 20 L. J. Q. B. 420; *In re Wood and the Secretary of State for War*, 32 L. J. Q. B. 53; *Lord* v. *Lee*, 5 U. C. L. J. N.S. 21; but will not be exercised unless fair to both parties: *Edwards* v. *Davies*, 23 L. J. Q. B. 278; *McNeill* v. *MacNeale*, 13 Ir. L. R. 154; *Gaffney* v. *Killen*, 12 Ir. C. L. R. App. xxv.; nor if the party applying has been guilty of great laches: *Doe d. Mays* v. *Cannell*, 22 L. J. Q. B. 321; see *Lambert et al* v. *Hutchinson*, 2 M. & G. 858; *Andrews* v. *Eaton*, 7 Ex. 221; *Kellett* v. *Local Board of Health of Tranmere*, 34 L. J. Q. B. 67; see further note *c* to section 179. The rule will not be granted *ex parte:* see *Clarke* v. *Stocken*, 5 Dowl. P. C. 32.

(*u*) *i. e.* Calendar month: see Interpretation Act, Con. Stat. U. C. c. 2, s. 13. "It seems clear that when the *time* for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by judge's order, should be made a rule of court as well as the original submission:" *Masecar* v. *Chambers et al*, 4 U. C. Q. B. 172, *per* Macaulay, J.; see *Crooks* v. *Chisholm et al*, 4 O. S. 121; *Charles* v. *Hickson*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Arbitration and Award," II. 3; also see *In re Thirkell et al*, 2 U. C. Q. B. 173.

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 15.

(*w*) An umpire may be appointed by name in the document of reference. If not so appointed, provision is made for his appointment under section 170 of this act. And it would seem that, in the absence of express directions, the umpire may be appointed without writing, though for obvious reasons the latter mode is in all respects preferable: see *Ray* v. *Durand*, 1 Cham. R. 27.

out making an award, (*x*) or have delivered to either party or to the umpire a notice in writing stating that they cannot agree, (*y*) the umpire may enter on the reference in lieu of the Arbitrators. (*z*) 19 Vic. c. 43, s. 95.

When the award directs possession of real property to be delivered, the Court may order such delivery and enforce it as a

174. (*a*) When any award made on any such submission, document or order of reference as aforesaid, (*b*) directs that possession of any lands or tenements capable of being the subject of an action of ejectment (*c*) shall be delivered to any party either forthwith or at any future time, (*d*) or that any such party is entitled to the possession of any such lands or tenements, (*e*) [illegible]urt of which the document authorizing

(*x*) The power of the umpire under this section is deferred until the arbitrators "shall have allowed their time to expire without making an award." Whether this provision is cumulative or the contrary is doubtful. Decisions before the passing of this act seem to establish "that an award of umpirage is valid though made before the time limited for the award of the arbitrators, if they disagree and do not make any award afterwards:" see note *b* to section 170.

(*y*) As to disagreement between arbitrators: see *Doddington* v. *Bailward*, 7 Dowl. P. C. 640.

(*z*) It is established law that the umpire is to decide between the parties to the reference and not between the arbitrators, in case of disagreement. When he enters upon his duties, the duties of the arbitrators terminate. In the words of this section, he "enters on the reference in lieu of the arbitrators." It is not unusual for an umpire appointed in the first instance, to sit with the arbitrators and hear the evidence, but to take no part in the proceedings unless the arbitrators disagree. This is a convenient practice, and saves at least the expense of a second examination of witnesses.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 16.

(*b*) *i. e.* The order of reference under section 158, as to compulsory references or the deed or instrument in writing as to references under section 167. This section is made to extend to any award referred or made pursuant to those sections which directs that possession of any lands, &c.

(*c*) By the common law an ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession. In other words, ejectment is only maintainable for corporeal hereditaments: Tillinghast's Adam's Eject. 18; also see a case of ejectment for "a pasture gate" and a "cattle gate:" *Doe d. Haxby* v. *Preston et al*, 5 D, & L. 7.

(*d*) This accords in principle with the power of a judge to certify that execution may issue forthwith "or at some day to be named in such certificate:" section 239.

(*e*) The distinction between an award that one party named "is entitled to the possession of land" and that "the possession of the land shall be delivered" by the other, is now practically of little importance. It may, however, be mentioned that decided cases before this act established the doctrine that no *interest* in land could be *transferred* by an award: see Rolle. Ab. Arbitrament A.; *Marks* v. *Marriot*, 1 Ld. Rayd. 114; *Johnson* v. *Wilson*, Willes. 248; *Doe d. Morris et al* v. *Rosser*, 3 East. 15; *Thorpe* v. *Eyre*, 1 A. & E. 926; see also *Henry* v. *Kirwan*, 9 Ir. C. L. R. 459. The

the reference has been or may be made a rule or order, may order any party to the reference who is in possession of such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the lands to the party entitled thereto pursuant to the award, (*f*) and such rule or order to deliver possession shall have the effect of a Judgment in ejectment against every such party or person named in it, (*g*) and execution may issue and possession shall be delivered by the Sheriff as on a Judgment in ejectment. (*h*) 19 Vic. c. 43, s. 96. Judgment in ejectment.

175. (*i*) In any County Court, the Judge thereof may, in term, or at the sittings, or in vacation, by consent of the parties, order any cause to be referred to arbitration, in the same manner, with the same effect and with the same powers, and in like manner may set aside any award thereon, as may be exercised by the Superior Courts in any cause therein. (*j*) 19 Vic. c. 90, s. 13; 8 Vic. c. 13, s. 47. County Courts may order reference to arbitration as in Superior Courts.

176. (*k*) Every agreement or submission to arbitration by consent, (*l*) whether by deed, or in writing not under Every submission to arbitration

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reason of the law was based upon feudal principles, viz., that lands should not be aliened without the consent of the lord. An award need not set out a description of the land by metes and bounds: *The Great Western Railroad Co.* v. *Rolph*, 1 Prac. R. 50.

(*f*) An application under this section should show the reference, the subject matter thereof, the award, and the parties in possession of the land awarded. As to delivery of possession: see *Mays et al* v. *Cannel*, 24 L. J. C. P. 41.

(*g*) A judgment in ejectment is not, as other judgments, final between the parties: *Clubine* v. *McMullen*, 11 U. C. Q. B. 250.

(*h*) The writ of execution upon a judgment in ejectment is known as a writ of *habere facias possessionem*. It as a general rule must, like other executions, follow the judgment.

(*i*) This is a combination of the County Courts Procedure Act, 19 & 20 Vic. c. 90, s. 13, and the old County Courts Act, 8 Vic. c. 13, s. 47.

(*j*) It is not necessary to repeat here what has already been stated in notes to sections 158 to 174, inclusive. Reference may be made to these sections for the practice as to references by consent and otherwise, and setting aside awards.

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 17.

(*l*) A submission by written agreement is a contract requiring to be proved like any other contract if its existence be denied. It is true that by statute it may be made a rule of court, but that is only for the purpose of enforcing its performance in a summary manner. The character of the contract is not altered by

may be made a rule of Court, unless the Instrument forbid it.

seal, (*m*) may, on the application of any party thereto, (*n*) be made a rule of either of the Superior Courts of Law, or of the Court of Chancery, or of a County Court in actions pending in such County Court, (*o*) unless such agreement or submission contains words purporting that the parties intended that it should not be made a rule of Court. (*p*) 19 Vic. c. 43, s. 97.

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its being made a rule of court, nor is it the rule which gives it the binding effect upon the parties, as in the case of a submission by rule: *Berney* v. *Read*, 7 Q. B. 83, *per* Denman, C. J. There can be no agreement unless there be mutuality of consideration. The consideration to one party is the signing of the other. Without the signatures, or at least the assent of both, there can be no agreement. It has been held that an order of reference of a borough court in England, purporting to be made by consent, and containing a stipulation for making it a rule of a superior court, might be made a rule of such court as an agreement of reference between the parties: *Harlow* v. *Winstanley*, 19 L. J. Q. B. 430.

(*m*) Oral submissions are clearly excluded from the operation of this section: see *Ansell* v. *Evans*, 7 T. R. 1; —— v. *Mills*, 17 Ves. 419. Where two persons agreed by deed to refer all matters in dispute which should arise between them in relation to a certain contract to two arbitrators, one to be chosen by each party, and on disputes arising arbitrators were appointed by parol, it was held that the submission was by parol, and could not be made a rule of court under this section: *Ex parte Glaysher*, 3 H. & C. 442. But in a somewhat similar case, where one of the parties had appointed an arbitrator in writing, the submission was made a rule of court: *In re Newton and Hetherington*, 19 C. B. N. S. 342; see also *In re Willcox and Storkey*, L. R. 1 C. P. 671. If one partner assume to execute a submission for a copartner, his authority to do so must be established before the submission will be made a rule of court: *Re Aldington et al and Chesshire*, 15 C. B. N. S. 375; see also *French et al* v. *Weir*, 17 U. C. Q. B. 245.

(*n*) The application may be made by either party at any time either before or after award. The practice of courts of law and equity in this respect appears to be the same: *In re Taylor et al*, 5 B. & Al. 217; *Ross and Ross*, 4 D. & L. 648; *Smith* v. *Symes*, 5 Madd. 74; *Pownall* v. *King*, 6 Ves. 10; *Fetherstone* v. *Cooper*, 9 Ves. 67; *Heming* v. *Swinnerton*, 5 Hare. 350.

(*o*) Until this provision has been complied with the courts have no jurisdiction over agreements of submission: see *Harrison* v. *Grundy*, 2 Str. 1178; *In re Pering and Keymer*, 3 Dowl. P. C. 98; *Davis* v. *Getty et al*, 1 S. & S. 411; *Harvey* v. *Shelton*, 7 Beav. 455; *Kirkus* v. *Hodgson*, 8 Taunt. 733; *Mayor of Bath* v. *Pinch*, 4 Scott, 299; *Bottomley* v. *Buckley et al*, 4 D. & L. 157; *In re Ross and Ross*, 4 D. & L. 648; see however *Little et al* v. *Newton*, 1 M. & G. 976. But there is inherent power in the court independently of any statutory enactment to make a judge's order or order of *nisi prius* a rule of court: *Aston* v. *George*, 2 B. & Al. 395; *Harrison* v. *Smith*, 1 D. & L. 876; *Millington* v. *Claridge*, 3 C. B. 609. Where it was agreed that a submission should be made a rule of "the court," without specifying any particular court, the Common Pleas allowed the submission to be made a rule of that court: *Soilleux* v. *Herbst*, 2 B. & P. 444.

(*p*) The difference between this section and that of 9 & 10 Wm. 3, cap. 15, should be noted. A submission under the latter can only be made a rule of court when the parties in the submission "agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record," &c.: section 1; whereas under the section here

Of what Court it may be made a rule, and if a case be stated in the award for the opinion of a Court.

177. (*q*) If in any such agreement or submission it be provided that the same may be made a rule of one in particular of the Superior Courts aforesaid, it shall be made a rule of that Court only; (*r*) and if when there is no such provision, (*s*) a case has been stated for the opinion of one of the Superior Courts (*t*) and such Court is specified in the award, (*u*) and the document authorizing the reference has not before the publication of the award to the parties been

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annotated the submission may be made a rule of court "unless such agreement or submission contains words purporting that the parties intended that it should not be made a rule of court." In the former case an express clause of consent is necessary. In the latter consent is presumed unless dissent be expressed. As to the intention of the parties in such matters, see *In re Woodcroft and Jones*, 9 Dowl. P. C. 538. Where an agreement to refer matters to arbitration not under seal was afterwards duly revoked by deed, the court of chancery refused an application to make such agreement a rule of court: *Re Drury and Lyne*, 19 L. T. N. S. 763. The restraint upon revocation without leave of the court extends to all submissions which do not contain words purporting that they are not to be made rules of court: see note *b* to section 179. But this clause does not import into every submission to arbitration all the consequences of the 9 & 10 Wm. III. cap. 15, s. 1: *Smith* v. *Whitmore*, 10 L. T. N.S. 128; *Mills* v. *Bayley*, 2 H. & C. 36. A submission made a rule of the court of chancery under this clause is not within the provisions of this act as to discovery: *In re The Anglo-Austrian Bank*, 10 L. T. N. S. 369. An action may be maintained on a judge's order of reference made by consent: *Lievesley* v. *Gilmore*, L. R. 1 C. P. 570. A submission was made a rule of court on the production of a verified copy of the submission, the original being in the possession of the opposite party, who refused to produce it: *Martin* v. *The Mayor, &c., of Belfast*, 12 Ir. L. R. 338; an order may, however, be made in such case for the bringing in of the submission: *Hamilton* v. *Alford*, 1 Prac. R. 13. Submission made a rule of court without an affidavit of the attesting witness who refused to make an affidavit: *Shortall* v. *Moran*, 2 Ir. L. R. 87. The making the submission a rule of court is not a condition precedent to the making of the award: *O'Keefe* v. *O'Connell*, 1 F. & S. 66. As to the costs of making a submission a rule of court: see note *q* to section 163.

(*q*) Taken from latter part of section 17 of Eng. Stat. 17 & 18 Vic. cap. 125.

(*r*) This has been the established practice ever since Stat. 9 & 10 Wm. III. cap. 15: see *Milstead* v. *Craufield*, 9 Dowl. P. C. 124. Where a submission by deed of three actions in the Exchequer and one in the King's Bench provided that the agreement might be made a rule either of the court of King's Bench or Exchequer, the court of Exchequer refused to allow the submission to be made a rule of that court after it had been made a rule of the King's Bench: *Winpenny* v. *Bates*, 2 C. & J. 379.

(*s*) *i. e.* A provision that the submission shall or may be made a rule of one in particular of the superior courts.

(*t*) As to the statement of special cases for the opinion of the court by arbitrators: see sections 158, 160 and 162, and notes thereto.

(*u*) The case may be stated on the face of the award, and, if stated for one court in particular, the name of that court must also appear on the face of the award.

made a rule of Court, such document shall be made a rule only of the Court specified in the award. (*w*) 19 Vic. c. 43, s. 97.

Other Courts not to interfere.

178. (*x*) When in any case the document authorizing the reference is or has been made a rule or order of any one of such Superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award. (*y*) 19 Vic. c. 43, s. 97.

Submission to arbitration if agreed to be made a rule of Court, not revocable without leave of Court.

179. (*z*) In case of the appointment of any arbitrator or umpire by, or in pursuance of any rule of either of the Superior Courts of Common Law or of the Court of Chancery, or of any County Court, or Judge's order, or order of *Nisi Prius* in any action, (*a*) or by or in pursuance of any submission or reference, not containing words purporting that the parties intended that such agreement should not be made a rule of any of such Superior Courts, (*b*) the power and

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(*w*) As already noticed, the submission may be made a rule of court as well *after* as before award: see note *n* to section 176.

(*x*) Taken from latter part of section 17 of Eng. Stat. 17 & 18 Vic. cap. 125.

(*y*) This is consonant with the decision of *Winpenny* v. *Bates*, 2 C. & J. 379.

(*z*) Taken from our repealed Stat. 7 Wm. IV. cap. 3, s. 29, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 39. Before the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 39, it was in the power of either party to revoke the submission at any time before the award was made, and that whether the submission was by deed or other agreement: *Milne et al* v. *Gratrix*, 7 East. 608; judge's order: *Clapham* v. *Higham*, 1 Bing. 87; or order of nisi prius: *Doe d. Turnbull et al* v. *Brown*, 5 B. & C. 384; *Skee* v. *Coxon*, 10 B. & C. 483; *Walker* v. *Minchin*, 2 Ir. Law Rec. N.S. 119; *Goulding* v. *Goulding*, 2 Ir. Law Rec. 164. But this did not release the party revoking from an action, if he had covenanted to abide by the reference: *Grazebrook et al* v. *Davis*, 5 B. & C. 534; see also *Brown* v. *Tanner*, 1 Mc C. & Y. 464; and *Warburton* v. *Storr*, 4 B. & C. 103. It therefore often happened that upon the slightest expression of opinion by an arbitrator, unfavorable to either party, that party revoked the submission: *Clarke* v. *Stocken*, 2 Bing. N. C. 651, *per* Vaughan, J.; and *James* v. *Attwood*, 7 Scott, 843, *per* Tindal, C. J. It was to remedy this state of things that the statute was passed.

(*a*) The provisions of the act are apparently confined to civil proceedings: *Rex* v. *Bardell et al*, 5 A. & E. 619; *Rex* v. *Shillibeer*, 5 Dowl. P. C. 238. But the court will not in such a case grant a rule to restrain the arbitrator from proceeding: *Rex* v. *Bardell*, 5 A. & E. 619. Besides, in civil cases the reference unless complete is not within the statute: *Bright* v. *Durnell*, 4 Dowl. P. C. 756. Where two arbitrators were nominated in pursuance of a clause in a partnership deed, which provided that they should appoint an umpire before proceeding, it was decided that until the appointment of an umpire the reference might be revoked without leave: *Ib.*

(*b*) The original act was in terms applicable only where the submission con-

authority of such Arbitrator shall not be revocable by any party to the reference, without the leave of the Court by which such rule or order was made, or which is mentioned in the submission, or by leave of a Judge of such Court; or in case no such Court be mentioned in the submission and there be no restriction of jurisdiction as aforesaid, then not without the leave of one of such Superior Courts, or of a Judge thereof, (*c*) and the arbitrator and umpire shall proceed with the reference notwithstanding any such revocation, and make an award, although the person making such revocation do not afterwards attend the reference; (*d*) and the Court, or any Judge thereof (*as the case may be*) may, from time to time, (*e*) enlarge the term for any such arbitrators making their award. (*f*) 7 Wm. IV. c. 3, s. 29.

Arbitrator to proceed with reference.

Court may enlarge time for making an award.

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tained an agreement that it might be made a rule of court. This statute is more extensive, for it is made applicable, unless the submission contain words to the effect that it shall *not* be made a rule of court: see *Wood* v. *Closter*, 16 U. C. Q. B. 490; see *Mills* v. *Bayley*, 2 H. & C. 36.

(*c*) The application should be by rule or summons to show cause: *Clarke* v. *Stocken*, 2 Bing. N. C. 651; and should properly speaking be made before the award is executed: *Phipps* v. *Ingram*, 3 Dowl. P. C. 669. But may be made afterwards: see note *t* to section 172. Leave will not be granted except upon strong grounds: *James* v. *Attwood*, 7 Scott, 843, *per* Tindal, C. J. The discretionary powers conferred by the enactment should be exercised in the most sparing and cautious manner: *Scott* v. *Van Sundau*, 1 Q. B. 102; *Pope* v. *Lord Duncannon*, 9 Sim. 177. It will in general be refused, unless misconduct on the part of the arbitrator be shown: *In re Woodcroft and Jones*, 9 Dowl. P. C. 538; *Wilson* v. *Morrell*, 15 C. B. 720; see also *Faviell* v. *The Eastern Counties Railway Co.* 2 Ex. 344. Fear of an excessive award is no ground: *The Great Western Railway Co.* v. *Miller*, 12 U. C. Q. B. 654. But the court in one case, considering the balance of convenience and inconvenience to the parties, the unsatisfactory language used in the contract between them, the uncertainty as to what was intended by the clause of reference, and the ample powers with which the courts and judges are now armed for compulsory references, allowed the reference to be revoked: *In re Wright et al and the Corporation of the County of Grey*, 8 U. C. L. J. 109.

(*d*) Though a party revoke or attempt to revoke a submission without leave, he would still seem to be entitled to notice to attend the meetings of the arbitrators: *In re Kyle et al*, 2 Jur. 760. The revocation, when duly made, is a good answer to an application to make the submission a rule of court: *In re Drury and Lyne*, 19 L. T. N. S. 763.

(*e*) *From time to time:* see *Leslie* v. *Richardson*, 17 L. J. C. P. 324, as to meaning of these words.

(*f*) It has been, after some doubt, established that this clause, although annexed to and immediately following the provision in reference to revocations, applies equally to all cases, whether there has been an attempt to revoke or not: see *Doe d. Jones et ux.* v. *Powell*, 7 Dowl. P. C. 539; *Parbery* v. *Newnham*, 7 M. & W. 378; *Lambert et al* v. *Hutchinson*, 2 M. & G. 858. The right of the court or a

Witnesses may, by order of the Court, be compelled to attend arbitrators.

180. (*g*) In case of a reference by any such rule or order, or by any such submission as aforesaid, and in case of an application to the Court by which such rule or order was made, or to the Court mentioned in such agreement, or to any Judge thereof, or if no such Court be mentioned in the submission and there be no restriction of the jurisdiction as aforesaid, then to one of the Superior Courts or a Judge thereof, setting forth the place of residence of any witness whose presence is desired, such Court or Judge may by a

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judge to interfere where a special power to enlarge has been conferred upon the arbitrator is not clear, though the preponderance of authority seems to be in favor of the proposition. *Held* where there was power in the arbitrator to enlarge the time, but the time was *intentionally* allowed to expire, that the court could not interfere: *Doe d. Jones et ux* v. *Powell*, 7 Dowl. P. C. 539. *Contra—Newman* v. *Parbury*, 9 Dowl. P. C. 288. *Semble, per* Tindal, C. J.: "Where the rule or order of reference contains *no power* to enlarge the time, the above enactment is a very useful provision, as it enables the court or a judge to supply the defect. But I doubt whether the statute empowers the court or a judge to interfere where the arbitrator has power to enlarge, but has *inadvertently* permitted the time to expire without exercising his power:" *Lambert et al* v. *Hutchinson*, 2 M. & G. 860; see also *In re Salkeld and Slater*, 12 A. & E. 767; *Davison* v. *Gauntlett et al*, 1 Dowl. N.S. 198. In a more recent case the court expressed a decided opinion that the time might be enlarged by a judge, though the arbitrator had the power but neglected to exercise it: *In re Browne and Collyer*, 2 L. M. & P. 470, *per* Wightman, J.; see also *Leslie* v. *Richardson*, 6 D. & L. 91; *Doe d. Mays* v. *Cannell*, 22 L. J. Q. B. 321. If no power be conferred upon the arbitrator, it is clear under our statute that the court has power to enlarge the time upon a proper application: *Jones et al* v. *Russell*, 5 U. C. Q. B 303, *per* Robinson, C. J. The validity of an award made by an arbitrator after the time limited in his authority for making it, but before enlargement by the court, is very doubtful: *In re Browne* v. *Collyer*, 2 L. M. & P. 470. It has been intimated that where a verdict has been taken subject to a reference, the court can compel either of the parties to consent to an enlargement under peril of the verdict being allowed to stand: see *Wilkinson* v. *Time*, 4 Dowl. P. C. 37. But there are cases where the arbitrator made his award after the time had elapsed, and the court notwithstanding enlarged the time: see note *t* to section 172. It is not necessary that the rule be drawn up on reading the rule making the order of reference a rule of court: *Browne* v. *Collyer*, 20 L. J. Q. B. 426. If issued on the third or fourth day of term, will relate back to the first day of term: *Hawke* v. *Duggan*, 5 U. C. Q. B. 636. A distinction between enlargements by the arbitrator and enlargements by the court should be noted. Though the arbitrator must exercise his power of enlargement during the period limited for making his award, the period within which the court will make an order for the purpose is only limited by its own discretion: *Newman* v. *Parbury*, 9 Dowl. P. C. 288; *Leslie* v. *Richardson*, 12 Jur. 730, s. c. 6 D. & L. 91; *Bowen* v. *Williams*, 6 D. & L. 235. But the court will seldom interfere except in cases where the arbitrator has by accident let slip the precise day: *Andrews* v. *Eaton*, 7 Ex. 223, *per* Parke, B.; see also *Edwards* v. *Davies*, 18 Jur. 448; *Leslie* v. *Richardson*, 6 C. B. 378; *In re Salkeld and Slater*, 12 A. & E. 767.

(*g*) Taken from our repealed Stat. 7 Wm. IV. cap. 3, s. 30, which was a transcript of the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 40.

rule or order for that purpose command the attendance and examination of any witness (*h*) named in such rule or order, and also the production of any documents mentioned therein. (*i*) 7 Wm. IV. c. 3, s. 30.

Neglect so to do, a contempt of court.

181. (*j*) In addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, be served, either together with or after the service of such rule or order, the disobedience of any such rule or order shall be deemed a contempt of Court, but the person whose attendance is required shall be entitled to the like conduct money, and payment of expenses, and for loss of time, as for and upon attendance of any trial; (*k*) and no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend for more than two consecutive days, to be named in such order. (*l*) 7 Wm. IV. c. 3, s. 30.

(*h*) Before the English statute, the court refused to compel the attendance of a witness although the reference was by order of nisi prius: *Wansell* v. *Southwood*, 4 M. & R. 359. The court may now grant a habeas corpus for the attendance of a prisoner in close custody: *Graham et al* v. *Glover et al*, 5 E. & B. 591; *Marsden* v. *Overbury*, 18 C. B. 34.

(*i*) The affidavit upon which application is made for an order for the attendance of witnesses and production of documents before arbitrators must show that the documents required are such as the witnesses would be compelled to produce at a trial: *Carrall et al* v. *Ball*, Chambers, 3 U. C. L. J. 12. The application ought in general to be made to a judge in chambers and not to the full court: *O'Connor* v. *Balfe*, 3 Ir. L. R. 66. The rule or order is generally absolute in the first instance: *In re Guarantee Society and Levy*, 1 D. & L. 907; *Gallena* v. *Cotton*, 3 U. C. L. J. 47; *In re Ricketts*, 9 L. T. N.S. 405.

(*j*) Taken from our repealed Stat. 7 Wm. IV. cap. 3, s. 29, which was a transcript of the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 40.

(*k*) The following things are made necessary before the party served can be proceeded against for contempt:—
1. Service of the rule, &c. 2. Exhibition of the original. 3. Service of an appointment of the time and place of attendance, signed by one at least of the arbitrators or by the umpire. 4. Payment of conduct money, &c.

(*l*) Witnesses under ordinary subpœnas are in general required to attend from day to day till called upon, with the right of daily demanding fees; but witnesses subpœned before arbitrators are not bound to attend for more than two consecutive days, and then must be named in the order, &c., directing their attendance.

When witnesses may be sworn by arbitrators.

182. (*m*) In case in any rule or order of reference, or in any such submission to arbitration as aforesaid, it is ordered or agreed that the witnesses upon such reference shall be examined upon oath, (*n*) the arbitrator or umpire, or any one arbitrator, shall administer an oath to such witnesses, or take their affirmations in cases where an affirmation is allowed by law instead of an oath. (*o*) 7 Wm. IV. c. 3. s. 31.

SUMMARY APPLICATIONS AND PROCEEDINGS. (*oo*)

(*m*) Taken from our repealed statute, 7 Wm. IV. cap. 3, s. 31, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 41.

(*n*) A clause in an order of reference that the witnesses shall be sworn before a judge, or assize, or commission, does not exclude the general power of the arbitrator to administer the oath under this section: *Hodsoll* v. *Wise*, 4 M. & W. 536; and under it in this respect the court and judge have concurrent jurisdiction: *James* v. *Attwood*, 5 Bing. N. C. 628. Where the order of reference provided merely that the arbitrator should be at liberty, if he should think fit, to examine the parties and their witnesses on oath, it was held he was not bound to do so: *Smith* v. *Goff*, 14 M. & W. 264. Where witnesses on one side have been examined by the arbitrator not on oath, the other party waives the objection, if any, by calling witnesses and examining them also not on oath: *Allen* v. *Francis*, 4 D. & L. 607, note.

(*o*) If the submission provide that "the witnesses be examined on oath," this does not entitle the arbitrator to receive written affidavits: *Banks* v. *Banks*, 1 Gale, 46. It is different where there is a reference by rule of court to the master: *Noy* v. *Reynolds*, 4 N. & M. 483. In the latter case the master is not entitled to receive *viva voce* evidence unless specially empowered by the court so to do: *Ib.*

(*oo*) The leading steps of an action from summons to verdict having been disposed of, the act now proceeds to lay down rules for incidental proceedings. Of these the most important because the most common are proceedings by affidavit. In order to satisfy a legal tribunal of the truth or falsity of a fact in dispute, there are two modes in ordinary use—first, affidavits; second, oral testimony. Hitherto the former was almost the only mode allowable in the discussion of incidental proceedings. Whereas the latter was almost the only mode at the trial of an action. To the former many causes of objection have been found to exist, which cannot be urged against the latter. The party who makes an affidavit is not before the court, the grounds of his belief are not canvassed, his circumstances and character usually unknown, and yet wanting these necessary aids to the discovery of truth, affidavits have been received as absolute testimony. And this was not all. Two other grave and striking objections forced themselves upon the attention of the commissioners. The courts not only refused to try disputed questions of fact on affidavit, but actually restricted the party moving to the particulars disclosed in the affidavits filed when he made his motion. This rule placed the party moving entirely at the mercy of an unscrupulous opponent. While the former was tied up the latter had the advantage of swearing last, a privilege that might be and often was abused. Whether from accident or design the result was too often the defeat of truth and the triumph of falsehood. Cases, too, occurred in which the truth was kept back because no person other than an officer of the court was compellable to give evidence by affidavit. In such cases the effect of a bribe or a threat was strong enough to neutralize the most just

183. (*p*) Upon motions founded on affidavits, (*q*) either party with leave (*r*) of the Court or a Judge, (*s*) may make affidavits in answer to the affidavits of the opposite party, (*t*)

Affidavits on new matter in answer to affidavits.

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applications. To remedy these defects in our judicial system it is enacted in ss. 183 to 195 following, amongst other things, that deponents and other witnesses may be orally examined, that necessary documents may be produced, that property may be inspected, that affidavits in answer to fresh matter may be received, that unwilling witnesses may be compelled to testify, that interrogatories may be administered to either party in the cause, and that discovery may be made of documents in the possession of either when relating to the matter in dispute. These changes have been effected in consequence of the suggestion of the Common Law Commissioners, in their second report, ss. 28 to 42, inclusive.

(*p*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 45. Founded upon the second report of the Common Law Commissioners, section 30.

(*q*) *Upon motions*, &c. the use of the words "court or a judge" in this section shows an intention that the word "motions" shall apply to applications before a single judge as well as to the full court.

(*r*) *With leave, i. e.* without leave the practice shall be as before the passing of this act.

(*s*) *Court or a judge, i. e.* of the court when motions are made in court, and of a judge when motions are made before a judge. *Qu.* Can there be an appeal from the decision of a judge in chambers who declines to receive affidavits in answer to what the party tendering them considers to be fresh evidence? The next following section speaks of "their or his discretion," words which in general exclude a direct appeal from a judge to full court, when the former has exercised his discretion. There does not appear to be in this section anything that can be held to prevent a party whose application to a judge in chambers has been dismissed from appealing to the full court in cases where before this act he might have done so: see *Tilt* v. *Dickson*, 4 C. B. 736; *Peterson et al* v. *Davis*, 6 C. B. 235; *Ilderton* v. *Burt*, *Ib.* 433; *Hawkins* v. *Akrill*, 14 Jur. 1060; *Dodgson* v. *Scott*, 6 D. & L. 27; see also note *w* to section 48.

(*t*) The practice in England under the section which corresponds with this is in a most unsettled state. The three superior courts differ as to the time when and the manner in which applications should be made. In the Queen's Bench it appears to have been ruled that a party wishing to file affidavits in answer to new matter must make a substantive motion: so assumed in *Wood* v. *Cox*, 16 C. B. 494. In the Common Pleas there has been a distinct refusal to adopt this construction of the act: *Wood* v. *Cox*, 16 C. B. 491; and an opinion was by that court intimated that the proper mode of carrying the act into effect must be by an exercise of discretion upon a rule coming on for argument: *Simpson* v. *Sadd*, 15 C. B. 760, note *b*; see also *Hayne et al* v. *Robertson*, 16 C. B. 554; *Harris* v. *The Cockermouth and Workington Railway Co.*, 6 W. R. 19; and *Swinfen* v. *Swinfen*, 1 C. B. N.S. 364. The Queen's Bench and Common Pleas thus differing in opinion, a hope was expressed that the Exchequer, if the question should arise before it, would settle the practice. Afterwards the question did arise before the court of Exchequer, and Martin, B., said, "we cannot lay down any rule on the subject; every case must depend on its own circumstances;" and Pollock, C. B.: "It may turn out that a man who comes with materials sufficient for a rule in the first instance, is met by an ambiguous answer, he may desire to answer that, and one of the benefits of the enactment is that he may do so:" *Pritchard* v. *Leech*, 2 Jur. N.S. 475. Thus the matter stands. As a general rule in our courts the affidavits in answer should be shown to the party moving before argument. If thereupon

upon any new matter (*u*) arising out of such affidavits, (*v*) subject to all such rules as have been or may be made respecting such affidavits. (*w*) 19 Vic. c. 43, s. 169.

Court or Judge may, on hearing

184. (*x*) Upon the hearing (*y*) of any motion or Summons, (*z*) before either of the Superior Courts or any Judge

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the latter desire to file affidavits in reply he may upon a substantive application obtain leave to do so, and in fact do so before the case comes on to be heard. It is, however, in the discretion of the court or judge to grant such leave at the time of argument, and in consequence defer further discussion until some future day.

(*u*) To define by rule what shall be considered "new matter" is quite impossible. Each application must stand or fall upon the circumstances of the case. On a rule for a new trial on the ground of the improper reception of evidence, the affidavit in answer alleged that it was withdrawn and not refiled, and *held* that an affidavit in reply showing how it came to be withdrawn was not receivable: *Whitehouse et al* v. *Hemmant*, 27 L. J. Ex. 295.

(*v*) The effect of the section is only to permit affidavits to be filed in *reply* to affidavits made in *answer* to affidavits first filed by the party seeking to reply. Wherever before this act a thing might be done as of course upon affidavit, for instance, it is presumed that now no more than formerly will there be any right to deny the material facts on affidavit: *Copeland* v. *Child*, 22 L. J. Q. B. 279; see further *Blewitt* v. *Gordon*, 1 Dowl. N. S. 815.

(*w*) In consequence of the difference of opinion in England (see note *t* to this section), some general rule is very much needed. None such has yet been made either in England or here.

(*x*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 46. The powers contained in this section are such as can only be exercised under it. They are not in any manner exercisable as incident to the jurisdiction of the court at common law: see *The Queen* v. *The Inhabitants of Upton St. Leonard's*, 10 Q. B. 837, *per* Lord Denman, C. J.

(*y*) *Upon the hearing, &c.* The court will not make the rule absolute for the first instance, though the witness be at the point of death: *Thomas* v. *Baron Von Stutterheim*, 5 W. R. 6. Notice at least must be given: *Bennett* v. *Bayes et al* 1 L. T. N.S. 69. The court or judge may require either explanation of affidavits filed or proof additional thereto. This may consist either of the production of documents or of witnesses, with reference to a subject matter under hearing: *Cockerell* v. *The Van Diemen's Land Co.*, 16 C. B. 255. The section points out modes of securing evidence for the information of the court or a judge, and *not* of the parties: see *Ashcroft* v. *Foulkes*, 18 C. B. 261.

(*z*) "Motion or Summons." The word motion is here used to embrace applications to the court, which may not be, strictly speaking, for rules. In other sections "motion" seems to express either a proceeding *in banc* or before a judge: section 183. The powers of the court and a judge in chambers appear to be concurrent. Where an application of a pressing nature for the examination of a witness *in extremis* was not made to a judge in chambers, because as alleged no order could be there obtained in the first instance, but was made directly to the court for a rule absolute in the first instance, the court said whatever power they had was also vested in the judge at chambers, and recommended the application to be made there: *Thomas* v. *Baron Von Stutterheim*, 28 L. T. Rep. 64. The section appears to apply only to interlocutory applications, and the court refused to ex-

thereof, having jurisdiction in the case, (*a*) such Court or Judge, at discretion, (*b*) and upon such terms as they or he thinks reasonable, may from time to time, (*c*) order to be produced, such documents (*d*) as they or he thinks fit, and may order such witnesses, as they or he thinks necessary, to appear and be examined *vivâ voce* (*e*) before such Court or Judge, or before a Judge of any County Court, or before any Clerk or Deputy Clerk of the Crown, (*f*) and upon reading the report of the Judge of the County Court, or Clerk or Deputy Clerk of the Crown (*as the case may be*), or if no such reference be made, then upon examining such documents or hearing such witnesses by the Court or Judge in which, or before whom such motion or Summons may be pending, such Court or Judge may make such rule or order

any motion or summons, order the production of documents or *vivâ voce* examinations.

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amine a witness on the argument of a rule for a new trial: *Chapman* v. *Monmouthshire Railway & Canal Co.* 30 L. T. Rep. 308; *Bennett* v. *Bayes et al*, 1 L. T. N.S. 69.

(*a*) *Court or Judge.* Relative powers: see note *w* to section 48.

(*b*) A judge's discretion exercised in cases within his jurisdiction cannot generally be appealed from: see *Woolmer et al* v. *Devereux*, 2 M. & G. 758; *Shaw* v. *Holmes*, 3 C. B. 952; see further note *w* to section 48.

(*c*) *From time to time.* These words taken in connection with "by such rule or order, or any subsequent rule or order, command, &c.," in the next succeeding section, indicate an intention to allow documents or witnesses to be called for as often as thought necessary during a hearing.

(*d*) Where on showing cause against a rule obtained by a plaintiff to rescind a judge's order, which directed the master to review his taxation, it was objected on the part of the defendant that there were no materials before the court to show what the taxation had been, the defendant's counsel saying he had an answer on the merits, the court allowed the master's allocatur to be produced at once without imposing any terms: *Ashcroft* v. *Foulkes*, 18 C. B. 261. Considering the practice authorized by this section as being more for the information of the court than of the parties, it may be that documents in the possession of either party, though privileged as against his opponent, might be ordered for the purposes of this section to be produced: see *Wood* v. *Morewood*, 9 Dowl. P. C. 44; *Coates et al* v. *Birch*, 2 Q. B. 252.

(*e*) The examination of witnesses is to be *viva voce;* but beyond this as to the proceedings upon an examination no information is given: see *Cockerell* v. *Van Diemen's Land Co* 16 C. B. 256. Whether there will be the right to cross-examine and re-examine is not decided. It is presumed that the right exists. "Examined" must mean more than "questioned by one side:" but see note *j* to section 185. It is not clear whether the strict rules of evidence as to leading questions, &c., are applicable. The process for wilful disobedience is attachment: see section 186.

(*f*) The application should be made on the affidavit of the party applying: *Fischer* v. *Hahn*, 13 C. B. N.S. 659.

And may make rule or order thereon.

as may be just, (*g*) and in cases within the jurisdiction of a County Court, the Court or a Judge therein having jurisdiction in the case, may order the production of documents or the attendance of witnesses before such Court or Judge, or before the Clerk of such County Court, and upon hearing such evidence or reading the report of the Clerk, may make such order as may be just in like manner as if such proceedings were had in one of the Superior Courts. (*h*) 19 Vic. c. 90, s. 16; 19 Vic. c. 43, s. 170.

Power by rule or order to compel attendance of witnesses or production of documents in such cases.

185. (*i*) Any such Court or Judge may, by such rule or order, or by any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, (*j*) or may command the production of any writings or other documents to be mentioned in such rule or order, (*k*) and in the case of a Judge, he may, if necessary or convenient to do so, direct the attendance of any such witness to be at his own place of abode (*l*) or elsewhere. (*m*)

(*g*) *i. e.* Upon *hearing* the evidence when the witnesses have been examined in the presence of the court or judge, or upon reading the report when the examination has taken place before one of the officers named. The rule or order to be made in the manner directed by section 186, and to have the effect therein enacted

(*h*) This is simply an extension to county courts of the practice declared in the previous part of the section in regard to the superior courts.

(*i*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 47.

(*j*) *i e.* Either before the court or a judge or before any one of the officers mentioned in the preceding section. This section is, if possible, less explicit as to the mode of examination than the preceding. There it is directed that the examination may be *viva voce*. But neither there nor here is it declared whether in other respects, as to cross-examination of witnesses, &c., the practice shall be like that of proceedings at nisi prius. It may be a question whether the right to cross-examine can exist in cases within these sections in the absence of express provision in the rule or order authorizing the examination: see *Hargrave* v. *Hargrave et al*, 5 D. & L. 151; *Nicol* v. *Alison*, 11 Q. B. 1006; *Simms* v. *Henderson*, *Ib.* 1015.

(*k*) It is enacted in the Eng. C. L. P. Act that the rule or order when obtained shall be proceeded upon in the same manner as a rule of court granted under Eng. Stat. 1 Wm. IV. cap. 22, a statute not in force in this Province.

(*l*) *At his own place of abode, &c.* *Qu.* Do the words "his own" relate to the abode of the witness or of the judge? The more immediate antecedent of "his" is "such witness." This part of the section is copied from Eng. Stat. 1 Wm IV. cap. 22.

(*m*) The examination may be either before the court or judge, *or* the judge of a County Court, *or* any clerk or deputy clerk of the crown, &c.: section 184. The word "elsewhere" may mean the office of one or other of the above-named functionaries, who alone are empowered to examine. But the words "if necessary

Disobedience to be a contempt of Court.

186. (*n*) If in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, be also served together with or after the service of such rule or order, the wilful disobedience of any such rule or order shall be a contempt of Court, and the order in the case of a Judge's order having been made a rule of Court, proceedings may be forthwith had by attachment. (*o*) But—1. Every person whose attendance is so required, shall be entitled to the like payment for attendance and expenses as if he had been subpœned to attend upon a trial; (*p*) 2. And no person shall be compelled to produce under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause; (*q*) 3. And the Court or Judge, or person appointed to take the examination, may adjourn the same from time to time as occasion may require. (*r*) 19 Vic. c. 43, s. 171.

Witnesses to be paid expenses.

What documents need not be produced.

Examinations may be adjourned.

187. (*s*) The Sheriff, Gaoler, or other Officer (*t*) having

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or convenient" give to the word "elsewhere" a more extensive signification. In the case of a sick witness an examination at his house might certainly be both necessary and convenient.

(*n*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 47.

(*o*) This part of the section declaring in what manner witnesses shall be punished for disobedience is substantially the same as 1 Wm. IV. cap. 22, s. 5.

(*p*) If conduct money be given to the witness with the appointment, and he afterwards and before he has done anything in relation to his attendance at the place appointed, receive notice not to attend, the conduct money may, it seems, be recovered back from him: *Martin* v. *Andrews*, 28 L. T. Rep. 122.

(*q*) As to which see Chit. Arch. 12 ed. 354.

(*r*) This is from Eng. C. L. P. Act 1854, s. 47. As nothing specific is enacted as to the mode of procedure upon examinations to be had under this section, in cases of doubt the rule or order to be made should prescribe the mode: see *McCombie* v. *Anton*, 6 M. & G. 27; *Scott* v. *Van Sandau*, 8 Jur. 1114; *Williamson* v. *Page*, 3 D. & L. 14.

(*s*) Apparently an original but very necessary provision. Without it there might be no means of securing the attendance of a prisoner whose testimony should be required at examinations authorized by this act. Though if the intention of the legislature to be gathered from any particular section be otherwise clear that prisoners should be examined as witnesses, the courts no doubt would grant the *habeas* in order that that intention might be carried into effect: see *Graham et al* v. *Glover et al*, 5 El. & B. 591; see also *Marsden* v. *Overbury*, 18 C. B. 34.

(*t*) *Or other officer.* *Qu.* Will this embrace the superintendent of a lunatic asylum, or any other than officers in the service of the courts?

How prisoners may be brought up to give evidence.

the custody of any prisoner, (*u*) may take such prisoner for examination under the authority of this Act, (*v*) by virtue of a Writ of *Habeas Corpus* to be issued for that purpose, (*w*) which Writ may be issued by the Court or Judge, (*x*) under such circumstances and in such manner as such Court or

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(*u*) *Qu.* In execution on final as well as on mesne process—in civil as well as in criminal cases?

(*v*) *i. e.* To any examination authorized by this act?

(*w*) Before this act upon the subject matter of the section under consideration, there were in Canada two statutes, 3 Wm. IV. cap. 2, s. 8, and 4 & 5 Vic. cap. 24, s. 11, both of which are consolidated in section 76 of Con. Stat. Can. cap. and 99, as consolidated read as follows: "When the attendance of any person confined in the penetentiary or in any other prison or gaol in this Province or upon the limits of any gaol is required in any *court of assize and nisi prius*, or of *oyer and terminer*, or *general gaol delivery*, or other court, *the* court before whom such prisoner is required to attend may make *order* upon the warden of the penetentiary or upon the sheriff, gaoler, or other *person* having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him, and such person shall thereupon instantly convey such prisoner to the place where the court issuing such order is sitting, there to receive and obey such further order as to the said court may seem meet; but no prisoner confined for any debt or damages in a civil suit shall be thereby removed out of the district (or county) where he is so confined." A comparison of this section with the one here annotated will show the following distinctions: Under the former—1. An order is sufficient for the removal without a *habeas*; 2. The removal can only be to one or other of the courts named; 3. That court only has the power to make the order; 4. The order may be delivered to any "person" having the custody of the prisoner; 5. No prisoner for debt in a civil suit shall be removed by such order without the limits of the county or union of counties in which he is confined. But previous to these statutes, and independently of any statute now extant, the courts granted writs of *habeas corpus ad testificandum*: *Foster*, 396; *Standard* v. *Baker*, M. T. 26 Geo. III. K. B, Tidd's Pr. 9 Edn. 809; *Gerry* v. *Hopkins*, 2 Ld. Rayd. 851; *Leigh* v. *Sherry*, 2 Moore, 33. On an affidavit that the prisoner was a material witness and willing to attend: *Rex* v. *Roddam*, 2 Cowp. 672, and the writ has been issued to bring up a prisoner before an election committee of the House of Commons: *In re Price*, 4 East. 587; *Rex* v. *Pilgrim*, 4 Dowl. P. C. 89; but refused as to a prisoner of war: *Furly* v. *Newnham*, Doug. 419; and as to a prisoner confined for high treason: *Langston et al* v. *Cotton*, 2 Pea. Ad. Ca. 21. The proper course in such cases being an application to the secretary of state: *Ib.* Though as to sailors on board a man-of-war, if willing to attend, the writ might be granted: *Rex* v. *Roddam*, 2 Cowp. 672. So as to a lunatic in an asylum, upon an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up: Com. Dig. "Testmoigne, Witness," A. 1. So as to prisoners in execution: *Rex.* v. *Burbage*, 3 Burr. 1440; but not where the application is a mere contrivance to remove the prisoner: *Ib.* The writ may be to produce the prisoner before a coroner if there be a strong case of necessity: *Ex parte Wakley*, 14 L. J. M. C. 188.

(*x*) *Court or Judge.*—According as it is intended that the examination shall take place before the one or other. The court should not be troubled with such applications so long as they can be disposed of by a judge in chambers: see note *w* to section 48.

Judge may by law issue a Writ of *Habeas Corpus ad Testificandum*. (*y*) 19 Vic. c. 43, s. 173.

Persons refusing to make affidavit may be compelled to appear and be examined or to produce papers.

188. (*z*) Any party to a civil action or other civil proceeding (*a*) requiring the affidavit of a person who refuses to make it, (*b*) may apply by Summons for an order upon such person to appear and be examined (*c*) upon oath before a Judge, or any other person to be named in the order to whom it may be most convenient to refer the examination, as to the matters concerning which he has refused to make an affidavit, (*d*) and a Judge may, if he thinks fit, make such order for the attendance of such person for the purpose of

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(*y*) The application ought generally to be made to a judge in chambers: *Fennell* v. *Tait*, 1 C. M. & R. 584; *Gordon's Case*, 2 M. & S. 582; *Browne* v. *Gisborne*, 2 Dowl. N. S. 963; upon an affidavit intitled in the court and cause, *Rex* v. *Layer*, Fort, 396, stating the witness to be in custody and willing to attend: *Regina* v. *Murray*, 2 Tidd's Pr. 9 Edn. 908. The writ must be signed by the judge when granted by a judge: *Rex* v. *Roddam*, 2 Cowp. 672; *Gibb* v. *King*, 1 C. B. 1; 1 & 2 Ph. & M. cap. 13, s. 7, and be left with the officer in whose custody prisoner is detained: 2 Tidd's Pr. 9 Edn. 810.

(*z*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 46. Founded upon the second report of the Common Law Commissioners, section 30.

(*a*) This section is restricted to proceedings in civil cases: see *Attorney-General* v. *Radloff*, 23 L. J. Ex. 240.

(*b*) The gist of the application is the refusal to make an affidavit when required of him by any party to an action.

(*c*) *Summons.* The use of this word denotes the tribunal to which application should be made, viz., to a judge in chambers. The subject matter of the section is new. There is no inherent jurisdiction in the courts to entertain the application, else the section would not have been required: see remarks of Coleridge, J., in *Harvey* v. *O'Meara*, 7 Dowl. P. C. 735. It is from this inferred that the court if disposed to entertain applications at all under this section will not do so in the first instance. The right to entertain an application by way of appeal is yet a question to be decided: see *Stokes* v. *Grissell*, 2 C. L. Rep. 730; and note *w* to section 48. The use of the word "summons" also denotes a clear intention that some party should be called upon to show cause. Whether the opponent or applicant, who may be either plaintiff or defendant in an action, or the witness who refuses to make affidavit is not stated. Reason indicates the latter.

(*d*) The object of the section seems to be to compel a person refusing to make an affidavit to be examined *viva voce*: *Cockerell* v. *Van Diemen's Land Co.*, 16 C. B. 261, *per* Cresswell, J. It is somewhat analagous to a subpœna to compel evidence: *Ib. per* Jervis, C. J. An arbitrator having refused to make an affidavit was ordered to attend before the master, to be examined as to whether he had enlarged the time for making the award within the prescribed time: *Roberts* v. *Evans*, 6 B. & S. 1. So where in a garnishee proceeding an arbitrator refused to make an affidavit as to the mode by which his award was arrived at: *In re Tate and the Corporation of the City of Toronto*, 3 Prac. R. 181.

being examined as aforesaid, (*e*) and for the production of any writings or documents to be mentioned in such order, (*f*) before the person therein appointed to take the examination, and may therein impose such terms as to such examination and the costs of the application and proceedings thereon as he thinks just, (*g*) and such order shall be proceeded upon in like manner as the order mentioned in the one hundred and eighty-fourth and one hundred and eighty-fifth sections of this act. (*h*) 19 Vic. c. 43, s. 174.

Provision for the discovery of

189. (*i*) Upon the application of any party (*j*) to a cause

(*e*) *As aforesaid, i. e.* upon oath. *Qu.* Is there power to order the examination of a witness without the jurisdiction of the courts under this section? As in such a case there would be no power to punish for disobedience, it is apprehended no order would be made.

(*f*) Before documents can be ordered to be produced the judge must be satisfied that there are documents in the possession of a party, and also probably that the documents are such as the party might be compelled to produce at a trial.

(*g*) The propriety or impropriety of imposing terms is a matter for the consideration of the judge upon the whole circumstances of the case before him. If the witness groundlessly and pertinaciously have refused to make the affidavit required of him, he may be denied conduct money.

(*h*) Disobedience under this section will, it is presumed, subject the party to attachment.

(*i*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 50. Founded upon the second report of the Common Law Commissioners, sections 5, 33–36 inclusive. The object of this section is to enable either party to a suit at law to obtain inspection and discovery of documents in the possession of his adversary without having recourse to a court of equity for that purpose. The principle involved is that which the commissioners asserted as an indisputable proposition, viz., that every court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction. Powers are conferred upon courts of common law which before they did not possess. The practice of these courts as to inspection and discovery of documents is a most important one, and one which in its present efficiency is almost wholly the creature of statute law. Inspection and discovery are not by any means synonymous terms, though sometimes so used. An application for inspection of a document pre-supposes a knowledge that such document exists; but an application for discovery presupposes ignorance of the document, a knowledge of which it is sought to obtain. Now, although inspection might in some cases be had upon application to courts of common law under their common law jurisdiction, and in some cases by statute, (see section 197 and notes thereto,) discovery as such could not be obtained.

(*j*) It is apprehended that upon suggestion of the death of the original party his representative may make the application: sections 131, 134-138. The application may be that of "either" plaintiff or defendant, which may be taken to extend to one of several plaintiffs or defendants. The time within which application should be made either for inspection or discovery is not limited. The application, if by plaintiff, must be after commencement of action, and may be before issue joined: *Rogers* v. *Turner*, 21 L. J. Ex. 8; and if by defendant, before plea pleaded: *Forshaw et al* v. *Lewis et al*, 10 Ex. 712; *Jones* v. *Hargreaves*, 29 L. J. Ex. 368.

or civil proceeding (*k*) stating his belief upon affidavit (*l*) that any document (*m*) to the production of which he is entitled for the purpose of discovery or otherwise, (*n*) is in the documents in the possession of the adverse party.

(*k*) "Cause *or other civil proceeding*" described in section 197 as "an action *or legal proceeding*." The words "or *other* civil proceeding," superadded to "cause," must mean some proceeding other than a cause. Probably proceedings by mandamus to enforce civil rights are embraced: *Regina* v. *Ambergate, &c. Railway Co.* 17 Q. B. 957; *Regina* v. *The York and North Midland Railway Co.* 19 L. T. Rep. 108; see further *Attorney-General* v. *Radloff*, 23 L. J. Ex. 240. Interpleader issues are within the principle of the statute: *White* v. *Watts*, 31 L. J. C. P. 381. The documents must be relevant to the cause or other court proceeding: *Mansell* v. *Feeney*, 2 Johns. & H. 320.

(*l*) The affidavit must be made by a party to the cause or other proceeding: *Herschfield* v. *Clark*, 25 L. J. Ex. 113; *Christophersen et al* v. *Lotinga*, 33 L. J. C. P. 121. But where by the act of God an affidavit by the party himself is impossible, it is apprehended that a *cy pres* compliance with the statute may be allowed, for instance an affidavit by the attorney: *Scott et ux.* v. *Macawley*, 4 Ir. L. R. 40. Thus, it has been held that where a corporation aggregate is a party to the cause, the affidavit may be made by the attorney to the corporation: *Kingsford* v. *The Great Western Railway Co.* 16 C. B. N. S. 761. As to where upon party applying sues or defends in person: see *Oxlade* v. *The North Eastern Railway Co.* 12 C. B. N.S. 250. And though made by the party himself, if defective, it may be that the court would receive a supplementary affidavit by another person: *Hewett* v. *Webb*, 28 L. T. Rep. 121. The affidavit may be one of belief. If the application be for a discovery, no more can be in reason expected. But an affidavit by deponent that he was "*advised*," not expressing belief, has been held insufficient: *Pepper* v. *Chambers*, 7 Ex. 226.

(*m*) An affidavit that the opposite party has in his possession, &c., "certain documents," is insufficient. Some particular document must be signified. "*Any* document" in the act means "*some* document" to be specified. The court before granting the application must be informed not only of the question in the cause, but of the nature of the documents in respect of which the application is made: *Hewett* v. *Webb*, 28 L. T. Rep. 121; *Bray* v. *Finch*, 1 H. & N. 468; *Thompson et al* v. *Robson et al*, 2 H. & N. 412; *Houghton* v. *London & County Assur. Co.* 17 C. B N.S. 80; *Evans* v. *Louis*, L. R. 1 C. P. 656. If in answer to interrogatories under section 190, a party admit certain documents to be in his possession, the court will not grant a rule upon him to give copies thereof, except upon application under this section: *Scott* v. *Zygomala*, 4 E. & B. 483.

(*n*) It must appear that he "is entitled" to the production of the documents "for the purpose of discovery *or otherwise*," which last words may at least include "inspection." *Qu.* Have these words the effect of allowing applications under this section in cases in which discovery could not be had in equity: see *Osborn* v. *The London Dock Co.* 10 Ex. 698; *Whateley* v. *Crawford*, 25 L. J. Q. B. 163. It seems that if the application for inspection be one in which, if a bill were filed before the C. L. P. Act, no discovery could be had, inspection will be refused. Thus it has been held that the demandant in an action of dower against a *bona fide* purchaser for value is not entitled to inspect the deed of conveyance to her husband, then being in the hands of the purchaser: *Gomm* v. *Parrot*, 30 L. T. Rep. 65. Discovery can only be had of documents relating to the matter in dispute and which support the case of the party applying: *Scott* v. *Waller*, 22 L. J. Q. B. 404. But inspection or discovery of documents may be had, which *bona fide* make out applicant's case, although that may merely be the negative of his opponent's: *Smith* v. *The Duke of Beaufort*, 1 Hare, 507. Where the opposite party has in

his possession a document which does not constitute his own case and will support that of the party applying, the latter is entitled to an inspection of it: *Sneider* v. *Mangino*, 7 Ex. 229. Documents equally support the case of applicant, whether they sustain it *prima facie* or contradict the case set up by his opponent: *Ib.* The right to inspect is not limited to documents necessary to make out a *prima facie* case, but extends to any documents which tend to strengthen or support it: *Coster* v. *Baring*, 2 C. L. Rep. 811. The documents must relate to a question in the cause: *Sneider* v. *Mangino*, 7 Ex. 229. Applications to procure evidence against a person not a party to the cause will be refused: *Ib.* The application must be *bona fide* and for the purpose of the suit. And the suit must be brought *bona fide*, and for the purposes other than the discovery of documents to found an action against a third party: *Temperley* v. *Willett*, 27 L. T. Rep. 103; and not against the defendants ostensibly to try a question in dispute, but in reality to procure evidence from one against the other: *Ib.* The general rule undoubtedly is, that a party has a right to the production of documents sustaining his case affirmatively, but not to those which form part of his adversary's case: *Hill* v. *Philp*, 7 Ex. 232; *Riccard et al* v. *Blanuri et al*, 4 El. & B. 329; *Wright* v. *Morrey*, 11 Ex. 209. See further *Galsworthy* v. *Norman*, 21 L. J. Q. B. 70; *Compton* v. *Earl Grey*, 1 Y. & J. 154; *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88. But it is no objection to the inspection of the document in the possession of a party that it relates to his own case if it also sustains the case of the party applying: *The London Gas Co.* v. *The Vestry of Chelsea*, 5 Jur. N.S. 469; *Bayley* v. *Griffiths*, 31 L. J. Ex. 477; *Coster* v. *Baring*, 2 C. L. Rep. 811. Correspondence between the parties and their agents have been allowed to be produced: *Coleman et al* v. *Truman et al*, 28 L. J. Ex. 457, *per* Pollock, C. B. But letters written by a party to an action, to his agent abroad, after the commencement of the action, for the purpose of the suit, are protected: *Bank of India, Australia and China*, v. *Rich*, 2 N. R. 316; see also *Hooper* v. *Gumm*, 2 Johns. & H. 602. So the opinions of counsel: *Jenkyns* v. *Bushby*, L. R. 2 Eq. 547; *Underwood* v. *Secretary of State for India*, 35 L. J. Ch. 545; *Walsham* v. *Stainton*, 2 H. & M. 1; *Nicholl* v. *Jones*, *Ib.* 588. One object in refusing applications under this section will be to discourage a party who, without a case of his own, hopes by an adventure to discover a flaw in that of his adversary: see *Pepper* v. *Chambers*, 7 Ex. 226; *Scott* v. *Walker*, 2 El. & B. 555; *Wright* v. *Morrey*, 11 Ex. 209. If the intention of the party applying be plainly to fish something favorable to his case, the application will be refused: *Rayner et al* v. *Alnusen*, 15 Jur. 1060; *Jones* v. *Platt*, 9 W. R. 696; *Bird et al* v. *Malzy*, 1 C. B. N. S. 308; *Adams* v. *Lloyd et al* 27 L. J. Ex. 499; *Wolley* v. *Pole*, 32 L. J. C. P. 263. Thus a party is not entitled to say, "If I saw my opponent's books I could find some evidence:" *Scott* v. *Walker*, 2 El. & B. 563, *per* Crompton, J. It would be exceedingly vexatious, whenever a tradesman brings an action for his bill, if he were compelled to disclose to his customer his manner of carrying on business: *British Empire Shipping Co.* v. *Soames*, 29 L. T. Rep. 75, *per* Lord Campbell, C. J. A party is not entitled to search the other party's papers with a view of finding out some invalidity in the case put forward by him: *Shadwell* v. *Shadwell et al*, 6 C. B. N.S. 679, nor for the purpose of rebutting the anticipated case of his opponent: see *Riccard* v. *The Inclosure Commissioners*, 4 El. & B. 329; *London Gas Light Co.* v. *The Vestry of Chelsea*, 6 C. B. N. S. 411; *Jones* v. *Hargreaves*, 29 L. J. Ex. 368; *Temperley* v. *Willett*, 6 El. & B. 380; *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 146. But see *Lawlor* v. *Murchison*, 3 Grant, 553. His right is as to a discovery of those papers that may directly or indirectly support his own case: *Rayner et al* v. *Althusen*, 2 L. M. & P. 605; *Galsworthy* v. *Norman*, *Ib.* 608, note; *Scott* v. *Walker*, 2 El. & B. 555; *Collins* v. *Yates et al*, 27 L. J. Ex. 150; *Reynoldson* v. *Morton*, 2 L. T. N.S. 462; *Coleman et al* v. *Truman et al*, 28 L. J. Ex. 5; *Daniel* v. *Bond et al*, 9 C. B. N. S. 716. Of necessity the applications must often be merely speculative, but should be strictly watched and great care taken that injustice is not done by granting them: *Bray* v. *Finch*, 28 L. T. Rep. 126. For instance, great injury by the

possession or power of the opposite party, (*o*) the Court or

discovery of trade secrets might result if the court were to sanction the principle that on the mere *possibility* of discovering matter advantageous to one party, an inspection by him of the other party's books, ranging over a lengthened period of time, should be allowed: *Smith* v. *The Great Western Railway Co.* 3 W. R. 69. The court or judge to whom application is made can only decide as to the propriety or impropriety of acceding to the application upon the affidavits filed. The contents of applicant's affidavits must be such as to establish upon his part a *prima facie* right to the inspection or discovery in accordance with the principles established in the foregoing cases. The affidavit, therefore, ought not only to show that a cause or other civil proceeding is pending, but also to state, not a mere suggestion, but circumstances sufficient to satisfy the court or judge that there are in the possession or power of the opposite party certain documents, and that such documents relate to such cause or other civil proceeding. A *prima facie* case, calling for an answer, must at least be stated in this respect, as it must be in the old proceeding to obtain inspection of documents held by a trustee. The judges, with a view to settling the practice under the Eng. Stat. of 14 & 15 Vic. cap. 99, to which our section 197 corresponds, laid down very full rules upon this subject. They declared that applicant, in addition to the foregoing, "must show that he would, by a bill for a discovery or other proceeding, be able to obtain a discovery and inspection of these documents," and continued, "under the last head we must follow the rules established in courts of equity, within which every plaintiff must bring himself in order to obtain an inspection by bill of discovery; and therefore if the facts be disputed, applicant ought to state all that a plaintiff in equity must state in order to entitle himself to a discovery and inspection:" see *Owen* v. *Nickson*, 3 L. T. N. S. 737; *Hamer* v. *Sowerby*, *Ib.* 734; *Adams* v. *Lloyd et al*, 3 H. & N. 351; *Daniel* v. *Bond et al*, 9 C. B. N.S. 716; *London Gas Light Co.* v. *The Vestry of Chelsea*, 6 C. B. N. S. 411; *Lacharme* v. *The Quartz Rock Mariposa Gold Mining Co.* 6 L. T. N.S. 502; *Davey* v. *Pemberton*, 11 C. B. N. S. 628; *Woolley* v. *Pole*, 14 C. B. N.S. 538. The party applying, therefore, who is in the same situation as a plaintiff in equity, must show, *first*, what is the nature of the suit and of the question to be tried in it; and it seems also that he should depose in his affidavit of his having just grounds to maintain or defend it. *Secondly*, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents in order that it may appear to the court or judge that the documents are asked for the purpose of enabling the party applying to support his case, not to find a flaw in the case of his opponent, and also that the opponent may admit or deny the possession of them: *Hunt* v. *Hewitt*, 7 Ex. 236; see *McCay* v. *Magill*, 3 Ir. C. L. R. 83. To this affidavit the opponent may answer by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is, for any sufficient reason, privileged from producing them, or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in anywise relate to applicant's case. The same course would be pursued in equity: *Hunt* v. *Hewitt*, 7 Ex. 244; see also *Attorney-General* v. *The Corporation of London*, 12 Beav. 8; *Hunt* v. *Elmes*, 27 Beav. 62; *Gomm* v. *Parrott*, 3 C. B. N. S. 47; *Bolton* v. *The Corporation of Liverpool*, 1 M. & K. 88; *Short* v. *Mercier*, 3 Mac. & G. 205; *Lind* v. *The Isle of Wight Ferry Co.* 8 W. R. 540; *Quin* v. *Ratcliff*, 9 W. R. 65; *Mertens* v. *Haigh*, 1 John. 735; *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271; *Hopkinson* v. *Lord Burghley*, L. R. 2 Ch. Ap. 447; *In re Birmingham Banking Co.* 15 L. T. N. S. 203. In applications under this section, a place for inspection should be named: *Rogers* v. *Turner*, 21 L. J. Ex. 3. The costs of the inspection ought, as a general rule, to be paid by the party applying: *Hill* v. *Philp*, 7 Ex. 232; but are, with the costs of the application, in the discretion of the court or judge: see section 195.

(*o*) It must be sworn that the document in respect of which application is made

Judge (*p*) may order that the party against whom such application is made, or if such party be a body corporate, that some named Officer of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, (*q*) or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) (*r*) to the production of such as are in his or their possession or power, and upon such affidavit being made, the Court or Judge may make such further order as is just. (*s*) 10 Vic. c. 48, s. 175.

Interrogatories may be served on

190. (*t*) In case the party if not a body corporate would be liable to be called and examined as a witness upon the

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is in the "possession *or power*" of the opposite party, which answer to the words "in the custody *or under control*," used in section 197. Applications having for their object the discovery of contents of documents should in general be made under the section here annotated, and not under section 197: *Ferrie et al* v. *The Great Western R. Co.* 3 U. C. L. J. 197. As to the practice in regard to corporate bodies see *Ranger* v. *The Great Western Railway Co.* 28 L. J. Ch. 741; *Attorney-General et al* v. *The Mystery of Mercers et al*, 9 W. R. 83; *Lacharme* v. *The Quartz Rock Mariposa Gold Mining Co.* 31 L. J. Ex. 385; *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271.

(*p*) *Court or Judge.* Relative powers: see note *w* to section 48.

(*q*) It is this part of the section that leads from inspection to discovery. Applicant having established a *prima facie* case as to some document of which he seeks inspection, is upon this foundation allowed to proceed further and to ask *what* documents his adversary has personally or in his power relating to the matter in dispute, &c.

(*r*) Generally where a party can resist the application for inspection he may resist an application for discovery which leads to inspection.

(*s*) Where the defendant obtained an order for discovery under this section, on its appearing that the plaintiff was in Australia, and that his wife was carrying on the action by his authority, the order was varied by allowing the affidavit of the wife and attorney to be substituted for that of the plaintiff: *Barnett* v. *Hooper*, 1 F. & F. 412–467. If the party deny having possession of the documents, his answer is conclusive: see *Reynell* v. *Sprye*, 1 DeG. M. & G. 656; *Adams* v. *Lloyd et al*, 27 L. J. Ex. 499. If it be shown that the document is lost, the answer as to contents is not available at the trial unless it be shown in the usual way that the document cannot be produced: *Wolverhampton New Water Works Co.* v. *Hawksford*, 7 W. R. 244. It has been held that an office copy of an affidavit filed in the cause is not admissible against the party who made it: *Barnes* v. *Parker*, 15 L. T. N. S. 218; see however *Fleet* v. *Perrins*, L. R. 3 Q. B. 536. But the contrary has been held to be the law in this Province: *Spafford* v. *Buchanan et al*, 3 O. S. 391; *Wilson* v. *Thorpe*, 18 U. C. Q. B. 443; *Riddell* v. *Brown*, 24 U. C. Q. B. 90.

(*t*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 51. Founded upon the second report of the Common Law Commissioners, sections 37, 38. Discovery may be either of documents in the possession of, or facts within the knowledge of

matter, (*u*) the Plaintiff with the declaration, and the Defendant with the plea, may deliver, or either of them, by leave of the Court or a Judge, at any other time, may deliver to the opposite party or his attorney, (*v*) interrogatories in writ-

the opposite party, who shall be required to answer them.

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the opposite party. The preceding section extends only to the first; this section to both.

(*u*) The test is a very general one. In nearly every case where the parties are resident within the jurisdiction of the court, even though foreigners, either party has a right to put his adversary in the box, and so is subject to interrogatories under this section: *Pohl* v. *Young*, 26 L. T. Rep. 108; s. c. 25 L. J. Q. B. 23. The court will allow any interrogatories to be administered which are relevant to the matters in issue, and which the party interrogated would be bound to answer if in the witness box: *Zychlinski* v. *Maltby*, 10 C. B. N. S. 838; *Hawkins* v. *Carr*, 6 B. & S. 995; *Stewart* v. *Smith*, L. R. 2 C. P. 293; *McFadzen* v. *Mayor and Corporation of Liverpool*, L. R. 3 Ex. 279. Asking whether the plaintiff has had a correspondence relating to the subject in dispute and dates and names of correspondents allowed: *Rew* v. *Hutchins et al*, 10 C. B. N. S. 839. As to questions tending to criminate: see note *s*, page 266.

(*v*) The time appointed for delivery of interrogatories by plaintiff is with his declaration, and by defendant with his plea. If at any "other time," particular attention must be paid to the form of the application. Convenience requires that if interrogatories are delivered *before* declaration, they should be accompanied with some statement as to the cause of action; it must be shown that they are pertinent: *Croomes* v. *Morrison*, 5 El. & B. 984; *Anon.* v. *Parr*, 11 L. T. N.S. 706; *Atter* v. *Willison*, 7 W. R. 265; *Stern* v. *Sevastopulo*, 14 C. B. N. S. 737. The court or judge must be supplied with information in order to see whether the interrogatories are proper or whether they are merely vexatious: *McKenzie* v. *Clark*, 4 Prac. R. 95. The power to admit interrogatories may be abused to annoy the opposite party and to multiply costs, and therefore requires to be carefully watched: *Croomes* v. *Morrison*, 5 El. & B. 984; s. c. 26 L. T. Rep. 238. The leave to allow interrogatories to be delivered to a defendant before declaration was refused where they were required for the purpose of seeing how to declare, and the plaintiff in his affidavit only stated he believed he had a good cause of action, without showing precisely what it was: *Anon.* v. *Parr*, 11 L. T. N.S. 706. Leave was granted to a defendant to deliver interrogatories *before* plea pleaded, where the plea was before the court and the interrogatories modified to have precise reference to the plea: *Street* v. *Cuthbert*, 3 U. C. L. J. 9. Leave may, it seems, be granted to a plaintiff even *after* plea pleaded without a special affidavit: *James* v. *Barns*, 17 C. B. 596. Defendant may ask leave to file additional pleas, and then ask leave to put interrogatories for the discovery of matter effecting them: *Street* v. *Provincial*, 2 U. C. L. J. 213. If the application to deliver interrogatories be not made till after issue joined, the court or judge will then be the better able to [illegible] to their relevancy and propriety: see *Jones* v. *Pratt*, 6 H. & N. 697; *M[illegible]* v. *Parr*, 6 B. & S. 203. In every case to entitle a party to file interrogatories an order of the court or a judge is made necessary: *Bank of Upper Canada* v. *Kaulan*, 3 Prac. R. 46. There is very good reason for this; for otherwise interrogatories would be delivered in all cases, and would be added to every declaration and plea. The power given to the court or a judge is to prevent expense being incurred unless the interrogatories are necessary: *Martin* v. *Hemming*, 10 Ex. 478. The interrogatories intended should be submitted at the time of application for leave to file them: *Croomes* v. *Morrison*, 5 El. & B. 984; s. c. 26 L. T. Rep. 238. Where a party to a cause has obtained a rule calling upon the opposite party to show cause why interrogatories should not be delivered to him,

ing (*o*) upon any matter (*p*) respecting which discovery may be lawfully sought, (*q*) and may require such party, or in the

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and the affidavit sworn by the opposite party, for the purpose of opposing the rule, gives the information required, the court will put the party moving in the same position as if the information had been given upon interrogatories: *Peck* v. *Revis*, 27 L. T. Rep. 136. The court may allow interrogatories to be delivered to a defendant after he has pleaded without a special affidavit: *James* v. *Burns*, 17 C. B. 596.

(*o*) The interrogatories had better be verified by affidavit: *Croomes* v. *Morrison*, 5 El. & B. 984. The common affidavit is not sufficient for the allowance of interrogatories that have a tendency to criminate: *Villesboisnet* v. *Tobin et al*, 19 L. T. N.S. 693. The court or judge will not settle them: *Zarifi* v. *Thornton*, 26 L. J. Ex. 214; *Robson* v. *Cooke et al*, 4 Jur. N.S. 75; *Phillips* v. *Emens*, 11 L. T. N. S. 512. The court or judge in such a case will exercise a proper discretion in sending them back to be reformed and put in a fit condition to be accepted: *Ib.* Where a judge at chambers has exercised his discretion, the court will not review it unless they see he is clearly wrong: *Edmunds* v. *Greenwood*, L R. 4 C.P. 70; *Villesboisnet* v. *Tobin et al*, 19 L. T. N.S. 693.

(*p*) Copies of written documents are not such "matter" as may be the subject of interrogatories under this section: *Scott* v. *Zygomala*, 4 El. & B. 483; s. c. 30 L. & Eq. 155.

(*q*) The right to deliver interrogatories in cases in which discovery could not be obtained in equity is a vexed question. They may be delivered as to "any matter upon which discovery may be sought." The question turns upon the word "discovery." It may mean information generally, or only such information as can be had by a bill in equity. In the first case which arose under the section, the court abstained from giving any decided opinion upon the point: *Martin* v. *Hemming*, 10 Ex. 478. In a later case, Parke, B. is reported as follows —"The section says that the party may be interrogated upon any matter as to which *discovery may be sought*. It does *not* say that the power is limited to cases in which a bill of discovery will lie:" *Osborn* v. *The London Dock Co.*, 10 Ex. 702. But contrary to this opinion there is that of Campbell, C. J.: "I interpret the meaning of these words to be that interrogatories may be put with reference to any matter as to which discovery may be sought by bill in equity. The rule is laid down rather widely by the court of Exchequer in *Osborn* v. *London Dock Co.*, where it is said that the interrogatories may be administered to the same extent as if the party interrogated was a witness under examination at the trial. I think the true rule is that such questions may be put as may reasonably be expected to produce answers tending to advance the case of the party who puts them. The rule on this subject has been very clearly laid down by that great jurist, Sir James Wigram, and I concur in that rule in the very terms in which he has laid it down. Whatever advances the plaintiff's case, may be inquired into, though it may at the same time bring out matter which the defendant relies upon for his defence; but you shall not inquire into that which is exclusively matter of defence. That which is common to both the plaintiff and defendant may be inquired into by either." "The very object of the section was to obviate the necessity of going for assistance into a court of equity, which brought great scandal upon the administration of justice:" *Whateley* v. *Crowter*, *Carew* v. *Davies*, 25 L. J. Q. B. 167; 26 L. T. Rep. 104; 5 El. & B. 709. Such also were Lord Campbell's views as expressed in a still later case: "We are disposed to think that the section now under consideration is intended to apply to cases only where the matter inquired into would be evidence in the cause, and it was not intended therefore to give one party the power of asking the other how he intends to shape his case. Such an inquiry is a mode of inquiring into particulars upon oath, without the party

case of a body corporate, may require any of the Officers of such body corporate, to answer within ten days the questions

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being compelled to confine himself to particulars. When the justice of the case requires such particulars to be given, the courts have generally the means of compelling them to be given under such conditions as are reasonable. We think that we ought at all events to hold that the discovery under the 51st section (Eng. C. L. P. Act, 1854), is confined by the words 'upon any matter as to which the discovery may be sought,' to cases where a discovery would be given at equity * * * * * and a party shall not make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he intends to support it:" *Edwards et al* v. *Wakefield*, 27 L. T. Rep. 201. The right of a plaintiff in equity to the benefit of a defendant's oath is limited to the discovery of such material facts as relate to the plaintiff's case, and does not extend to the discovery of the manner in which the defendant's case is to be established: Wigram on Discovery, 2nd ed. 15; see also *Carew* v. *Davis*, 25 L. J. Q. B. 165. To entitle a party to interrogatories it is not enough that he is entitled to discovery in equity on some ground and for some purpose, it must be on the same ground and for the same purpose for which the interrogatories are sought: *Jourdain* v. *Palmer*, 14 W. R. 283. It is not intended that the mere practice of a court of equity as to discovery shall be followed by courts of common law: *Bartlett* v. *Lewis*, 31 L. J. C. P. 230; *Hawkins et al* v. *Carr*, 14 W. R. 138. *Held* in an action of trover by the assignees of a bankrupt to recover property that the defendant was not entitled to deliver interrogatories to the plaintiffs, calling on them to show "what case they intended to set up as entitling themselves to recover," or to state "what act or acts of bankruptcy they intend to rely upon in support of their title as assignees:" *Edwards et al* v. *Wakefield*, 27 L. T. Rep. 201. But in an action for money had and received and for non-delivery of goods, where plaintiff's case was that the defendant had professedly sold him goods and received payment for them as broker, while he was really the principal, the plaintiff was allowed to ask whether the defendant was really principal or agent, and if agent for whom and by what authority: *Thöl* v. *Leask*, 10 Ex. 704. Where a party to an action has a specific case, but the materials necessary to support it are in the hands of his adversary, he is allowed to interrogate him as to this, but is not allowed to deliver to him interrogatories the object of which is to fish out only how his adversary intends to shape his case, or whether or not there be some latent defect in it, or to contradict written evidence: *Moore* v. *Roberts et al*, 3 Jur. N.S. 1221. In an action of ejectment, defendant was allowed to ask the plaintiffs whether they claimed as heirs or grantees, and how they traced their pedigree: *Flitcroft* v. *Flether*, 11 Ex. 543; *Horsman* v. *Horsman*, 2 U. C. L. J. 211; *Kettlewell* v. *Dyson*, 5 U. C. L. J. N.S. 21; *Chester* v. *Wortley et al*, 17 C. B. 410. Especially if it be made to appear that defendant is wholly unacquainted with plaintiff's title: *Sloate* v. *Rew*, 16 C. B. N. S. 209; *Pearson et al* v. *Turner*, *Ib.* 157; *Ingilby* v. *Shafto*, 33 Beav. 31; *Winn* v. *Rose*, 36 L. J. C. P. 306. Interrogatories that might be proper in an ejectment brought by a stranger might however be improper in ejectment by a landlord against his tenant: *Sloate* v. *Rew*, 32 L. J. C. P. 160, *per* Willes, J. Defendant in trover has been refused the right to interrogate plaintiff as to his title to the goods in question: *Fenney* v. *Forward et al*, 14 W. R. 85. See as to an action for negligence, *Peppiatt et ux.* v. *Smith*, 33 L. J. Ex. 239. It has been held that plaintiff in ejectment has no right to ask defendants by what title they hold possession: *Horton* v. *Bott*, 29 L. T. Rep. 228; or to declare the nature and particulars of their title: *West* v. *Holmes*, 3 U. C. L. J. 72. Particularly if the answer would subject the party interrogated to a forfeiture: *May* v. *Hawkins*, 24 L. J. Ex. 309; *Blyth* v. *L'Estrange*, 3 F. & F. 154; *Pye* v. *Butterfield et al*, 5 B. & S. 829. But defendant may be interrogated as to whether he is the real defendant: *Sketchley* v. *Connolly*, 11 W. R. 573. Interrogatories by

in writing by affidavit to be sworn and filed in the ordinary way; (*r*) and any party or Officer omitting, without just cause, (*s*) sufficiently to answer, within the above time, or

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defendant to plaintiff after plea pleaded as to amount of damages claimed by plaintiff were allowed: *Ferrie et al* v. *The Great Western Railway Co.* 15 U.C. Q. B. 513; see also *Wright* v. *Goodlake et al*, 13 W. R. 349; s. c. 3 H. & C. 540; *Dobson* v. *Richardson*, L. R. 3 Q.B. 778; but see *Jourdain* v. *Palmer*, L. R. 1 Ex. 102. In an action by the drawer of a bill of exchange purporting to be accepted by two defendants as members of a firm, one defendant suffered judgment by default and the other pleaded *inter alia* that the bill was accepted by the other without his knowledge and in fraud of him, and beyond the scope of the authority of the party accepting with the knowledge of plaintiff. The plaintiff applied for leave to deliver interrogatories to the defendant, among others, the following: "Were you ever, and if yea when and during what time, a partner with the defendant, J. C. (the defendant who accepted the bill), in any and what business and under what style and firm." *Held* too general: *Robson* v. *Cooke et al*, 4 Jur. N.S. 75. In general, interrogatories in an action for slander will not be allowed: *Stern* v. *Sevastopulo*, 14 C. B. 737. But it being shown that the defendant in a certain place, in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, and that the persons refused to give the plaintiff any further particulars, the court allowed interrogatories to be put to the defendants as to the precise words he had used: *Atkinson* v. *Fosboke*, L. R. 1 Q. B. 628. This will not be allowed in an action for libel: *Tupling* v. *Ward*, 6 H. & N. 749; *McKenzie* v. *Clark*, 4 Prac. R. 95. If the interrogatories be of a fishing character they will be disallowed: see note *n* to section 189. As to what interrogatories may be delivered to an administrator who has pleaded *plene administravit*: see *Peck* v. *Nolan*, 14 Ir. C. L. R. App. xxxii. Form and extent of interrogatories which may be administered in an action for infringement of letters patent: see *Thomas* v. *Tillie*, 17 Ir. C. L. R. 783; *Hoffman* v. *Postill*, L. R. 4 Ch. Ap. 673.

(*r*) The proper way to answer interrogatories is to give a separate and distinct answer to each question, that is to say, a specific answer to a specific question: *McInnes* v. *Hardy*, 7 U. C. L. J. 295. It is not, it is presumed, for the party answering to set out the interrogatories before his answers. As to interrogatories in the case of corporations: see *Ranger* v. *The Great Western R. Co.* 28 L. J. Ch. 74; *Attorney-General* v. *The Mystery of Mercers et al*, 9 W. R. 83; *Lacharme* v. *The Quartz Rock Mariposa Gold Mining Co.* 31 L. J. Ex. 335; *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271; *Mason* v. *Wythe*, 3 F. & F. 153; *Mackewan* v. *Rolt*, 33 L. T. Rep. 240.

(*s*) *Just cause.* The tendency of a question to criminate is, it seems, a just cause; but that is no reason why the interrogatory should not be allowed, if *bona fide* put: *Osborn* v. *The London Dock Co.* 10 Ex. 698; *Chester* v. *Worsley et al*, 17 C. B. 410; *James* v. *Barns*, *Ib.* 596; *Bartlett* v. *Lewis*, 12 C. B. N. S. 249; *Baker* v. *Lane*, 3 H. & C. 544; *Bickford* v. *Darcy et al*, L. R. 1 Ex. 354. It is, however, in cases of this kind, unfair to submit questions which a party is clearly not bound to answer, the object being either to compel him to answer them when not bound, or to refuse, and so create a prejudice against him; and if interrogatories be not put *bona fide* they will be disallowed: *Tupling* v. *Ward*, 6 H. & N. 749; *Peppiatt et ux* v. *Smith*, 11 L. T. N. S. 139; *McKenzie* v. *Clark*, 4 Prac. R. 95; *Edmunds* v. *Greenwood*, L. R. 4 C. P. 70; s. c. 19 L. T. N. S. 423. Stronger reasons should be given for putting such interrogatories than in other cases, and such interrogatories should not be allowed on the common affidavit: *Villesboisnet* v. *Tobin et al*, 10 L. T. N. S. 693. Whether a witness is entitled himself to object to the question upon the ground of its tendency, or is

such extended time as the Court or Judge may allow, all questions as to which discovery may be sought, shall be deemed guilty of a contempt, and may be proceeded against accordingly. (*t*) 19 Vic. c. 43, s. 176.

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bound to satisfy the court that such will be its effect, in other words, whether the court or the witness is to judge of the effect, is not settled: *Fisher* v. *Ronalds*, 12 C. B. 762; *Osborn* v. *London Dock Co.* 10 Ex. 698; *Sidebottom* v *Adkins*, 29 L. T. Rep. 310. A witness cannot refuse to be sworn and examined on the ground that the only relevant questions that could be put to him are such as would tend to criminate him. The opposite party has a right to insist on his being sworn, and it is for him then to claim the privilege, upon being asked the objectionable questions: *Boyle* v. *Wiseman*, 10 Ex. 647. Illness would seem to be "good cause:" *Turk et al* v. *Syne*, 27 L. J. Ex. 54; see also *Geary* v. *Buxton*, 29 L. J. Ex. 280. On an application in chancery by the plaintiffs in an administration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution which had been recovered by a third party against a debtor of the estate, on the grounds of the same being fraudulent and collusive, the debtor was subpœnaed as a witness in support of the motion, and on his examination touching the *bona fides* of the judgment in question he thus stated his objection: "I object to answer on the ground that in this suit I cannot be examined in respect of matters arising in another suit in which I am a party; and also that I cannot be examined in this suit, for the purpose of fishing out evidence upon which to found a suit against me, and to be used as an application in which fraud and collusion are charged against me." *Held* not a good objection: *Granger* v. *Latham*, 2 Ch. Cham. 313. *Held* also that to entitle the witness to privilege on the ground that his answer would expose him to a penalty or forfeiture, he must state explicitly that he believes his answer would have that effect, and not merely leave it to be inferred that his answer would have that effect: *Ib.* It is no ground for refusal, in an action for the infringement of a patent, that the answer may expose defendant's customers to actions: *Tetley* v. *Easton et al*, 18 C. B. 643; nor is it any ground of refusal that the answer, if in the affirmative, will disclose fraud: *Coleman et al* v. *Truman et al*, 3 H. & N. 871; *Bayley* v. *Griffiths*, 1 H. & C. 429; *Goodman* v. *Holroyd et al*, 15 C. B. N.S. 839; *Blight* v. *Goodliffe et al*, 18 C. B. N. S. 757. *Contra*, if it would establish a forfeiture: *May* v. *Hawkins*, 11 Ex. 210; *Horton* v. *Bott et al*, 2 H. & N. 249; *Pye* v. *Butterfield et al*, 5 B. & S. 829; *United States of America* v. *McRae*, L. R. 4 Eq. 327; s. c. L. R. 3 Ch. Ap. 79; or be detrimental to the public interest: *Beatson* v. *Skene*, 3 W. R. 544.

(*t*) The court will not grant an attachment until after the time for answering has expired, nor if the party has filed answers before application, though after time appointed: *Curran* v. *Elphinstone*, 4 W. R. 50; nor will it in general be granted unless it appear that personal service of the rule *nisi* has been effected: *Birket* v. *Holme*, 4 Dowl. P. C. 556. But where an order of a judge had been obtained for the defendant to answer interrogatories, and he had obtained an extension of time, the court granted the rule *nisi* for an attachment, although there had been no personal service of the order to answer: *Lord Seafield* v. *Pratt*, 5 L. T. N.S. 580. A rule for an attachment may be issued on the application of a party interested in the suit in which the order was made, though not the person upon whose application it was originally granted: *Madrid Bank* v. *Bayley*, 15 L. T. N. S. 292. It is not the practice to issue an attachment for disobedience of a judge's order: *Grover* v. *Yeovill*, 29 L. T. Rep. 80. The order should first be made a rule of court: *Ib.* The attachment will not be granted unless the party has been guilty of neglect or refusal: *Van Hoff* v. *Hoerster*, 27 L. J. Ex. 299; *Lord Seafield* v. *Pratt*,

Affidavit upon which the application for leave to serve such interrogatories must be founded.

191. (*u*) The application for such order (*v*) shall be made upon an affidavit of the party proposing to interrogate, (*w*) and of his Attorney or agent, (*x*) or in the case of a body corporate, of their Attorney or agent, (*y*) stating respectively that the deponent believes that the party proposing to interrogate, whether Plaintiff or Defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or of defence upon the merits, (*z*) and if the application be made on the part of the Defendant, that the discovery is not sought for the purpose of delay; (*a*) but where it happens, from unavoidable circumstances, that the Plaintiff or Defendant cannot join in such

Where the party is prevented from

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5 L. T. N. S. 674; *Hill* v. *Glen*, 26 L. T. Rep. 62; *Curran* v. *Elphinstone*, 4 W. R. 50; *Rainsford* v. *Campbell*, 2 L. T. N. S. 432; *De Faria* v. *Lawrie*, 17 L. T. N. S. 296. Where a party has substantially answered interrogatories, but there are defects in his answers which the court does not consider intentional, the proper course is to apply at chambers under section 192: *Bender* v. *Zimmerman*, 29 L. J. Ex. 244. A rule for an attachment against the directors of a railway company was refused where the order did not specify what office of the company was to make the answer: *Button et al* v. *South Eastern Railway Co.* 3 Week. Notes, 20.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 52.

(*v*) *i. e.* Such order as is mentioned in the preceding section.

(*w*) *i. e* Either plaintiff or defendant, even though not beneficially interested: *Christopherson* v. *Lotinga*, 15 C. B. N. S. 809; *Barwick* v. *De Blaquiere et al*, 4 Prac. R. 267; see also *Tiffany* v. *Bullen*, 18 U. C. C. P. 91.

(*x*) It is to be observed that the application must be made upon an affidavit of the party *and* his attorney or agent. It is material that there should in such applications be a responsible officer of the court. The attorney must in any event be a party to the affidavit. But the objection cannot be taken *in banc* after an application in chambers, without objection there: *Whateley* v. *Crawford, Carew* v. *Davies*, 34 L. & Eq. 200. In case of necessity, under circumstances of peculiarity, such, for example, as the residence of the client in parts abroad, an affidavit in a form other than that here required might be received: see note *l* to section 189. Where a person sues or defends in person, no affidavit of an attorney is necessary: *Oxlade* v. *The North Eastern Railway Co.* 12 C. B. N. S. 350.

(*y*) In this case an affidavit of the attorney or agent only is made sufficient: see previous note.

(*z*) Whether plaintiff or defendant apply there must be an affidavit of merits: *May* v. *Hawkins*, 11 Ex. 210. And in either case the words "upon the merits" should be incorporated in the affidavit: *Anon.* 26 L. T. Rep. 197. If the application be *before* declaration, a general affidavit under this section would be wholly insufficient. In such case information must be given of the cause of action: *Croomes* v. *Morrison*, 5 El. & B. 984; see also *Jones* v. *Barns*, 17 C. B. 596; *Martin* v. *Hemming*, 10 Ex. 478.

(*a*) Delay should be negatived in the affidavit.

affidavit, (*b*) the Court or a Judge (*c*) may, upon affidavit of the circumstances by which the party is prevented from so joining, allow and order that the interrogatories may be delivered without such affidavit. (*d*) 19 Vic. c. 43, s. 177.

Joining in such affidavit.

192. (*e*) In case of omission, without just cause, (*f*) to answer sufficiently such written interrogatories, (*g*) the Court or a Judge (*h*) may direct an oral examination of the interrogated party, as to such points as they or he may direct, to be had before a Judge or any other person specially named; (*i*) and the Court or a Judge may, by such rule or order, or by

In case of omission to answer, the party may be examined orally or commanded to produce the documents, and before whom.

(*b*) What may be unavoidable circumstances in the opinion of the court or judge can only be determined with reference to the special circumstances of each particular case as it arises for adjudication: see note *l*, page 259.

(*c*) *Court or Judge.* Relative powers: see note *w* to section 48.

(*d*) This is in effect the interpretation placed on section 189, though the express language here used is not there used: see note *l*, page 259.

(*e*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 53. Founded upon the second report of the Common Law Commissioners, section 39. This section is an extension of the right of one party to put written interrogatories to his opponent.

(*f*) *Just cause.* See note *s* to section 190.

(*g*) The right orally to examine seems to be restricted to cases where the party interrogated has without just cause *omitted* to answer sufficiently. This is rather more limited than the commissioners intended it should be. They recommended an oral examination "in case of an insufficient answer, and in any other case in which it may be made to appear essential to justice, subject to the control of the court." The jurisdiction of the court under this section will be exercised with caution and with a due regard to the nature and circumstances of the action: *Swift* v. *Nun*, 26 L. J. Ex. 365. A defendant sued as administrator answered that he had not taken out administration, and the Court of Exchequer refused a rule for his oral examination, there being no affidavit in support of the application, although the plaintiff shewed cause in the first instance and waived the objection: *Ib.* The party interrogated is not bound to set out the contents or copies of documents admitted by him to be in his possession: *Scott* v. *Zygomala*, 4 El. & B. 483. In principle this section is the same as that of section 188, which allows an oral examination of a witness who declines to make an affidavit. One distinction may be noted, which is, that under the former a judge only seems to have jurisdiction whilst under the section here annotated, there is express power in the court or a judge. But it is more the business of a judge in chambers to settle these questions than the court *in banc*: *Bender* v. *Zimmerman*, 29 L. J. Ex. 244; *Meadows* v. *Kirkman*, 2 L. T. N. S. 251. The application should be made promptly: *Chester* v. *Wortley et al*, 18 C. B. 239. There should be a rule *nisi* or summons in the first instance: *Turk et al* v. *Syne*, 27 L. J. Ex. 54; *Swift* v. *Nun*, 26 L. J. Ex. 365.

(*h*) Relative powers: see note *w* to section 48.

(*i*) The most likely persons to be appointed for the duty under our act are public officers, such as county judges, clerks or deputy clerks of the crown, &c.

any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination for the purpose of being orally examined as aforesaid, or may command the production of any writings or other documents to be mentioned in such rule or order, (*j*) and may impose therein such terms as to such examination and the costs of the application and of the proceedings thereon, and otherwise, as to such Court or Judge seems just, and such rule or order shall have the same force and effect and may be proceeded upon in like manner as an order made under the one hundred and eighty-fifth and one hundred and eighty-sixth sections of this Act. (*k*) 19 Vic. c. 43, s. 178.

Examination to be filed in the office of the Court.

193. (*l*) Whenever, by virtue of this Act, an examination of any party or parties, witness or witnesses, has been taken before a Judge of either of the Superior Courts of Common Law or of any County Court, or before any Officer or other person appointed to take the same, (*m*) the depositions taken down by such examiner shall be returned to and kept in the office of the Court (Principal or Deputy Clerk's or Clerk's office, *as the case may be*,) in which the proceedings are carried on, (*n*) and office copies of such depositions may be given out, (*o*) and the examinations and depositions certified under the hand of the Judge or other officer or person taking the same, (*p*) shall, without proof of the signature, (*q*) be received

May be used in evidence.

(*j*) Though a privilege may exist as to the party himself or as to certain documents, the production of which is required, it is apprehended that the party should, in obedience to the order of the court, at least attend, and then claim his privilege.

(*k*) See notes to sections 185 and 186.

(*l*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 55.

(*m*) Extends apparently to examinations had under sections 186, 188 and 192.

(*n*) All proceedings to final judgment may be carried on in the office whence first process issued: section 61.

(*o*) If the copy appear to have been delivered out of the office in the due course of business, it will be *prima facie* taken to be correct: *Duncan* v. *Scott*, 1 Camp. 102; see notes to section 128.

(*p*) This apparently means the original examinations or depositions. The meaning cannot be that office copies given out should be certified by the Judge or other officer or person taking the *same;* for the officer takes the original examination or depositions, and not office copies.

(*q*) The original depositions only appear to be made receivable as evidence without proof of signature. But see latter part of note *s* to section 189.

and read in evidence, (*r*) saving all just exceptions. (*rr*) 19 Vic. c. 43, s. 179.

Examiners may make a special report to the Court.

194. (*s*) Every Judge, Officer, or other person named in any such rule or order as aforesaid, for taking examinations under this Act, (*t*) may, and if need be, shall make a special report to the Court in which such proceedings are pending, (*u*) touching such examination and the conduct or absence of any witness or other person thereon or relating thereto; (*v*) and the Court shall institute such proceedings and make such order or orders upon such report as justice may require, and

Orders thereupon.

(*r*) The effect of this section is to make the depositions or examinations evidence upon their bare production.

(*rr*) *Saving all just exceptions.* It is difficult to say what would be a "just exception" within the meaning of this section. It may be doubted whether the depositions can be read if the witness be within the jurisdiction of the court and compellable to attend for oral examination at the assizes: see *Proctor* v. *Lainson*, 7 C. & P. 629. Depositions taken under a commission to examine witnesses cannot be read if the witness be within the jurisdiction of the court and of sound mind, &c.: Con. Stat. U. C. c. 32, s. 21. If there has been any irregularity in proceeding with a commission to examine witnesses, as, for instance, if it were executed without any notice to the opposite party to enable him, if he pleased, to put cross interrogatories, such irregularity is a good objection to the admissibility of the depositions: *Steinkeller* v. *Newton*, 9 C. & P. 313. Where a witness who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced, it was held on the trial of the cause in England that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdict, on of the Court, of compelling the production of the letter: *Ib. Sed qu.* See this case differently reported in 2 Moo. & R. 272. Where the witness was both examined and cross-examined, the answers to the examinations-in-chief were held not to be admissible without the answers to the cross-examination: *Temperley* v. *Scott*, 5 C. & P. 341; see further *Stephens* v. *Foster et al*, 6 C. & P. 289. Objectionable questions or answers may be struck out at the trial, so as not to be laid before the jury, but the right to make the application does not extend to the party who produces them: *Hutchinson et al* v. *Bernard*, 2 Moo. & R. 1; *Lady Tufton* v. *Whitmore et al*, 9 L. J. Q. B. N. S. 405; *Williams* v. *Williams*, 4 M. & S. 497.

(*s*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 56. The origin of the section seems to be Eng. Stat. 1 Wm. IV. cap. 22, s. 8.

(*t*) *i. e.* Under sections 186, 188 and 192.

(*u*) The officer who takes the examination is "required to make" a special report, "if need be." *Qu.* Who is to judge of the necessity? Can a party to the cause require the officer to make a special report?

(*v*) The matters that may enter into the subject of the special report are here enumerated, viz., the conduct or absence of any witness or other person. If a witness produced improperly conduct himself from bias or other corrupt motives, that may be made to appear. If there be reason to believe that a witness absent

as may be instituted and made in any case of contempt of the Court. (*w*) 19 Vic. c. 43, s. 180.

As to costs of rule and examination.

195. (*x*) The costs of every application for any rule or order to be made for the examination of parties or witnesses by virtue of this Act, (*y*) and of the rule or order and proceedings thereon, (*z*) shall be in the discretion of the Court or Judge by whom such rule or order is made. (*a*). 19 Vic. c. 43, s. 181.

Inspection of real or

196. (*b*) Either party may apply to the Court or a Judge for a rule or order for the inspection by the Jury, or by him-

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has been kept away through the influence of either party, that also may be made to appear. So if a party to the cause, or any other person upon his behalf, disturb the examination. These, and matters of a similar nature that will, when necessary, readily suggest themselves, furnish materials for a special report.

(*w*) See note *t* to section 190.

(*x*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 57.

(*y*) See sections 186, 188 and 192.

(*z*) May refer to admissions or other matters incidental to but arising out of the examinations.

(*a*) The costs of inspection ought as a general rule to be paid by the party applying: *Hill* v. *Philp*, 7 Ex. 252; but are under all circumstances in the discretion of the court or judge: *Smith* v. *The Great Western Railway Co.* 25 L. J. Q. B. 279. They are not necessarily to be paid by the party applying: *Stilwell et al* v. *Ruck*, 4 H. & N. 468. The order should in express terms make provision for the costs: *Smith* v. *The Great Western Railway Co.* 25 L. J. Q. B. 279; and if not so provided for none can be had: *Ib.* As to costs of an expert: see *Churton* v. *Frewen*, 16 L. T. N. S. 171.

(*b*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 58. Founded upon the second report of the Common Law Commissioners, section 42. The first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our senses. In certain cases, from an early period, either party to a suit was allowed to obtain a view by a jury, the view to be of the "place in question." The origin of the practice is not traceable to any statute of which we have an account. But the frequency of applications having been found to be an abuse which tended much to the hindrance of justice, the legislature in the course of time endeavored to circumscribe the practice. One source of abuse was a rule which made it necessary for a cause to be entered for trial before a view could be had. Another was that the applications, when made at the trial, were granted, as of course, without inquiry. These causes combined, and attended with the difficulty of procuring the attendance of the necessary viewers at a future trial, had the effect in many cases of rendering unavoidable, repeated and vexatious postponements of a trial. The remedy applied was that of Stat. 4 Anne, cap. 16, s. 8, which empowered the courts to grant a view *previous* to the trial, and then only when *proper and necessary*: 1 Burr. 253. The view being authorised, the next inquiry is the manner in which it shall be conducted. This was made to depend upon Eng. Stat. 3 Geo. II. cap. 25, s. 14, of which our Stat. 34 Geo. III. cap. 1, s. 14, was a copy. Writs of *venire*,

self, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determina- personal property by jury, par-

facias and *distringas*, were, upon application, issued to the sheriff or other person appointed, commanding him to have six or more of the jurors named in the writs or in the panel annexed thereto at the "place in question," to view it at some convenient time before the trial. In every case where a view had been authorised there were two classes of jurors, from which conjointly the jury chosen to try the cause was selected. The first was that class who had their appointment under the special *venire facias* and *distringas*, already noticed. The second, all such jurors as were ballotted for at the trial in open court. The composition of the jury to try the cause was in this manner: six or more of the jurors who had acted as viewers being in attendance at the trial, were first sworn, and then only so many more were added to them from jurors drawn in court, so as in the whole to make the number twelve. The twelve thus chosen were *the* jury sworn to try the cause. In the working of this practice under the Stat. of Geo. II., owing to non-attendance of viewers, and other causes not necessary to be mentioned, some dissatisfaction was experienced. However, the great cause of mischief was an opinion which prevailed that the six viewers whose attendance was necessary should be six or more of the first twelve named upon the panel, and that in the event of their neglect to attend no trial could take place. The endless delays which arose out of such a construction can well be conceived. Whatever ground might have existed for this opinion at one time, there can be none at the present day. It was enacted "that when a view shall have been allowed, those men who shall have had the view, or *such of them* as shall appear upon the jury to try the issue, shall be first sworn," &c.: 13 & 14 Vic. cap. 55, s. 52, taken from Eng. Stat. 6 Geo. IV. cap. 50, s. 24. The changes effected in the law by the present act are, first, as to the cases in which a view or inspection may be procured; and, secondly, the persons by whom it may be had. From the use of the words, "the place in question," in all the former statutes, it was decided that views could be obtained only in proceedings of a local nature, such as trespass *qu. cl. fr.*, nuisances, and the like: *Stones* v. *Menhem*, 2 Ex. 382. The right of inspection is now extended to "any real or personal property, the inspection of which may be material to the proper determination of the question in dispute:" *Baker et al* v. *The London and South Western Railway Co.* L. R. 3 Q. B. 91; *Ennor* v. *Barwell*, 8 W. R. 301; s. c. 1 DeG. F. & J. 529. And the inspection of property which formerly could only be had by jurors specially selected for that purpose, may now be "by jury *or* by himself (the applicant), *or* by his witnesses." It is presumed that, as a general rule, inspection by a *jury* under this section will be conducted in the same manner and subject to the same rules as views by a *jury* before this act. In the Eng. C. L. P. Act, 1854, section 58, there is an express declaration that such shall be the case. Inspection by the applicant or by his witnesses stands more in doubt; first, as to the time when the inspection may be made; secondly, as to the mode of application; thirdly, as to the mode of inspection; fourthly, as to effect of inspection. To dispose of inspection by jury: a rule for a view is first issued, and upon that writs of *venire facias* and *distringas:* Con. Stat. U. C. c. 31, ss. 124, 125. In England, though not in this province, the rule may be had at side bar: Eng. R. 48 H. T. 1853. Both in England and here the party applying must make certain deposits of money, and in other respects comply with rules of court made for his guidance: Eng. R. 49 H. T. 1853; R. G. pr. 39; Con. Stat. U. C. c. 31, s. 124. In England the view may be had upon the rule without intermediate writs: Eng. C. L. P. Act, 1852, section 114; but in this Province the writs are still necessary: Con. Stat. U. C. c. 31, s. 125. And in the writs, when issued, "shewers" must be named, whose duty it will be to show the property to the jurors: *Ib.* section 126; and unless the shewers be so named, there can be no view as required by the act: *Taylor* v. *Thompson*, 1 Dowl. P. C.

ties, or witnesses.

tion of the question in dispute, (*c*) and the Court or a Judge may make such rule or order upon such terms as to costs and otherwise as such Court or Judge may think fit; (*d*) but nothing herein contained shall affect the provisions of any Act as to obtaining a view by a Jury. (*dd*) 19 Vic. c. 43, s. 172.

INSPECTION OF DOCUMENTS.

When the Court or a Judge may allow inspection of documents.

197. (*e*) Either of the Superior Courts of Common Law and any County Court in which an action or legal proceeding may be pending, or any Judge thereof respectively in vacation, may, on application (and in any such action or proceeding in either of the Superior Courts, when the Attorneys for both parties reside in the same County, the Judge of the County Court of such County may on application), compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal

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218. It was held that the jury could not be taken out of their county, even by consent: *Malins* v. *Lord Dunraven*, 9 Jur. 690; *Hawthorne* v. *Denham*, 3 Ir. Law Rep. 1; but now this may be done by order of the court: Stat. 29 & 30 Vic. cap. 46. After view the proceedings may be such as already noted. With respect to inspections by the party or his witnesses, the practice will be found to resemble inspections under the Eng. Patent Act, 15 & 16 Vic. cap. 83, s. 42, the principle of which it was recommended by the commissioners should be extended to *all* cases, which recommendation is here carried into effect. The practice under the Patent Act is not to grant inspection as of course, but only when shown to be material for the purposes of the cause: *Amies et al* v. *Kelsey*, 22 L. J. Q. B. 84; *Shaw* v. *The Bank of England*, 22 L. J. Ex. 26; but application may be made before declaration: *Amies et al* v. *Kelsey*, 22 L. J. Q. B. 84; see also *Patent Type Founding Co.* v. *Walter*, John. 727; *Patent Type Founding Co.* v. *Lloyd*, 5 H. & N. 192; *Meadows* v. *Kirkman*, 29 L. J. Ex. 205.

(*c*) In an action for not accepting gun barrels sold according to a pattern, inspection was granted to the defendants of the pattern barrel, in the possession of plaintiffs, and of the residue of the barrels tendered, many of which were produced in court, and inspected and guaged by witnesses in the presence of the jury: *Meyer et al* v. *Barnett et al*, 3 F. & F. 696. But in an action against a gas company for negligently allowing gas to escape, whereby plaintiff's house was destroyed, inspection by defendants of a model made for plaintiff from memory, after the destruction of his house, which had since been rebuilt, was refused: *Morley* v. *The Great Central Gas Co.* 2 F. & F. 373.

(*d*) The court may not only order inspection but order the removal of obstructions, with a view to facilitate such inspection: *Bennett* v. *Griffiths et al*, 3 L. T. N. S. 735; see also *White* v. *Storey*, 43 L. T. 91, Ex. T. T. 1867.

(*dd*) See Con. Stat. U. C. c. 31, ss. 124, 125, 126, 127, 128.

(*e*) Taken from our repealed Statute 16 Vic. cap. 19, s. 8, which was a transcript of Eng. Stat. 14 & 15 Vic. cap. 99, s. 6.

proceeding, (*f*) and if necessary, to take examined copies of the same, in all cases in which previous to the passing of

(*f*) The courts have a common law jurisdiction where an action is brought on an instrument to order inspection of it: *Doe d. Child et al* v. *Roe*, 1 El. & B. 285, *per* Lord Campbell, C. J.; *Price* v. *Harrison*, 8 C. B. N. S. 617; *Coleman et al* v. *Trueman et al*, 3 H. & N. 371; *Cooper* v. *Sanders*, 1 F. & F. 13; and now that profert is abolished the power is more necessary than ever: *The Penarth Harbour, Dock and Railway Co.* v. *The Cardiff Waterworks Co.* 7 C. B. N. S. 816; *Hill* v. *The Great Western Railway Co.* 10 C. B. N. S. 148. But the power of the courts at common law is very uncertain. In general it is necessary for the party applying to show that he has a direct interest in the document, as, for example, under-lessee in a lease, or that his opponent holds the document under some trust, express or implied, as, for example, that the document, though executed by both parties, is in the possession of one: *Blakey* v. *Porter*, 1 Taunt. 386; *Bateman et al* v. *Phillips*, 4 Taunt. 157; *Taylor* v. *Osborne*, *Ib.* 159; *Ratcliffe* v. *Bleasby*, 3 Bing. 148; *Lord Portmore* v. *Goring*, 4 Bing. 152; *Lawrence* v. *Hooker*, 5 Bing. 6; *Street* v. *Brown*, 6 Taunt. 302; *Morrow* v. *Sanders*, 3 Moo. 671; *Threlfall* v. *Webster*, 7 Moo. 559; *Blogg* v. *Kent*, 6 Bing. 714; *Devenoge* v. *Bouverie*, 8 Bing. 1; *Cocks* v. *Nash*, 9 Bing. 723; *Inman* v. *Hodgson et al*, 1 Y. & J. 28; *Woodcock et al* v. *Worthington*, 2 Y. & J. 4; *Neale* v. *Swind*, 2 C. & J. 278; *Travis* v. *Collins*, *Ib* 625; *Reid* v. *Coleman*, 2 C. & M. 456; *Doe d. Morris* v. *Roe*, 1 M. & W. 207; *Doe d.* —— v. *Slight*, 1 Dowl. P. C. 163; *Evans* v. *Delegal*, 4 Dowl. P. C. 374; *Jones* v. *Palmer*, *Ib* 446; *Tunzell* v. *Allen et al*, 7 Dowl. P. C. 496; *Griffin* v. *Smythe*, 8 Dowl. P. C. 490; *Goodliff* v. *Fuller*, 14 M. & W. 4; *Steadman* v. *Arden*, 15 M. & W. 587; *Ley* v. *Barlow*, 5 D. & L. 375; *Bluck* v. *Gompertz*, 7 Ex. 67; *Doe d. Avery* v. *Langford*, 21 L. J. Q. B. 217; *Shaw* v. *Holmes*, 3 C. B. 952; *Powell* v. *Bradbury et al*, 4 C. B. 541; *Foster* v. *The Bank of England*, 8 Q. B. 689; *Pritchett* v. *Smart*, 7 C. B. 625; *Flood* v. *Wilson*, Batty, 73; *Williams* v. *Gosson*, 3 Ir. Law Rec. O. S. 57; *Murphy* v. *Fitzpatrick*, 3 Ir. Law Rec. O. S. 161; *Alexander* v. *Alexander*, Alc. & Nap. 109; *Clarke* v. *McDaniel*, 4 Ir. L. R. 131; *Beasley* v. *Tyrrell*, 1 Ir. C. L. R. 365; *Taylor* v. *Quinton*, 2 Ir. Jur. O. S. 72; or as to documents upon which an action or defence is immediately founded, that there is a suspicion of forgery, or that the documents have been improperly dealt with since execution: *Thomas* v. *Dunn*, 6 M. & G. 274; *Woolner et al* v. *Devereux*, 9 Dowl. P. C. 673, *per* Tindal, C. J.; but see *Chetwind* v. *Marnell*, 1 B. & P. 271; *Jessel* v. *Millingen*, 1 M. & Scott, 605; *Hildyard* v. *Smith*, 1 Bing. 451; *Threlfall* v. *Webster*, *Ib.* 161; *Richey* v. *Ellis*, Alc. & Nap. 111; *Smith* v. *McGonegal*, 2 Ir. L. R. 272; *Daly* v. *Kelly*, 4 Ir. L. R. 16. In general, it is necessary for the party applying to show himself to be a party to the document: *Smith* v. *Winter*, 3 M. & W. 309; *Lawrence* v. *Hooker*, 5 Bing. 6. The courts in England have, under certain circumstances, upon the application of one party to a suit, ordered documents in the possession of the opposite party to be produced, for the purpose of being stamped: *Gigner* v. *Bayly et ux*, 5 Moore, 71; *Rowe et al* v. *Howden*, 4 Bing. 539, note; *Neale* v. *Swind*, 1 Dowl. P. C. 314; *Bousfield et al* v. *Godfrey*, 5 Bing. 418; *Travis* v. *Collins*, 2 C. & J. 625; *Hall* v. *Bainbridge et al*, 14 L. J. Q. B. 289; but have refused inspection of the title deeds of a party whose title is in dispute: *Pickering* v. *Noyes*, 1 B. & C. 262. Now that a party may be examined orally as to all matters touching his own case, the doctrine propounded in the last case may be questioned: *Lynch* v. *O'Hare*, 6 U. C. C. P. 259; *Horsman* v. *Horsman*, 2 U. C. L. J. 211, *per* Burns, J. Whatever jurisdiction the courts possess at common law as to inspection is not affected, except so far as extended by the statutes: *Bluck* v. *Gompertz*, 7 Ex. 67; *Doe d. Avery* v. *Langford*, 21 L. J. Q. B. 217; *Doe d. Child et al* v. *Roe*, 1 El. & B. 279.

The section under consideration appears to correspond with Eng. Stat. 14 & 15 Vic. cap. 99, s. 6, under which it was held that the legislature never intended

this Act a discovery might have been obtained by Bill, or other proceeding in Equity, at the instance of the party so making application as aforesaid. (*g*) 16 Vic. c. 19, s. 8.

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to give courts of common law a power to *compel discovery* by a bill or analogous proceeding, but to *allow an inspection*, by one litigating party, of documents in the custody or under the control of the opposite litigant party, with certain restrictions or limitations. The intention of the legislature was reduced to this—that inspection might be allowed whenever discovery could be compelled in equity: *Hunt* v. *Hewitt*, 7 Ex. 236; see also *Rayner et al* v. *Allhusen*, 21 L. J. Q. B. 68; *Galsworthy* v. *Norman*, *Ib.* 70; *Woolley* v. *The North London Railway Co.* L. R. 4 C. P. 612, *per* Montague Smith, J. This was held to be the legal intendment of the act, though it is more than possible that the actual intention of the Legislature was to provide a more extensive remedy. The mischief to be remedied was the necessity existing for proceeding in equity, with its attendant trouble, expense and delay, in order to support proceedings at law. The remedy proper for such a mischief is *complete* relief in one court. Such is the remedy which has been applied by the legislature under section 189 of this act.

(*g*) It is impossible to lay down with certainty any general rules as to when inspection will be granted. "The whole question appears to be in a state of darkness and confusion:" *The Macgregor Laird*, L. R. 1 Ad. & Ec. 307, *per* Dr. Lushington. An affidavit detailing such facts as would sustain a bill for discovery in equity will, in general, entitle the applicant to an inspection of the documents referred to in the affidavit: *McCay* v. *Magill*, 3 Ir. C. L. R. 83. Inspection of letters ordered where no copies had been kept, and the action was in whole or in part barred on the letters: *Price* v. *Harrison*, 8 C. B. N.S. 617; *The Commercial Bank of Canada* v. *The Great Western Railway Co.* 25 U. C. Q. B. 335. Ordered in an action for breach of promise of marriage: *Stone* v. *Strange*, 3 H. & C. 541; *Chute* v. *Blennerhasset*, 16 Ir. C. L. R. Ap. ix. But not where the affidavit was that the promise, "if any," was contained in such letters: *Hamer* v. *Sowerby*, 3 L. T. N.S. 734; only for *fac simile* of letters by photograph or otherwise: *Davey* v. *Pemberton*, 11 C. B. N.S. 628. So in libel: *Perrott* v. *Morris*, 1 Ir. Jur. N. S. 334; but see *Finlay* v. *Lindsay*, 7 Ir. C. L. R. 1; *McKenzie* v. *Clark*, 4 Prac. R. 95. An agent was compelled to give copies of alleged private memoranda, which were made by him in the course of his employment: *Bishop of Winchester* v. *Bowker*, 29 Beav. 479; so a company suing a shareholder for calls was compelled to allow inspection of the registry for shares, &c.: *Lancashire Cotton Spinning Co.* v. *Greatorex*, 14 L. T. N.S. 290. So a railway company of their minutes relating to a servant, in an action by him for wrongful dismissal: *Hill* v. *The Great Western Railway Co.* 10 C. B. N.S. 148. So a ship owner suing an underwriter, was compelled to grant inspection of documents in any way relating to the subject matter of the policy: *Rayner et al* v. *Ritson*, 6 B. & S. 888; see also *Kellock* v. *The Home and Colonial Insurance Society*, 12 Jur. N.S. 653. So trustees under a composition deed compelled to allow creditors to inspect signatures to deed, &c.: *Andrew et ux* v. *Pell*, L. R. 2 C. P. 251. So in an action by a consignee of goods against shipowners for damage sustained in consequence of unseaworthiness of the ship, the court compelled inspection of certain surveys made on the ship in a foreign port, &c.: *Daniel* v. *Bond et al*, 9 C. B. N.S. 716. So inspection of deed held by defendant for a lien: *Owen et al* v. *Nickson et al*, 3 E. & E. 602. So in an action against a railway company for negligence, inspection ordered of the medical reports, &c.: *Baker et al* v. *The London and South Western Railway Co.* L. R. 3 Q. B. 91. An inspection of a document not granted to a plaintiff on the allegation that it contained a particular clause in support of his case, where the evidence of such clause was directly denied by the defendant: *Frewen* v. *The Incorporated Society*, 3 Ir. C. L. R. 118. Order for the inspection of defendant's rent book refused in an action for illegal distress: *Fitzgerald* v. *Christ-*

ADMISSION OF DOCUMENTS. (A)

Calling on parties to admit documents.

198. (*i*) Either party may (*j*) call upon the other party, by notice, (*k*) to admit any Document, (*l*) saving all just

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mas, 5 Ir. C. L. R. 180. So plaintiff refused in ejectment for a forfeiture; *Riccard et al* v. *The Inclosure Commissioners*, 4 El. & B. 329; *Coster* v. *Baring*, 2 C. L. R. 811; *Pye* v. *Butterfield et al*, 5 B. & S. 829. So refused where the object is to enforce penalties: *Pritchett* v. *Smart*, 7 C. B. 625; see also *Bullock* v. *Richardson*, 11 Ves. 373. But a defendant in ejectment brought on a forfeiture has been allowed inspection of the lease under which he claimed: *Doe d. Child et al* v. *Roe*, 1 El. & B. 279. The party opposing the inspection may answer the application by denying the possession of the documents, that they relate exclusively to his own case, or that he is privileged from producing them: see *Hill* v. *Philp*, 7 Ex. 232; *Forshaw et al* v. *Lewis et al*, 10 Ex. 712; *Pritchett* v. *Smart*, 7 C. B. 625; *Short* v. *Mercier*, 3 Mac. & G. 205; *Robinson* v. *Kitchin*, 8 DeG. M. & G. 88; *Coleman et al* v. *Trueman et al*, 3 H. & N. 871: *Woolley* v. *Pole*, 14 C. B. N.S. 538; or may shew part, covering the remainder, on an affidavit that the part concealed does not in any way relate to the case of his opponent: *Hunt* v. *Hewitt*, 7 Ex. 236; *Bull et al* v. *Clarke*, 15 C. B. N. S. 851; and if the court collect from all the materials before them that the documents do not support the case of the applicant, inspection will be refused: *Chartered Bank of India, Australia and China* v. *Rich*, 4 B. & S. 73; *Felkin* v. *Lord Herbert et al*, 30 L. J. Ch. 798. "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, is not privileged." *Woolley* v. *The North London Railway Co.* L. R. 4 C. P. 613, *per* Brett, J.

(*h*) The law contained in the following sections is one that has prevailed in this Province for years. Its operation is by deliberate admission made before trial to dispense with the more formal and expensive mode of proving the documents in question. The object being to save expense, each party having an opportunity of preventing, by timely admissions, the cost of proving the documents proposed to be given in evidence against him. The practice is one of a most salutary nature, and in its application should rather be extended than restricted. Both in England and in this Province there have been rules of court in substance the same as the provisions of this act: Rules U. C. 5 & 6 of T. T. 3 & 4 Wm. IV. Cam. R. 7, copied from Eng. Rules 6 & 7 of H. T. 2 Wm. IV. 3 B. & Ad. 392; and Rule U. C. 28 of E. T. 5 Vic.; Cam. R. 32, copied from Eng. Rule 20 of H. T. 4 Wm. IV. 5 B. & Ad. xvii.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 117. Founded upon the first report of the Common Law Commissioners, s. 72.

(*j*) *i. e.* In all cases of trials, assessment, or inquisitions *of any kind*, either party may, &c.: R. G. pr. 30.

(*k*) A party calling upon his adversary to admit documents must serve the ordinary notice to admit and proceed as directed in R. G. pr. 29 and 30: *Anon.* Chambers, Sept. 22nd, 1856, *per* Burns, J. See the form prescribed in R. G. pr. 29.

(*l*) *Any document.* The rule of practice extends to every document which the party proposes to adduce in evidence, and is not confined to documents in his custody or control: *Rutter* v. *Chapman*, 8 M. & W. 388; *Conger* v. *McKechnie*, 1 Chsm. R. 220. The fact of the document not being in his possession works no hardship upon his adversary, because in order to obviate any mischief or hard-

exceptions, (*m*) and in case of refusal or neglect to ad-

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ship arising from the difficulty of access to it, the judge at the trial has power to say that the document is not one which the party ought reasonably to be called upon to admit: *Rutter* v. *Chapman*, 8 M. & W. 392, *per* Parke, B. In one case, on plaintiff paying to defendant the expenses of examining a foreign judgment and other documents abroad, an order was made for the defendant to pay the expenses of proving them at the trial, such proof having been satisfactory to the judge, and so certified by him: *Smith* v. *Bird et al*, 3 Dowl. P. C. 641. The practice as to giving notice has been held to be imperative and to apply to all cases, whether the document proposed to be given in evidence is put in issue on the record or not: *Spencer* v. *Barough*, 9 M. & W. 425. The fact that the opposite party had in positive terms refused to make any admission was held not in the least to dispense with the necessity of serving the notice: *Ib.* But the old rules were held neither to apply to a case where ancient records of a public nature required not proof but explanation and translation: *Bastard* v. *Smith et al*, 10 A. & E. 213; nor to original affidavits in the Court of Chancery, which could only be produced by an officer of that court: *Ib.*

(*m*) The "just exceptions" are, among others, *First.* The sufficiency of the stamp: *Vane* v. *Whittington*, 2 Dowl. N. S. 757. *Second.* Its admissibility in evidence: *Phillips* v. *Harris*, Car. & M. 492. *Third.* Its legal effect: *Hills* v. *The London Gas Light Co.* 1 F. & F. 346. The object of an admission under this section is to dispense with the production of an attesting or other witness, acquainted with the handwriting to be proved. The party called upon to admit sees the document, and does so for the purpose of ascertaining whether there is any ground of objection to it. If he perceive an interlineation, either he objects then, or it must be taken that he dishonestly declines to do so: for in the absence of objection his opponent will not produce the attesting witness, who might be able to explain the interlineation. An admission, therefore, so far recognises the general character and accuracy of the document, that no objection can afterwards be made to its reception on the ground of interlineation: *Freeman* v. *Steggall*, 14 Q. B. 202; see also *Poole* v. *Palmer*, Car. & M. 69. The party, when served with a notice to admit, may inspect if he chooses. If he make the admission, whether he inspect or not, he must bear the consequences. His consent is an admission that there is such a document as that in the notice described: *Doe d. Wright et al* v. *Smith*, 8 A. & E. 255. And in some cases it may be an admission of facts mentioned in the description of the document, for instance, acceptance of a bill when described as accepted by A. B. &c.: *Wilkes* v. *Hopkins*, 1 C. B. 737; *Hunt* v. *Wise*, 1 F. & F. 445; *Hawk* v. *Freund*, *Ib.* 294; *Chaplin* v. *Levy*, 9 Ex. 531. Recent authority, however, seems to militate against this position: *Pilgrim et al* v. *The Southampton and Dorchester Railway Co.* 8 C. B. 25. Admissions inadvertently made, may, in certain cases, be withdrawn by judge's order obtained for that purpose: *Elton* v. *Larkins*, 5 C. & P. 385; but a mere notice of withdrawal served upon the opposite party is not sufficient: *Doe d. Wetherell* v. *Bird*, 7 C. & P. 6. When a party is called upon to admit a copy, it involves the power of seeing that *it is* a copy, that is, of seeing the original: *Rutter* v. *Chapman*, 8 M. & W. 391, *per* Alderson, B. But an admission of a copy cannot under any circumstances be taken as an admission of the original, and whether the notice do or do not in such a case contain a saving of all just exceptions, the admission of the copy will not entitle plaintiff to put in the copy without first accounting for the original: *Sharpe* v. *Lamb et al*, 11 A. & E. 805; see also *Goldie* v. *Shuttleworth*, 1 Camp. 70. Neither does the admission obviate the necessity of producing the document admitted at the trial: see *Vane* v. *Whittington*, 2 Dowl. N. S. 757; *Lesslie* v. *Leahy*, 5 O. S. 487. The admission when made is conclusive: *Langley* v. *The Earl of Oxford*, 1 M. & W. 508. And when made for any one trial continues to be so for any future trial: *Elton* v. *Larkins*, 5 C. & P. 385; *Doe d. Wetherell* v.

mit, (*n*) the costs of proving the Documents shall be paid by the party so neglecting or refusing, (*o*) whatever the result of the cause may be, (*p*) unless at the trial the Judge certifies that the refusal to admit was reasonable, (*q*) and except in cases where the omission to give the notice is, in the opinion of the Taxing Officer, a saving of expense, (*r*) no costs of proving any Document shall be allowed unless such notice has been given. (*s*) 19 Vic. c. 43, s. 165. Costs.

Bird, 7 C. & P. 6; see also *Hope* v. *Beadon*, 2 L. M. & P. 593; see further *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612; *Wilson* v. *Baird*, 19 U. C. C. P. 98. A variance in the description of a document not of a nature to mislead, will not release the party who makes an admission from his obligation: *Field* v. *Fleming*, 5 Dowl. P. C. 450; *Bittleston et al* v. *Cooper*, 14 M. & W. 399. It does not appear to be necessary to identify the document produced at the trial with the one admitted: *Doe d. Wright et al* v. *Smith*, 8 A. & E. 265, *per* Coleridge, J. But prudence will generally dictate the propriety of being prepared with such proof, or at least of having the documents that are to be produced signed or marked by the party who made the admission: see *Clay* v. *Thackrah*, 9 C. & P. 47; *Doe d. Tindal* v. *Roe*, 5 Dowl. P. C. 420. A formal admission only should be relied on: *Holford* v. *Hughes*, 10 W. R. 60. Where the notice called on the defendant to admit *the authority* under which the documents were signed, *held* that defendant was not bound to do so, and had a right to defeat the whole notice, without peril of costs in any event: *Oxford, Worcester and Wolverhampton Railway Co.* v. *Scudamore*, 1 H. & N. 666.

(*n*) To determine when the party neglects or refuses to admit, it is manifest that there must be, as regards time, some limit within which the admission must be made. No limit is specified in this act. The time must be reasonable, considering the situation of the parties, &c.: *Tynn* v. *Bellingsley*, 3 Dowl. P. C. 810; see also *Cary* v. *Cumberland*, 1 Prac. R. 140. The admission may be signed by the attorney or by his managing clerk: see *Taylor* v. *Willans*, 2 B. & Ad. 845.

(*o*) Not, it would seem, if the witness called to prove the document in his testimony in chief give evidence on any other fact than the genuineness of the document: *Stracey* v. *Blake*, 7 C. & P. 404.

(*p*) If the party neglect or refuse to admit, he must pay the costs, though the verdict obtained be set aside, and though before the second trial the admission be made: *Lewis* v. *Howell*, 6 A. & E. 769.

(*q*) To entitle either party to the costs of proving a document under the old practice, even after notice, refusal to admit and order, it was necessary for the judge to certify that he was satisfied with the evidence. Now it is the rule that the costs shall be paid, "unless the judge certify that the refusal to admit was reasonable:" see *Day* v. *Vinson*, 9 L. T. N. S. 723. If the document be one inadmissible in evidence, it stands to reason that no costs can be allowed: *Phillips* v. *Harris*, Car. & M. 492.

(*r*) The exceptions thus created may, in some respects, moderate the rigor of the old practice, which made it imperative in every case of a written document, whether denied on the record or not, to give the notice before being entitled to costs. How far in such cases the omission to give the notice can be risked with safety, must be determined as actual cases arise for decision.

(*s*) A party is only entitled to the costs if the document be proved: *Doe d. Peters* v. *Peters*, 1 C. & K. 279; *Day* v. *Vinson*, 9 L. T. N.S. 723; *Rochfort* v.

Evidence of admissions.

199. (*t*) An affidavit of the Attorney in the cause, (*u*) or his Clerk, (*v*) of the due signature of any admissions made in pursuance of such notice, (*w*) and annexed to such affidavit (*x*) shall be, in all cases, sufficient evidence of such admissions. (*y*) 19 Vic. c. 43, s. 166.

Evidence of service of

200. (*a*) An affidavit of the Attorney in the cause, (*b*) or his Clerk, (*c*) of the service of any notice to produce, (*d*)

Sedley, 12 Ir. C. L. Rep. iv. If the rule be abused by the preparation and service of a voluminous notice, the costs may be disallowed: *Edwards* v. *The Great Western Railway Co.* 12 C. B. 419. Where plaintiff's attorney was in possession of a probate of a will essential to the defendant's case, and on being called on to give an undertaking to produce it refused to do so, and the defendant then warned him that an exemplification of the will must be procured at great expense, it was held that the defendant, who obtained the verdict, was notwithstanding, only entitled to the expense of an ordinary copy, as he might have called on plaintiff to admit a copy: *Goldstone* v. *Tovey*, 6 Bing. N. C. 274.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 118.

(*u*) *Qu.* If after admission there has been a change of the attorney who witnessed the signature of the admission, would he not still be competent to make the affidavit here contemplated? It is only reasonable that he should be.

(*v*) *i. e.* Some clerk connected with the attorney's office, whose duty it is to attend to the business of the office, and who is himself personally cognizant of the particular fact to be proved: see *Taylor* v. *Willans*, 2 E. & Ad. 845.

(*w*) The admission may be either as to the whole of the documents specified in the notice, or only as to part. In either case it may be indorsed on the notice. In the first case, if indorsed, it may be in this form: "I hereby make the admissions of the documents specified in the within notice as thereby required, saving all just exceptions." In the second case, if indorsed, it may be thus; "I hereby make the admissions of the documents marked numbers 1, 2, 3, 6, &c., specified in the within notice as required therein, saving all just exceptions." The notice should be examined to see if it contain a reserve of all just exceptions: see *Chaplin* v. *Levy*, 9 Ex. 531.

(*x*) The affidavit may be to the effect that on, &c., A. B. &c., then and still being attorney for the defendant in the cause, did, in the presence of deponent, sign the admissions annexed, and that the name A. B., set out and subscribed to the admissions, is of the proper handwriting of the said A. B., and that the admissions were made in pursuance of the notice annexed, upon which the admissions are indorsed.

(*y*) In a case where defendant objected to the proof of admissions which had in fact been made, and plaintiff was in consequence non-suited, a new trial was granted, on the ground of breach of faith, with costs to be paid by defendant: *Doe d. Tindal* v. *Roe*, 5 Dowl. P. C. 420.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 119.

(*b*) See note *u* to preceding section.

(*c*) The affidavit is only admissible when made by the attorney or clerk: *Patterson* v. *Morrison*, 17 U. C. Q. B. 130.

(*d*) The ordinary notice, though served for a particular assize, is good for subsequent assizes, without renewal: *Hope* v. *Beadon*, 2 L. M. & P. 593. A notice to

in respect to which notice to admit has been given, (*e*) and of the time when it was served, with a copy of such notice to

notice to produce.

produce a deed at the sessions held sufficient for the assizes: *McDonnell* v. *Conry*, Ir. Cir. Rep. 807. It may be in form as follows: "Take notice, that you are hereby required to produce to the court and jury, on the trial of this cause, (*here specify the particular documents*) and all other documents, letters, books, papers, or writings whatsoever, containing an entry, memorandum, or minute, or other matter in anywise relating to the matter in question in this cause." The notice should be properly styled in the cause: *Harvey et al* v. *Morgan et al*, 2 Stark. 19; but is not, for a defect therein, necessarily bad: *Lawrence* v. *Clark*, 14 M. & W. 250. The words "all and every letter written by plaintiff to defendant, and relating to the matters in dispute in the action," were held sufficient to let in secondary evidence of a particular letter, of which the date was not specified: *Jacob* v. *Lee*, 2 Moo. & R. 33; *Morris et al* v. *Hauser et al*, *Ib.* 392; and "all accounts relating to the matters in question in this cause" sufficient to let in a particular account, though no date specified: *Rogers* v. *Custance*, *Ib.* 179; but see *France* v. *Lucy*, R. & M. 341. Notice to produce a letter purporting to enclose an account, sufficient notice to produce the account: *Engall et al* v. *Druce*, 9 W. R. 536. But a notice to produce letters from plaintiff to A. not sufficient to require letters from A. to the plaintiff: *Coombs* v. *The Bristol and Exeter Railway Co.* 1 F. & F. 206. A notice to produce "the several letters written in the year 1839" is too general: *Ahern* v. *Maguire*, Arm. Mac. & Og. 39. It must be served a reasonable time before trial. But there does not appear to be any inflexible rule as to time: *Trist* v. *Johnson*, 1 Moo. & R. 259; *Rex* v. *Ellicombe*, *Ib.* 260; *George* v. *Thompson*, 4 Dowl. P. C. 656. The night before the trial not generally reasonable: *Jones* v. *Curry et al*, 8 Ir. L. R. 257; *Sims* v. *Kitchen*, 5 Esp. 46; *Foster* v. *Pointer*, 9 C. & P. 718; *Atkins* v. *Meredith*, 4 Dowl. 658; *Howard* v. *Williams*, 9 M. & W. 725. *Contra*, if documents shown to be in possession of the attorney: *Lloyd* v. *Mostyn*, 2 Dowl. N.S. 476; *Leaf* v. *Butt*, Car. & M. 451; *Byrne* v. *Harvey*, 2 Moo. & R. 84; *Gibbons* v. *Powell*, 9 C. & P. 634. Notice served on the day of and within one hour of the trial held too late: *Nash* v. *Bush*, 5 U. C. C. P. 300. It should be served on the attorney as agent: *Cates* v. *Winter*, 3 T. R. 306; *Housenan* v. *Roberts*, 5 C. & P. 394. Or on the party himself: *Hughes* v. *Budd*, 8 Dowl. P. C. 315. Where attorney changed, notice served on the first attorney before the change sufficient: *Doe d. Martin* v. *Martin*, 1 Moo. & R. 242. Service upon the wife of defendant's attorney late in the evening before trial held sufficient: *Doe d. Wartney* v. *Grey*, 1 Stark. 283. So service by dropping the notice in the attorney's letter box late over night: *Lawrence* v. *Clark*, 14 M. & W. 250; see also *Leaf* v. *Butt*, Car. & M. 451; *Meyrick* v. *Woods*, *Ib.* 452. Service on Sunday not good as a service on that day: *Hughes* v. *Budd*, 8 Dowl. P. C. 315. No objection to service after commission day or after commencement of trial, if sufficient time: *Sturm et al* v. *Jeffree*, 2 C. & K. 442. Three days' notice to produce letters used in a chancery suit six years before the trial held sufficient: *Sturge* v. *Buchanan*, 10 A. & E. 598. So two days' notice to the attorney, the party himself being abroad: *Bryan* v. *Wagstaff*, 2 C. & P. 126; *Firkin* v. *Edwards*, 9 C. & P. 478. So four days' notice to let in evidence of letters written eighteen years back: *Drabble* v. *Donner*, R. & M. 47. But a few days' notice to produce a letter written by a party to his firm at Bombay not sufficient: *Ehrensperger* v. *Anderson*, 3 Ex. 148. If document be in court at the time of the trial, a notice to produce it forthwith is sufficient: *Dwyer* v. *Collins*, 7 Ex. 639. The question as to what is a reasonable time seems chiefly to rest with the judge of assize: see *James* v. *Mills*, 4 U. C. Q. B. 366; *McCrae* v. *Osborne et al*, E. T. 7 Vic. *MS.* R. & H. Dig. "Notice to Produce," 5; *Robertson* v. *Boulton*, H. T. 6 Vic. *MS. Ib.* same title, 6.

(*e*) This section impliedly sanctions the rule that a notice to produce served before a notice to admit, is such a document as may be specified in the latter, and

produce annexed to such affidavit, (*f*) shall be sufficient evidence of the service of the original of such notice, and of the time when it was served. (*g*) 19 Vic. c. 43, s. 167.

NOTICE OF TRIAL OR OF ASSESSMENT OF DAMAGES, AND COUNTERMAND THEREOF. (*h*)

Eight days' notice of

201. (*i*) Eight days' notice of trial (*j*) or of assess-

be followed with all the consequences attending notice to admit when given as to ordinary documents.

(*f*) The affidavit may be to the effect, 1. That deponent did on &c. between the hours of &c. serve A. B. &c. with a notice to produce, a true copy of which is annexed, marked A. by delivering the same to, &c.; 2. That deponent did, pursuant to section 200 of the C. L. P. Act, serve (*here state service of notice to admit*) a true copy of which is annexed, marked B.; 3. That the notice to produce mentioned and referred to in the notice to admit, is the notice to produce, a copy of which is annexed, marked A. as aforesaid.

(*g*) It is not declared that proof of service of the notice to admit may be by affidavit. It is for the judge at the trial, before admitting secondary evidence, to decide whether or not the document produced is the document called for, if there be any dispute as to the fact: *Froude* v. *Hobbs*, 1 F. & F. 612. The refusal to produce not only has the effect of allowing the production of secondary evidence: *Dwyer* v. *Collins*, 7 Ex. 639, but the farther effect of preventing the party himself from using the document to vary or contradict the secondary evidence: *Doe d. Thompson* v. *Hodgson*, 12 A. & E. 135; *Edmonds* v. *Challis et al*, 7 C. B. 413; *Montgomery ap.* v. *Boyce resp.* 1 Cr. & Dx. C. C. 422; *In re Murphy*, 2 Ir. Leg. Rep. 163.

(*h*) It is very proper the court should see that a written notice of trial is served giving such information as would satisfy any reasonable person that it was intended to be acted upon: *Fenn* v. *Green*, 27 L. T. R. 170, *per* Lord Campbell, C.J.; and that some period should be fixed as constituting a reasonable notice, instead of leaving the reasonableness or unreasonableness of it to be determined by the circumstances of each particular case: see *Lyman* v *Snarr*, 9 U. C. C. P. 64. Where no notice of trial has been given, defendant is not entitled to his costs of preparing for trial: *Cooper* v. *Boles*, 5 H. & N. 188; *Curtis* v. *Platt*, 33 L. J. C. P. 255. Nor in such case is plaintiff so entitled: *Freeman et al* v. *Springham*, 14 C. B. N.S. 197.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 97. Founded upon the first Report of the Common Law Commissioners, section 70.

(*j*) The intention of the section as regards time is that no notice for a less period than eight days shall be good. As to computation of time, see *Vrooman* v. *Shuert*, 2 Prac. R. 122; *The Buffalo and Lake Huron Railway Co.* v. *Brooksbanks*, *Ib.* 126; *Callaghan* v. *Baines et al*, *Ib.* 144; *Clark* v. *Waddell*, *Ib.* 145; *Phillips* v. *Merritt*, *Ib.* 233; *Cameron* v. *Cameron*, *Ib.* 259; *Cuthbert* v. *Street*, 6 U. C. L. J. 20. Short notice of trial means four days' notice, first and last days inclusive: *Williams* v. *Lee*, 2 U. C. C. P. 157. But plaintiff may by his conduct relieve defendant from such an undertaking: see *Provident Permanent Building and Investment Society* v. *McPherson*, 3 Prac. R. 96. As to notice of countermand: see section 202. There is no settled form of notice made necessary. It will be sufficient if it apprise defendant with certainty that plaintiff means to proceed to trial, and clearly inform him when and where the trial is to take place: *Ginger* v. *Pycroft*, 5 D. & L. 554; *Cory et al* v. *Hotson*, 1 L. M. & P. 23. The terms of the notice will at the hands of the courts receive a common sense construction. The courts will not give way to captious objections or stupid mistakes in favor of a defendant,

ment (*k*) (the first and last days being inclusive) shall be trial to be given.

who either pretends to misunderstand or will not understand what any reasonable man might understand from the words of the notice served upon him. In a recent case very strong language was used in reference to the conduct of a defendant who so conducted himself. Coleridge, J., "As to the affidavit that the defendant believed the notice of trial was intended for Easter Term, 1857, I say, I not only disbelieve it but I think it one of the most infamous falsehoods ever presented to a court:" *Fenn* v. *Green*, 27 L. T. R. 170; see also *Graham* v. *Brennan*, 11 Ir. C. L. R. Ap. xvii. If notice be clearly irregular or insufficient and not waived, the verdict may be set aside: *Williams* v. *Williams*, 2 Dowl. P. C. 350; *Benthall* v. *West*, 1 D. & L. 599; *The Grand River Navigation Co* v. *Wilkes*, 8 U. C. Q. B. 249. But this is no ground for refusing to try the case: *Byrne* v. *Hogan*, Arm. Mac. & Og. 170. A notice in a suit against two defendants, served with the name of only one defendant, held a nullity: *Doe d. Read* v. *Paterson et al*, 1 Prac. R. 45. But notice of trial in a county instead of united counties is a mere irregularity: *The Commercial Bank of Canada* v. *Lee*, 6 U. C. L. J. 21. If from the misreading of the notice, or from any similar cause, there be gross and palpable negligence on the part of the attorney or his clerk, the court will not, it seems, interfere, but leave defendant to his remedy by action: *Nash* v. *Swinburne*, 1 Dowl. N.S. 190. The notice, though irregular, if not calculated to mislead, may be waived if defendant lie by without taking objection: *Bell* v. *Graham et al*, 2 U. C. Q. B. 37. Thus a notice naming Friday, 19th May, instead of Friday, 18th May, though irregular, cannot avail defendant unless he *before* the trial give notice of objection to plaintiff's attorney: *Gordon* v. *Cleghorn*, 7 U. C. Q. B. 171. But the mere retaining of the irregular notice is not itself a waiver of irregularity, as defendant is not bound to return it: *Dignam* v. *Mostyn*, 6 Dowl. P. C. 547; s. c. intitled *Dignam* v. *Ibbotson*, 3 M. & W. 431; *Wood* v. *Harding*, 3 C. B. 968. The waiver consists of the retention *and* failure to take objection within proper time: *Brown* v. *Wildbore*, 1 M. & G. 276; *Yonge* v. *Fisher*, 4 M. & G. 814; *Bell* v. *Graham et al*, 2 U. C. Q. B. 37; *Senior* v. *McEwen et al*, *Ib.* 95. Eight days held not to be too great a delay: *Anderson* v. *Culver et al*, 3 Prac R. 306. Defendant by his conduct, such as appearing at the trial of the cause or applying to strike it out of the cause list, or obtaining a rule for a special jury, may be taken to have waived irregularities in the notice: *Doe d. Antrobus* v. *Jepson et al*, 3 B. & Ad. 402; *Younge* v. *Fisher*, 2 Dowl. N.S. 637; *Berresford et al* v. *Geddes*, L. R. 2 C. P. 285; *Waldron* v. *Parrott*, 8 Ir. C. L. R. Ap. l. But an offer to refer the cause to arbitration is not such a waiver: *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. Q. B. 249. It has been held that a notice of trial in an action against two defendants, served with the name of one only therein, was a nullity: *Doe d. Read* v. *Paterson et al*, 1 Prac. R. 45; and therefore could not be waived.

(*k*) A notice of trial served instead of a notice of assessment has been held a fatal objection to an assessment of damages, which was in consequence, with all subsequent proceedings, set aside: *Billings et al* v. *Reid*, 5 O. S. 73. But where there were issues in fact and in law, a notice of trial only has been held sufficient to enable plaintiff to assess contingent damages: *Davis* v. *Davis*, M. T. 6 Wm. IV. *MS.* R. & H. Dig. "Notice of Trial," 7; see further *Thompson* v. *Shanley*, 4 Ir. C. L. R. 617. And where the notice was to try the issues and assess damages, and there were in fact no issues on the record to be tried, the notice as to the assessment was considered regular: *Gamble et al* v. *Rees*, 7 U. C. Q. B. 406. Where the last day for serving the notice of trial was also the last day for pleading, a notice served on that day in anticipation of a plea, was held good, though the plea was not filed till the following morning: *Lowry* v. *Robinson*, 11 Ir. L. R. 57; *Lindsay* v. *Dowling*, *Ib.* 59; see further *Farrell* v. *Fagan*, *Ib.* 76. But held that notice of trial of a Queen's Bench suit in a county court could not be given by anticipation: *Riach et al* v. *Hall*, 11 U. C. Q. B. 356; *Young et al* v. *Laird*, 2 Prac. R. 16.

given, (*l*) and shall be sufficient in all cases, (*m*) whether at

(*l*) It is not sufficient to leave the notice at an attorney's office by putting the same under the door: *Grand River Navigation Co.* v. *Wilkes*, 8 U. C. Q. B. 249. It must be shown that it was left with some person in the office and doing business there: *Brewer* v. *Bacon*, 5 O. S. 343. Therefore service on a housekeeper of the office is insufficient: *Peddie* v. *Pratt*, 6 M. & G. 950. In such cases no notice of an intention to move against the verdict is required. The verdict may be set aside without an affidavit of merits: *Consumers' Gas Co.* v. *Kissock*, 5 U. C. Q. B. 542. Service on defendant himself if he have an attorney is irregular: *Ferrie* v. *Tannahill*, Dra. Rep. 340. Notice if regularly served on the attorney will be good, though the attorney die before the trial, and particularly if plaintiff have no knowledge of his death: *Ashley* v. *Brown*, 1 L. M. & P. 451. Where notice of assessment had been sent to the sheriff for service, and was returned by him to the plaintiff's attorney with the following indorsement, "Received a copy of the within for defendant," signed by "E. & G." attorneys, in the handwriting of G.; and for the plaintiff it was shown that E. & G. were constantly in the habit of accepting services for defendant, but G. stated that he only consented at the bailiff's request to hand such notice to defendant as soon as he should see him, and that the indorsement was intended, not as an acceptance of service, but as showing a willingness to hand the notice to defendant; but there was neither a denial that E. & G. were in the habit of accepting services for defendant nor an assertion that G. told the bailiff what he intended by the receipt indorsed; *held* a sufficient service: *Rutledge* v. *Thompson*, 1 Prac. R. 275. If defendant do not defend by attorney, notice must be served on him personally. Even a request by him that the notice should be put under his door has been held to be no substitute for personal service: *Fry* v. *Mann*, 1 Dowl. P. C. 419. Service by taking the notice to defendant's house and throwing it over his fence into his yard, telling his son, who was present, that it was a notice of assessment for his father, and where the son refused to have anything to do with it, and where the father, who was absent from home, knew nothing about it until after the assizes, has been held to be clearly insufficient: *McGuin* v. *Benjamin*, 1 Cham. R. 142. Where service by mail is agreed upon between the attorneys, the time counts from the time the paper is mailed, and not from the time of its receipt: *Robson* v. *Arbuthnott*, 3 Prac. R. 313. The paper, in the event of loss or miscarriage, is entirely at the risk of the attorney to whom sent: *Ib.* A notice of trial, when allowed to be fixed up in the office of a deputy clerk of the crown, can only be fixed up in the office of the county in which the action is brought: *Chase* v. *Gilmour*, 6 U. C. Q. B. 604. Notice can only be fixed up in the principal office at Toronto when defendant's attorney, residing in Toronto, has neglected to make an entry of his name and place of business, as directed by R. G. pr. 136, or if residing out of Toronto, has neglected to appoint and enter the name and place of business of his agent in Toronto, as directed by R. G. pr. 137. These rules may be held to apply to the case of an attorney being defendant in person: see *Bank of Upper Canada* v. *Robinson*, 7 U. C. Q. B. 478. There may be a special agency constituted for the purpose of service of papers: *Smith* v. *Roe*, 1 U. C. L. J. N.S. 156; *Baby* v. *Langlois*, *Ib.* 209. In practice, when plaintiff's replication or other pleading is in denial of defendant's pleading, the notice of trial may be served at the same time as the replication, and without waiting for the joinder: R. G. Pr. 38. A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, and it will be binding upon all parties unless the principal promptly repudiate the acceptance and give notice thereof to the opposite party: *Orr* v. *Stabback*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Notice of Trial," 16.

(*m*) It does not seem that this section is intended to apply to trials by record, where the party giving the notice is the party to produce the record. There is no analogy between notice of trial in ordinary cases where issues in fact

Bar, or at *Nisi Prius*, or at the County Courts. (*n*). 19 Vic. c. 43, s. 146; 8 Vic. c. 13, s. 29; 2 Geo. IV. c. 1, s. 36.

202. (*o*) Unless otherwise ordered by the Court or a

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are to be tried the object being to give defendant time to prepare for his defence and a trial by record where the defendant has nothing for which to prepare. And therefore two days' notice of trial by record has been held to be sufficient: *Hopkin* v. *Daggett*, 1 L. M. & P. 541. But a notice on Saturday for Monday has been held insufficient, as the days contemplated are business days: *Maguire* v. *Kincaird*, 21 L. J. Ex. 264. R. G. Pr. 35, which is as follows, appears to set the doubts at rest: "On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record; otherwise judgment." Though a case be made a *remanet* at the assizes, a fresh notice of trial appears to be necessary: *Gains* v. *Bilson*, 4 Bing. 414. *Contra*, where the cause is made a *remanet* from one sitting to another in London and Middlesex: *Ham* v. *Greg*, 6 B. & C. 125; *Claudet* v. *Prince*, L. R. 2 Q. B. 406; *Cawley* v. *Knowles*, 16 C. B. N.S. 107. And so if a certain day be fixed by the court for the trial of the cause, and it does not take place on that day: *Ellis* v. *Trusler*, 2 W. Bl. 798. Unless, perhaps, when postponed or continued: *Sed qu.* see *Burgess* v. *Royle*, 2 Chit. R. 220; *Forbes* v. *Crow*, 1 M. & W. 465; *Wyatt* v. *Stocken*, 6 A. & E. 803; *Shepherd* v. *Butler*, 1 D. & R. 15. Where plaintiff's proceedings after notice were stayed by an injunction obtained by defendant, *held* that so long as it remained in force the proceedings were stayed, but that when it was dissolved the parties were *in statu quo*, and plaintiffs at liberty to proceed in the action without a fresh notice: *Stockton and Darlington Railway Co.* v. *Fox*, 6 Ex. 127; *Claudet* v. *Prince*, L. R. 2 Q. B. 406; overruling *Jocks* v. *Mayer*, 8 T. R. 245, and *Ellis* v. *Trusler*, 2 W. Bl. 798, and distinguishing *Cawley* v. *Knowles*, 16 C. B. N.S. 107. A fresh notice has been held necessary though plaintiff has entered into a peremptory undertaking, because, notwithstanding the undertaking, he may decline to try the cause: *Monk* v. *Wade*, 8 T. R. 246, note; *Sulsh* v. *Cranbrook*, 1 Dowl. P. C. 148. When proceedings having been stayed until the costs of a former notice have been paid, the defendant, though called on, neglects to tax his costs, the plaintiff will be allowed to serve a fresh notice of trial upon giving an undertaking to pay the costs of the former notice within such time after taxation as the court may direct: *O'Brien* v. *Chadwick*, 11 Ir. L. R. 33.

(*n*) Anciently all causes prosecuted in court were tried at the bar of that court. In course of time this practice was found to be highly inconvenient both to the court and to suitors. To the court because of the pressure of business, and to suitors because of the necessity of travelling from all parts with witnesses to the place where the court was held, then in one fixed place. Hence a new practice was originated, which was to *continue* the suit from term to term *provided* the Justices in Eyre did not first come to the county where the cause of action arose, and who, upon their arrival, had power to try the cause, and relieve the court *in banc*—administering justice as it were at every man's door. When justices in Eyre were superseded by justices of assize, a power was conferred upon the latter by their nisi prius commissions to try all causes. From that time the frequency of trials at bar began to decline, and at present they can only be had in cases of great difficulty and importance. It is discretionary with the court to grant or refuse a trial at bar. If granted, a special jury must be summoned for the occasion, and notice of trial must be given to the clerk of the crown and pleas of the court before giving notice to the opposite party: R. G. Pr. 37.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 98. Founded upon the first report of the Common Law Commissioners, section 70.

Four days' notice of countermand.

Judge, or by consent, a countermand of notice of trial or assessment (*p*) shall be given (*q*) four days (the first and last days being inclusive) before the time mentioned in the notice of trial or assessment, (*r*) unless short notice has been given, (*s*) and then two days, both inclusive, before the time mentioned in the notice. (*t*) 19 Vic. c. 43, s. 147.

(*p*) *Semble*, a notice of trial or of assessment may be countermanded, though a rule to set aside the notice has been obtained with a stay of proceedings: *Mullins et al* v. *Ford*, 4 D. & L. 765. The countermand may be in this form: "Take notice that I do hereby countermand the notice of trial given in this cause."

(*q*) *Given.* See note *l* to preceding section.

(*r*) It is necessary to observe the peculiar wording of this section. The countermand "shall be given four days *before the time mentioned in the notice of trial or assessment.*" It follows that if the cause be entered and made a *remanet*, there cannot be any countermand of notice: *Tempany* v. *Rigby et al*, 10 Ex. 476; but see *Sully* v. *Noble et al*, 1 H. & C. 809.

(*s*) The expression short notice of trial, or short notice of assessment, shall be in all cases taken to mean four days' notice: R. G. pr. 34. A defendant who obtains time to plead on the "usual terms," is bound to accept short notice of trial: *Senior* v. *McEwen et al*, 2 U. C. Q. B. 95. The conditions, however, are in general expressly stated in the rule. If the rule be on condition of "taking short notice of trial," defendant will not be thereunder obliged to take short notice of assessment: *Wright* v. *McPherson et al*, 3 U. C. Q. B. 145; see also *Stevens* v. *Pell*, 2 Dowl. P. C. 355; but see *Williams* v. *Lee*, 2 U. C. C. P. 157. It is therefore prudent for plaintiff to see these further words added, "*or of assessment of damages in case such notice shall be necessary:*" *Wright* v. *McPherson*, 3 U. C. Q. B 145. The words "short notice, &c., *if necessary*," deserve attention. Where these words are used, defendant is not bound to take short notice if *not* necessary, or if plaintiff has needlessly delayed giving the notice: *Nicholl* v. *Forshall*, 15 L. J. Q. B. 203; *Drake* v. *Pickford*, 15 M. & W. 607; *Dignam* v. *Ibbotson*, 3 M. & W. 431. And yet in a case where the plaintiff took five days to join issue, and then gave short notice of trial, it was held sufficient: *Flowers* v. *Welch*, 9 Ex. 272; see further *Byrne* v. *Jones*, Bl. D. & O. 40; *Woolley* v. *Aldritt*, 17 L. T. N.S. 120. So the words, when used, "short notice, &c., if necessary, *for the next assizes at*," &c., which restrict defendant only as to a particular assize. If plaintiff neglect to go to trial at *that* assize, defendant becomes entitled to the usual notice for any subsequent assize: *Slatter* v. *Painter*, 8 M. & W. 672; *Dignam* v. *Mostyn*, 6 Dowl. P. C. 547; see also *Abbott* v. *Abbott*, 7 Taunt. 452; *White* v. *Clarke*, 8 Dowl. P. C. 730; *Lewis* v. *Hay*, 4 Jur. 579. Plaintiff can easily avoid the effect of such a restriction by having added to the former words the following: "*or at any future assize.*" If a party avail himself of the terms of a short notice of trial, he cannot afterwards countermand it: *Doncaster* v. *Cardwell*, 2 M. & W. 390.

(*t*) Before this act it was held that in computing the time for short notice of trial the first day was exclusive and the last inclusive: *Love* v. *Armour*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Notice of Trial," 5; but it has been since held that the first and last days are inclusive: *Williams* v. *Lee*, 2 U. C. C. P. 157. Two days' notice of countermand are declared to be sufficient, but it is presumed that these days must be business days, and that a notice on Saturday for Monday would be insufficient: *Rose* v. *Macgregor*, 1 D. & L. 583. The notice of countermand, like the original notice, must be served on the defend ant's attorney, when he has appeared by attorney, and not on himself personally: *Margetson* v. *Rush*, 8 Dowl. 388; see further note *l* to section 201.

NISI PRIUS RECORDS.

203. (*u*) In the Superior Courts, the record of *Nisi Prius* need not be sealed, but shall be passed and signed by the Clerk or Deputy Clerk of the Crown in whose office the same is passed, (*v*) and in Country causes shall be entered

Nisi Prius records need not be sealed.

(*u*) Taken partly from Eng. Stat. 15 & 16 Vic. cap. 76, s. 102, and partly from our own law, and so far as taken from Eng. C. L. P. Act, founded upon the first report of the Common Law Commissioners, section 71.

(*v*) The adaptation of this section to some extent to the corresponding section of the Eng. C. L. P. Act has led to a change in our practice, which was the introduction into this Province of the English practice as to making up and delivering paper and issue books: R. G. pr. 33. The issue book is a transcript of the pleadings, with the dates of pleading and the order when pleaded: *Worthington* v. *Wigley*, 5 Dowl. P. C. 209. It concludes ordinarily with the words, "therefore let a jury," &c.: Form thereof R. G. pr., Sch. No. 1. But when it is intended to determine questions raised by consent a different form is made necessary: *Ib.* Sch. No. 3. It is sometimes expedient to make suggestions on the issue as to the death of one or more of several plaintiffs or defendants when the action survives: ss. 131, 132, and notes thereto. The issue book can only be made up when issue has been joined: see section 108 and notes thereto. But may in certain cases be made up by plaintiff's attorney before the pleadings are in fact completed: *Ib.* The time within which it must be made up is not limited. Defendant may himself, if issue has been completed, make up the issue book and proceed to trial by proviso. When made up by plaintiff's attorney it ought to be delivered either before or at the time of the service of notice of trial, and at least eight days before the commission day of the assizes. But whenever plaintiff's last pleading is in denial of the defendant's pleading, plaintiff's attorney, without joining issue, may give notice of trial at the time of serving his replication or other pleading, and in case of issue being afterwards joined, the notice operates from the time when first given. And of necessity in such a case the issue book would be made up and delivered *after* notice of trial and probably within less than eight days of the assizes: see R. G. pr. 36. If there be several defendants appearing by different attorneys, a copy of the issue book should be delivered to each. When delivered it will be presumed to be true, and plaintiff's proceedings in respect thereof to be regular. If any statement therein be untrue, an application should be made to set the issue book aside on the ground that it is untrue: *Harvey* v. *O'Meara*, 8 Dowl. P. C. 680. A defendant who files one plea, and by mistake serves a different one, cannot be heard against the issue on the ground that it does not contain a true copy of the plea filed: *The Commercial Bank of Canada* v. *Lee et al*, 6 U. C. L. J. 21. A mere irregularity, such as the omission of the date of a pleading, &c., may be amended either upon application of plaintiff or of defendant: *Ikin* v. *Plevin et al*, 5 Dowl. P. C. 594; *Dennett* v. *Hardy*, 2 D. & L. 484. In such cases plaintiff's proper course is to amend and not to deliver a second issue book: *Ethersey* v. *Jackson*, 8 T. R. 255. The amendment may be made at any time: *Farwig* v. *Cockerton*, 3 M. & W. 169. In some cases of irregularity, either in the form of issue or of its delivery, defendant, if he apply promptly, may set it aside: see *Lycett* v. *Tenant*, 4 Bing. N. C. 168; *Currey et al* v. *Bowker*, 9 Dowl. P. C. 523; *Cooze* v. *Neumegen*, 1 Dowl. N.S. 429. But he may, by appearing at the trial, without objecting to irregularities, by his conduct waive them: see *Emery et al* v. *Howard*, 9 M. & W. 108.

The *nisi prius* record is a copy of the issue book as delivered, and when the latter has neither been set aside nor moved against, must be taken to be a true copy: *Doe* v. *Cotterell*, 1 Chit. Rep. 277; but if the record agree with the original

for trial with the Deputy Clerk of the Crown of the proper County, before noon of the Commission or opening day of the Assizes for such County; (*w*) but the Judge may permit a record in any suit to be entered after the time above limited, if upon facts disclosed on affidavit, or on the consent of both parties, he sees fit to do so. (*x*) 19 Vic. c. 43, s. 154.

How to be passed.

204. (*a*) The party entering any such record shall indorse thereon whether it be an assessment, an undefended issue or a defended issue; (*b*) and the Deputy Clerk of the Crown shall make two lists, and enter each Record in one of the said lists, in the order in which the Records are received by him, and in the first list he shall enter all the assessments and undefended issues, and in the second list all defended issues (*c*) and the Judge at *Nisi Prius* may call on the causes in the first list at such time and times as he finds most

How to be indorsed.

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pleadings a variation from the issue book will not materially affect it: *Shepley* v. *Marsh*, 2 Strange, 1130; *Doe d. Cotterill* v. *Wylde*, 2 B. & Al. 472; *Jones* v. *Tatham*, 8 Taunt. 634. This section requiring the record to be passed and signed by the clerk or deputy clerk of the crown does not supersede the rule of court requiring service of an issue book: *Reeves* v. *Eppes*, 16 U. C. C. P. 137.

The court will not suffer a party to retain a verdict upon a record which has been improperly altered by him: *Suker et al* v. *Neale*, 1 Ex. 468. As sealing is unnecessary in the first instance, of course it is equally so though the cause be made a *remanet:* see *Cook* v. *Smith*, 1 Dowl. N.S. 861. As to issues and records on issues raised on pleas of *nul tiel record:* see *Jackson* v. *Oates*, 5 D. & L. 231.

(*w*) Where in a country cause the record was entered for trial before the commission day of the assizes, and afterwards and before the commission day the suit was settled, the master, upon consulting the chief justice of the common pleas, refused to allow the costs of entering the record or counsel fee: *Hingston* v. *Whelan*, 8 U. C. L. J. 72.

(*x*) If there be an affidavit disclosing the facts or consent of defendant to enter the record, the judge may still exercise his discretion in allowing the same to be done. In a case where plaintiff had given an undertaking to try at a particular sitting but did not enter his record on the first day of the sittings, the court above refused to entertain a motion for judgment during that assize, because *possibly* the record might be entered after the first day by order of the presiding judge: *Burn* v. *Cook*, 1 L. M. & P. 736; see further *Archbishop of Tuam* v. *McDonnell*, 1 Ir. Law Rec. O.S. 55, 75; *Adshead* v. *Upton et al*, 22 U. C. Q. B. 429.

(*a*) This section, as it originally appeared in the consolidated statutes, provided for three lists, and it was repealed by Stat. 23 Vic. cap. 42, s. 2, which substituted for it the section here annotated, which "shall in lieu thereof be read as the two hundred and fourth section of the said act."

(*b*) Non-compliance with this direction would, it is presumed, be an irregularity, amendable upon terms.

(*c*) "And the deputy clerk of the crown *shall* make," &c. This is a duty which the clerk is bound to perform.

convenient for disposing of the business. (*d*) 19 Vic. c. 43, s. 154.

205. (*e*) In Town causes (*f*) the Records shall be entered with the Clerk of Assize, who shall, for the purpose of receiving and entering the same, attend at the Court House on the Commission or opening day from nine in the morning until noon, (*g*) after which he shall not receive any Record without the order of the presiding Judge, who shall have the same power, in this respect, as set forth in the two hundred and third section, (*h*) and the Clerk of Assize shall make two lists, as aforesaid, which shall be regulated and the business disposed of as in Country causes. (*i*) 19 Vic. c. 43, s. 155. How records to be entered in Town causes.

206. (*j*) The Judge presiding at the Assizes or County Court sittings, may, in his discretion, peremptorily order the business of the Court to be proceeded with, on the first day of the sitting of the Court. (*k*) 14 & 15 Vic. c. 14, s. 14. The Judge may order proceedings peremptorily on the first day.

207. (*l*) In the County Courts, the plaintiffs shall enter with the Clerk of such Courts, respectively, a record in the form of a *Nisi Prius* record, on or before the first day of the How entered in County Courts.

(*d*) Every cause is *supposed* to be ready when it is placed in the list, and the cause list itself is entirely in the discretion of the presiding judge. He has the entire conduct of it, and may take the causes as he pleases: *Dunn* v. *Coutts*, 17 Jur. 347; 16 L. & Eq. 137. The exercise of that discretion will not be reviewed by the court above: *Ib.*

(*e*) This section, like the preceding as it originally appeared in the consolidated statutes, provided for three lists, but like the preceding section was repealed by Stat. 23 Vic. cap. 42, s. 3, which substituted for it the section here annotated, "which shall in lieu thereof be read as the two hundred and fifth section of the said act."

(*f*) As to what are town causes see section 226.

(*g*) In town causes the time for entry of records is apparently from 9 o'clock, a. m., till noon, but in country causes there is no such limit. In country causes the record is required to be entered "before noon of the commission or opening day of the assizes:" see section 203.

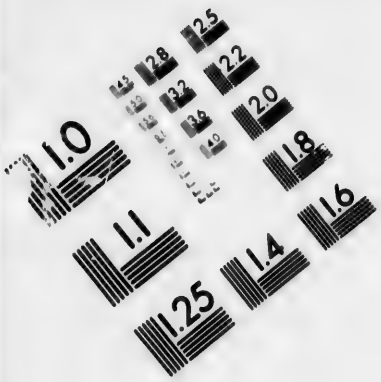
(*h*) See note *x* to section 203.

(*i*) See section 204 and notes thereto.

(*j*) Taken from our repealed Statute 14 & 15 Vic. cap. 14, s. 14.

(*k*) See note *d* to section 204.

(*l*) Taken from section 30 of the old County Courts Act, as amended by Stat. 12 Vic. cap. 66, s. 9, now repealed.



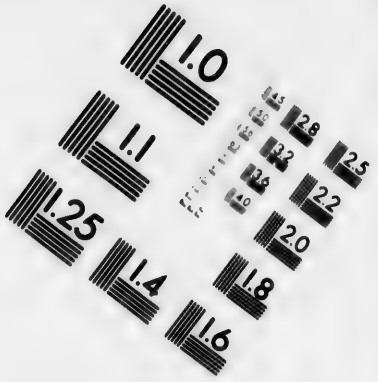
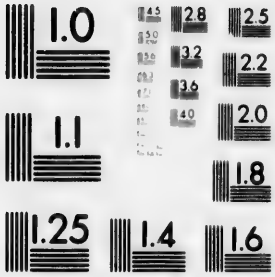
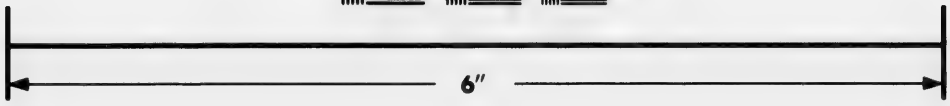
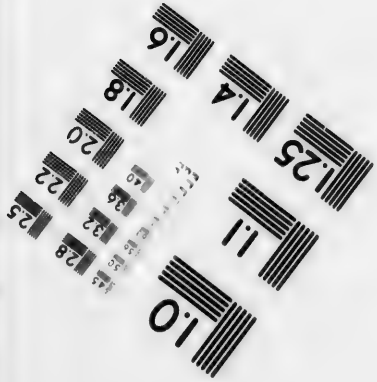
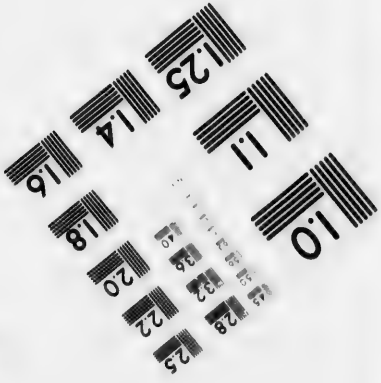


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sitting of such Courts, (*m*) and in those Courts no other *venire* than the following need be entered in the record:

Venire.

Therefore, the Sheriff (*or* Coroner, *as the case may be*,) is commanded that he cause to come before ———, Judge of our said Court, at the next sitting thereof, for trials and assessments, at the Court House, in ———, in the said County, on ——— the ——— day of ———, in the year of our Lord, one thousand eight hundred and ——— a Jury to try the said issue, (*or* assess the damages, *as the case may be*). (*n*)

When there are issues in law and also in fact, or upon any assessment of damages, the above *venire* may be altered and adapted to the particular case. (*o*) 8 Vic. c. 13, s. 30; 12 Vic. c. 63, s. 9.

TRIALS MAY BE ADJOURNED, &c.

When the Court may adjourn a trial.

208. (*p*) The Court (*q*) or Judge at the trial of any cause (*r*) may, (*s*) when deemed right for the purposes of

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(*m*) *i. e.* A transcript of the pleadings, with a *venire*.

(*n*) It is not said that no other form of *venire shall* be entered on the record, but simply that no other *need* be entered. The distinction deserves to be noted. But it is apprehended that practitioners will follow the form given rather than experiment in new forms at the risk of having material variances.

(*o*) As to notice of trial in such cases see note *k* to section 201.

(*p*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 19. Founded upon the second report of the Common Law Commissioners, section 6. The object of this section is to modify the rigorous inflexibility with which a cause commenced was carried on to its close: *Ib.* At the Guilford summer assizes, 1854, *coram* Pollock, C. B., Shea sergeant, applied for an adjournment of a cause until the next day for the purpose of avoiding a nonsuit by procuring the attendance of a witness, but the chief baron said he had no power to grant the adjournment, and nonsuited the plaintiff: Fin. C. L. P. Act, 364.

(*q*) *Court.* Probably means the court *in banc* in trials at bar, which are, however, of very rare occurrence: see note *n* to section 201.

(*r*) *Any cause.* This section has not been extended to trials in criminal cases. It has been decided that on a trial for felony the court has no power to order an adjournment from one day to another on account of the mere absence of witnesses: *Regina* v. *Parr*, 2 F. & F. 861. But this does not apply to a suspension of proceedings for a short time in the same day: see *Ib.* 862 notes *a* and *b* and cases therein mentioned.

(*s*) Confers a power but does not impose an obligation. The provisions of the section are to be distinguished from the practice of putting off a trial—a step which precedes and defers the trial, whereas the adjournment is a step taken during the pendency of a trial, and delays its progress from one day to another,

justice, (*t*) order an adjournment for such time (*u*) and subject to such terms and conditions, as to costs and otherwise, as they or he may think fit. (*v*) 19 Vic. c. 43, s. 158.

ADDRESSES OF COUNSEL, &c.

How addresses of counsel to jury regulated.

209. (*a*) Upon the trial of any cause (*b*) the addresses to the Jury shall be regulated as follows: the party who begins, or his Counsel, (*c*) in the event of his opponent not

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which is the proper meaning of the word adjournment. Postponements were formerly granted not only in civil cases: see *Thompson* v. *Lewis*, 2 C. L. R. 707; but in criminal cases: see 1 Leach, 430, note; *Rex* v. *Hunter*, 3 C. & P. 591; *Regina* v. *Savage et al*, 1 C. & K. 75; *Regina* v. *Macarthy*, Car. & M. 625; *Rex* v. *Palmer*, 6 C. & P. 652; see also *Regina* v. *Tait*, 2 F. & F. 553.

(*t*) The discretion to permit adjournments when it is deemed right for purposes of justice is a very wide one. It is one that can only be exercised with advantage by the judge presiding at the trial. He being conversant with the whole complexion of the case, must be the better able to arrive at a correct opinion as to the necessity for an adjournment. The adjournment, when applied for after the commencement of a cause, will generally be on some ground of surprise, and will not be granted in favour of a party who was negligent in getting up the proof of his case: *Graham* v. *Oldis*, 1 F. & F. 262. The examples given by the commissioners are cases where it happens that a party is taken by surprise by his adversary's case, or where a witness or a document becomes unexpectedly necessary and is not forthcoming. One useful test will be to consider whether the circumstances of the surprise are such that upon them the court *in banc*, if applied to, would grant a new trial. It is probable that if either party be clearly wronged by the refusal of the judge at nisi prius to grant an adjournment, the court above will grant a new trial: see *Sainsbury* v. *Matthews*, 4 M. & W. 343; *Roberts* v. *Holmes*, 2 C. L. R. 726; but that, unless in very clear cases, the discretion of the judge, when exercised upon the facts before him at the trial, will not be interfered with.

(*u*) Where a party hesitated at the trial to consent to a reference, Willes, J. intimated that unless the necessary consent were given he would adjourn the trial till the then next assizes: *Jones* v. *Beaumont*, 1 F. & F. 336.

(*v*) See note *t*, *supra*.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 18. Founded upon the second report of the Common Law Commissioners, section 5. The change effected by this section is one that in the opinion of the commissioners was necessary to the advancement of justice. The only objection to it is the possibility of a trial being unnecessarily prolonged. This may be averted by the conduct of counsel in the exercise of ordinary circumspection.

(*b*) *Any cause*. *Held* not apparently to extend to criminal cases: see *The Queen* v. *McLellan*, 9 U. C. L. J. 75. But has been since extended to criminal cases by Stat. 29 & 30 Vic. c. 41.

(*c*) The right to begin is not altered by this act. The rule which before the act prevailed is still to be observed. It is that the party upon whom the burden of proof lies is the party entitled to begin: *Rex* v. *Yeates*, 1 C. & P. 323; *Fowler* v. *Coster*, 3 C. & P. 463; *Williams* v. *Thomas*, 4 C. & P. 234; *Lewis* v. *Wells*, 7 C. & P. 221. One test is this: What would be the consequence if no evidence were offered at all? If in such a case the verdict ought to be given for one party,

announcing at the close of the case of the party who begins,

it is manifest that something must be done by the other to prevent that consequence, and he who has to give evidence to prevent that result being against him must begin: *Geach et al* v. *Ingall*, 14 M. & W. 100, *per* Alderson, B.; see also *Amos* v. *Hughes*, 1 Moo. & R. 464; *Soward* v. *Leggatt*, 7 C. & P. 613; *Leete* v. *The Gresham Ins. Co.* 15 Jur. 1161. Another test is to consider what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the right to begin lies on which ever party would fail if this step were taken: *Mills* v. *Barber*, 1 M. & W. 427, *per* Alderson, B. In trespass, with plea of *liberum tenementum*, the defendant is entitled to begin: *Pearson* v. *Coles*, 1 Moo. & R. 206. Defendant in replevin, who pleaded property in a third person besides denying property of plaintiff, held entitled to begin: *Colstone* v. *Hiscolbs*, *Ib.* 30; but see *Neville* v. *Fox*, 28 U. C. Q. B. 231. To the rule that the party upon whom the *onus probandi* lies has the right to begin, there are a few exceptions, as in actions for libel, slander, and injuries to the person, in which cases plaintiff shall begin, though the affirmative issue be on defendant: *Cannam et al* v. *Farmer*, 3 Ex. 619, *per* Parke, B.; see also *Mercer* v. *Whall*, 5 Q. B. 447, and the resolutions of the judges reported in *Ib.* 462, *per* Lord Denman, J. The *onus probandi* is governed by the following rules mentioned by Mr. Best in his work entitled "Right to Begin," to the end of some of which rules the editor has appended the names of more recent cases:—

First. Generally the burden of proof lies on the party who asserts the affirmative on the record: Best on Right to Begin, 3; also *Collier* v. *Clarke et al*, 5 Q. B. 467; *Booth* v. *Milns*, 4 D. & L. 52; *Bostwick* v. *Phillips*, 6 Grant, 427.

Secondly. The affirmative on the record means the affirmative in *substance* and not the affirmative in form: Best on Right to Begin, 5; also *Soward* v. *Leggatt*, 7 C. & P. 615; *Cannam et al* v. *Farmer*, 3 Ex. 698; *McCollum* v. *Davis*, 8 U. C. Q. B. 150; *Light* v. *The Woodstock and Lake Erie Railway and Harbour Co.* 13 U. C. Q. B. 216; *Platt* v. *The Gore District Mutual Fire Insurance Co.* 9 U. C. C. P. 405; *Jacobs* v. *The Equitable Insurance Co.* 19 U. C. Q. B. 250.

Thirdly. If there be a presumption of law in favour of the pleading of either party, the *onus probandi* is cast upon his adversary, though he may thereby be called on to prove a negative: Best on Right to Begin, 12; also *Mills* v. *Barber*, 1 M. & W. 425; *Smith* v. *Martin*, 1 Dowl. N.S. 418; *Bingham* v. *Stanley*, 2 Q. B. 117; *Bailey* v. *Bidwell*, 13 M. & W. 73; *Elkin* v. *Janson*, 13 M. & W. 655; *Hogarth* v. *Penny et al*, 14 M. & W. 494; *Doe d. Bridger* v. *Whitehead*, 8 A. & E. 571; *Sutherland et al* v. *Patterson*, M. T. 6 Vic. *MS.* R. & H. Dig. "*Onus Probandi*," 7; *Rex* v. *Nash*, Tay. Rep. 197; *McKinnon* v. *Burrowes*, 3 O. S. 114; *Le Mesurier* v. *Willard*, 3 U. C. Q. B. 285; *Doe d. McKay* v. *Purdy et al*, 6 O.S. 144; *O'Neill et al* v. *Leight*, 3 U. C. Q. B. 70; *Doe d. Place et al* v. *Skae*, 4 U. C. Q. B. 369; *McCollum* v. *Davis*, 8 U. C. Q. B. 150; *Mair* v. *McLean*, 1 U. C. Q. B. 455; *Doe d. Hagerman* v. *Strong et al*, 8 U. C. Q. B. 291.

Fourthly. When there are conflicting presumptions the *onus probandi* lies on the party who has in his favour the weakest presumption of the two: Best on Right to Begin, 21.

Fifthly. If the case of a party rest on the proof of some particular fact, of the truth or falsehood of which he must from its very nature be peculiarly cognizant, the *onus* of proving the fact lies on him: Best on Right to Begin, 23; also *Rex* v. *Turner*, 5 M. & S. 209; *Apothecaries Co.* v. *Bentley*, R. & M. 159.

Sixthly. And this rule holds good, even though there be a presumption of law in favour of his pleading: Best on Right to Begin, 23.

It may be mentioned that, after a thorough investigation, an important qualification has been established, viz. in actions for damages, when the affirmative of the issue is on the defendant, the latter has the right to begin, provided no proof of the amount of damage sustained is incumbent on plaintiff: *Mercer* v. *Whall*,

his intention to adduce evidence, (*d*) shall be allowed to address the Jury a second time at the close of such case, for the purpose of summing up the evidence; (*e*) and the party

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5 Q. B. 465. If plaintiff is bound and intends to show the amount of damages sustained, he is entitled to begin, notwithstanding the affirmative of the issue is on defendant: *Ib.*; see also *Ashby et al* v. *Bates*, 4 D. & L. 33; *Pim* v. *The Eastern Counties Railway Co.* 2 F. & F. 133. But if the affirmative of the issue is on defendant, and plaintiff's counsel will not undertake to offer proof of substantial damages, defendant has the right to begin: *Chapman* v. *Rawson et al*, 8 Q. B. 673. Where in ejectment the defendant admits so much of the plaintiff's case as would entitle the latter to recover, if his title were not displaced by defendant the defendant is entitled to begin: *Bernard* v. *Clune*, Ir. Cir. Rep. 826. But in ejectment by a devisee under a prior will against a devisee under a subsequent will, it was held that defendant could not by admitting the will under which plaintiff claimed obtain the right to begin: *French* v. *French*, 2 Ir. Jur. O. S. 21.

An incorrect ruling as to the right to begin is no ground for a new trial, unless the ruling did "clear and manifest wrong:" *Lyons* v. *Fitzgerald*, 8 Sm. & Bet. 405; *Ashby et al* v. *Bates*, 4 D. & L. 33; see also *Edwards et al* v. *Matthews*, *Ib.* 721; *Brandford* v. *Freeman*, 5 Ex. 734; *Doe d. Bather* v. *Brayne*, 5 C. B. 655; *Hamilton* v. *Davis et al*, 2 U. C. Q. B. 137; *McDonald* v. *McHugh et ux*, 12 U. C. Q. B. 503.

(*d*) In a case where counsel did not announce his intention to adduce evidence, in consequence of which the counsel who began summed up his evidence: *held* that the case was thereby closed, and that the former could not be allowed afterwards to alter his mind and to adduce evidence: *Darby* v. *Ouseley*, 1 H. & N. 1. But where plaintiff's counsel opened the case and called his witnesses, and then defendant's counsel addressed the jury, and at the close of his address stated that he did not intend to call any witnesses for the defence; thereupon plaintiff's counsel rose to address the jury a second time: *held* at nisi prius under this section, that plaintiff's counsel had no right to reply after defendant's counsel had addressed the jury: *Gibson* v. *The Toronto Roads Co.* 3 U. C. L. J. 11, *per* Robinson, C. J.

(*e*) Before this act the party who began a case was not entitled to a reply in cases where his adversary refrained from adducing evidence. Often his adversary, to prevent him from having a reply, intentionally omitted to call witnesses. In such cases the avowed object was to prevent the party who began from having the last word with the jury, and thereby producing the last impression upon them. The adversary having adduced no evidence, it was always ruled that inasmuch as there was no evidence for the party who began to comment upon, there was no necessity for a reply, and it was upon this ground denied. But when the adversary's counsel in his address to the jury stated facts without intending or attempting to prove them, it was understood that the presiding judge might, in his discretion, permit a reply: *Crerar* v. *Sodo et al.* 1 M. & M. 85; *Naish* v. *Brown et al*, 2 C. & K. 219; *Arundell* v. *Hayes et al*, 1 Hud. & B. 486; *Reordan* v. *Sullivan*, Ir. Cir. Rep. 346. But statements made as matters of inference from the evidence did not give a right of reply: *Magrath* v. *Browne*, Arm. Mac. & Og. 133. The right of the party who begins to address the jury for the purpose of summing up the evidence which may be merely his own evidence, must be allowed in all cases, that is, in all cases where there is evidence to be summed up, which means evidence fit to be submitted to a jury: see *Clark* v. *White*, Ir. Cir. Rep. 523. It is for the presiding judge, at the close of plaintiff's case, if he be the party who began, to decide whether there is or is not such evidence. Hence, if his decision be in the negative, there is no evidence to sum up, and consequently no right to plaintiff's counsel to make a second address to the jury. To allow counsel to address the

on the other side, or his Counsel, shall then be allowed to open his case and also to sum up the evidence (if any), (*f*) and the right to reply shall be the same as at present. (*g*) 19 Vic. c. 43, s. 157.

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jury on the point as to whether there is evidence or not, would be to permit an appeal from the judge to the jury, and would be manifestly improper. It would be wrong to allow counsel to argue at the judge through the jury: *Hodges* v. *Ancrum et al*, 11 Ex. 214, Platt, B. *dissentiente*. It is usual for some judges of experience, where plaintiff's counsel merely opens the pleadings, not to restrict him to "a mere summing up" where defendant calls no witnesses. It is not usual to restrict counsel very strictly to the summing up, especially if no objection be made by opposing counsel: see *Glennie* v. *Glennie et al*, 3 Sw. & Tr. 109.

(*f*) It has been held in trespass, where there are several defendants, who, having separate defences plead by several attorneys, and at the trial appear by separate counsel, that the latter may cross-examine the plaintiff's witnesses, and address the jury separately: *Dixon* v. *Dane*, Arm. Mac. & Og. 152.

(*g*) This means the general reply, that is, the opener's reply upon the whole case as before the jury. The old rule, which is still the law, is thus stated: "The counsel of the party which doth begin to maintain the issue, whether of plaintiff or defendant, ought to conclude." Plaintiff, if the party to begin and there are several issues joined some of which only are upon him, may do one of two things, either anticipating the defence to go into the whole case at once, rebutting the anticipated defence as he proceeds, or content himself with establishing a *prima facie* case, reserving his evidence in reply till defendant has established his defence: *Anon.* 4 Ir. L. Rec. O.S. 120; *Ball* v. *Mannion*, Cr. & Dix. Ab. Not. Cas. 75. If he adopt the former course he will not be allowed to add further evidence in reply: *Browne* v. *Murray*, R. & M. 254. If he adopt the latter mode, and defendant, besides impeaching the *prima facie* case, set up an entirely new case, which plaintiff controverts by evidence, then defendant is entitled to a special reply to the evidence so produced, and plaintiff to the general reply upon the whole case: *Meagoe* v. *Simmons*, 3 C. & P. 75. Thus, where in an action on a bill plaintiff's counsel made out a *prima facie* case, and the defendant's counsel proved usury, thereupon plaintiff called a witness in reply to deny the usury, the defendant's counsel was held entitled to address the jury upon plaintiff's evidence in reply, and plaintiff's counsel then to the general reply: *Ib.* Where there are several issues, the *onus* of proving some of which lies on the plaintiff and others on the defendant, the practice is for plaintiff to begin, and prove such of the issues as are incumbent on him; the defendant then does the same on his side; afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affimative proofs; the defendant is then entitled to a special reply on the fresh evidence in support of his affirmative, and then plaintiff has a general reply: Best on Right to Begin, 101. If plaintiff, after his case is closed, proves a document which is important for his case by one of the defendant's witnesses, the defendant's counsel is entitled to address the jury in reply, but his speech must be confined to the question in relation to which the document was given in evidence: *Malone* v. *Hackett*, Arm. Mac. & Og. 349. So where the opposing counsel, in his address to the jury, raises any point of law, or cites any case, the other side will be allowed to address the court to the point of law or observe on the case cited without trenching on the facts in question, further than is necessarily involved in the discussion of the point or case in question: Best on Right to Begin, 101. It would seem that if there be only one issue on the record, and it lie upon plaintiff, he cannot content himself with a *prima facie* case in the

THE EXAMINATION OF WITNESSES.

Cross-examination as to previous statements in writing.

210. (*h*) Upon the trial of any cause, a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, (*i*) relative to the subject matter of the cause, (*j*) without such writing being shown

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first instance, and after defendant has shaken it, call further evidence. He must put forth his whole evidence in the beginning: *Jacobs* v. *Turleton*, 11 Q. B. 421; see also *Wright* v. *Wilcox*, 19 L. J. C. P. 333. Evidence in reply will not be allowed merely because it confirms the case of the party who began. It must be confined to rebutting the evidence adduced for the defence: *Rex* v. *Hilditch et al*, 5 C. & P. 299; *Browne* v. *Murray*, R. & M. 254; *Jacobs* v. *Tarleton*, 11 Q. B. 421. And yet it must be consistent with the original case: *Whittingham* v. *Bloxham*, 4 C. & P. 597. It is for the presiding judge to decide as to the admissibility of evidence offered in reply: *Wright* v. *Wilcox*, 19 L. J. C. P. 333; see further *Doe d. Gosley* v. *Gosley*, 2 Moo. & R. 243; *Briggs* v. *Aynsworth*, *Ib* 168; *Osborn et al* v. *Thompson*, *Ib* 254; *Anon.* 3 Ir. L. R. 39. Where the defence of forgery was set up to an action on bills of exchange, and counsel in opening the plaintiff's case stated that the only issue was "forgery or no forgery," it was held that counsel in reply was not at liberty to open to the jury the question as to whether the defendant by his conduct had not adopted the forgeries: *The Provincial Bank* v. *Costelloe*, Arm. Mac. & Og. 303; for had this view of the case been opened it might have altered the line of defence: *Ib*.

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 24. Founded upon the second report of the Common Law Commissioners, section 15. Applied to criminal cases: Stat. 29 & 30 Vic. cap. 41. The object of this section is to reverse a rule laid down in the Queen's case, 2 B. & B. 286, and condemned by the Common Law Commissioners.

(*i*) As to oral statements under similar circumstances see section 215.

(*j*) That is, a statement made at any time previous to his examination in chief, but in reference to the subject matter of the cause. The latter words deserve especial attention. A witness cannot be contradicted as to *any* statement provided it be in *any way* connected with the subject matter before the jury. Contradiction if allowed on every pretence would involve inextricable confusion by the production of innumerable collateral issues not at all affecting the merits of the cause. The limitation sought to be imposed would appear to be to allow contradiction as to statements not purely collateral. What statements are collateral—what not? In *Attorney-General* v. *Hitchcock*, 1 Ex. 100, Pollock, C. B. observed, "that the statement must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which if answered in a particular way would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as *connected with*, the subject of inquiry." Now no matter is capable of being distinctly given in evidence that is not relevant to the subject matter in issue, and this is a principle which extends to the several sections here annotated. The question as to what evidence is relevant to the subject matter at issue of course must depend upon the nature of the cause and the issues raised. Reference may be had to the following cases: *Gilbert* v. *Gooderham et al*, 6 U. C. C. P. 39; *Calder* v. *Rutherford et al*, 3 B. & B. 302; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; *Backhouse et al* v. *Jones et al*, *Ib*. 65; *Rowe* v. *Brenton*, 8 B. & C. 758; *Tyrwhitt* v. *Wynne et al*, 2 B. & Al. 554; *Watts* v. *Lyons*, 6 M. & G. 1047; *Gerish* v. *Chartier*, 14 L. J. C. P. 84; *Smethurst* v. *Taylor et al*, 14 L. J. Ex. 86; *Murray* v. *Gregory*, 19 L. J. Ex. 355; *Alcock* v. *Royal Exchange*

to him; (*k*) but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; (*l*) and the Judge at any time during the trial, may

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Insurance Co. 18 L. J. Q. B. 121; *Daines et al* v. *Hartley*, 3 Ex. 200; *Berry* v. *Alderman*, 13 C. B. 674. The statement must be one made by the witness and not by third parties to the witness: *Macdonnell* v. *Evans*, 11 C. B. 930. But in *Henman* v. *Lester*, 12 C. B. N. S. 776, where a party to the cause gave evidence in support of his own case, it was held (Byles, J. *dissentiente*) that he might be asked on cross-examination, with a view of testing his credit, whether a certain action had not been brought against him in respect of a similar claim upon which he had given evidence and was defeated, and this without proof of the record or proceedings in that suit.

(*k*) The old rule, grounded upon the principles that the best evidence of the contents of a writing is the writing itself, that the best evidence ought to be produced, and that the court ought to be put in possession of the whole document, in some cases worked unreasonably: *McEvoy* v. *Agar*, 4 Ir. Jur. O.S. 336; *Hunter* v. *Kehoe*, Ir. T. Rep. 350, 352, 354, 355; *Pujolas* v. *Holland*, 3 Ir. L. R. 533. The rule was not questioned where the object of the examining counsel was to establish the contents of a written document as a fact material to the merits of a cause. But when the object was merely to test the memory of the witness or to discredit him, the application of the rule, though supported by authority, was much doubted by eminent lawyers. Lord Brougham more than once declared that the rule, as applied to the latter case, could not be defended, but was founded on a gross fallacy. Upon one occasion he thus forcibly expressed himself: "If I wish to put a witness's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it, though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. Neither am I in like manner allowed to apply the test to his veracity; and yet how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him as to the contents of a letter written by him, and which he believes to be lost:" Speech on Law Reform, Brougham's Speeches, II. 447. The reasoning contained in this speech has now prevailed. In *Sladden* v. *Sergeant et al.* 1 F. & F. 322, a witness was cross-examined as to the contents of an affidavit which was not put in evidence, it was objected that it ought to be put in, but Willes, J. overruled the objection under this section. When at quarter sessions a witness for the crown identified a prisoner who was a dark-haired man, and on cross-examination said he did not recollect whether or not he had deposed before the justices of the peace that the man who had committed the assault with which the prisoner was charged was "a fair-haired man," it was held that the counsel for the prisoner was entitled to give evidence that the witness had made such a statement, without producing and reading any part of the witness's depositions: *Regina* v. *Connors*, 4 Ir. Jur. N.S. 263. But see *Regina* v. *Hamilton et al*, 16 U. C. C. P. 340.

(*l*) This is a limitation engrafted upon the rule enacted in the first part of the section. If the witness wholly deny the document itself or any statement in it, the production of the document would, it is apprehended, be considered fresh evidence, and as evidence produced by the party cross-examining. Should this be the case, then the opposite party would be entitled to re-examine. The question how far evidence produced is to be deemed fresh evidence so as to entitle an

require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit. (*m*) 19 Vic. c. 43, s. 161.

Proof of previous conviction of a witness may be given if he denies it, &c.

211. (*n*) A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, (*o*) and upon being so questioned, if he either denies the fact or refuses to answer, (*p*) the opposite party may prove such conviction, (*q*) and a certificate containing the substance and effect only (omitting the formal part) of the indictment and

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adversary to re-examine, is not affected by this section. Where a witness for plaintiff swore that he had never heard of a certain agreement in writing, and it was thereupon put into his hands, and he was then asked by defedant's counsel if he had ever seen any agreement respecting the matter, to which he replied, "Never before I came into court," held that defendant, wishing to have it read, could only do so by putting it in as his own evidence: *Keys* v. *Harwood*, 15 L. J. C. P. 207.

(*m*) To prevent abuse of the facilities given by the former part of this section, this proviso is added. An erroneous ruling under this section is not *per se* ground for a new trial: *Henman* v. *Lester*, 12 C. B. N.S. 776.

(*n*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 25. Apparently founded upon the second report of the Common Law Commissioners, section 16, but goes much further than recommended by the commissioners. Applied to criminal cases: Stat. 29 & 30 Vic. cap. 41; Stat. Dom. 32 & 33 Vic. c. 29, s. 65.

(*o*) It was proposed by the commissioners that only questions impeaching the witness's character or standing should be put, with the consequences of denial here enacted, when such questions related to "perjury or any other form of *crimen falsi*." It will be perceived that by virtue of this section the questions may be put as to previous convictions for *any* felony or misdemeanor. A denial will let in the proof, in contradiction of which the mode is in this section described. In any event the questions authorised to be put are such only as have a tendency to affect the character or credit of witnesses. Questions tending to degrade the character of the witness by imputing to him misconduct not amounting to legal criminality remain as before the act: *Regina* v. *Garbett*, 2 C. & K. 474; see as to questions tending to criminate the witness as to subject him to penalties, note *s* to section 190. If the reason assigned for not answering be insufficient, the witness may be compelled to answer: *In re Aston*, 27 Beav. 474; *Doe d. Marr* v. *Marr*, 3 U. C. C. P. 36.

(*p*) A witness so interrogated has before him one of these courses—to admit the crime deny it, or refuse to answer. If he admit, there will be no necessity for further proceedings to establish it. If he deny it or refuse to answer, proceedings may be had under this section. No witness can be *excluded* on the ground of crime: Con. Stat. U. C. cap. 32, s. 3; but proof of crime may lessen the value of his testimony when admitted.

(*q*) No man can be said to have been convicted unless the judgment of the court upon the indictment against him has been pronounced: see *Rex ex rel Reynolds* v. *Bridger*, 1 M. & W. 145; *Regina* v. *Whitehead*, 2 Moo. C. C. 181; *Burgess* v. *Boetefeur*, 7 M. & G. 481.

conviction for such offence, (*r*) purporting (*s*) to be signed by the Clerk of the Court or other officer having the custody of the records of the Court at which the offender was convicted, (*t*) or by the Deputy of such Clerk or Officer, (for which certificate a fee of *one dollar* and no more may be demanded or taken,) shall, upon proof of the identity of the witness as such convict, (*u*) be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. (*v*) 19 Vic. c. 43, s. 162.

212. (*a*) It shall not be necessary to prove by the attest-

(*r*) This enactment as to the contents of the certificate is substantially the same as Con. Stat. Can. cap. 99, s. 72, taken from Eng. Stat. 7 & 8 Geo. IV. cap 28, s. 11. And under the latter, a certificate from a clerk of assize setting forth that the prisoner was "tried and convicted" of felony, but not showing that any judgment had been given on the conviction, was held insufficient: *Regina* v. *Ackroyd et al*, 1 C. & K. 158; see further *Burgess* v. *Boetefeur*, 7 M. & G. 481; *Regina* v. *Stonnell*, 1 Cox C. C. 142. At one time the conviction could only be proved by the production of the record of conviction: *Macdonnell* v. *Evans*, 11 C. B. 930, *per* Cresswell, J. But if the record of conviction be not produced, it must be proved by a certificate, as in this section provided; neither the production of the calendar of the sentences signed by the clerk of assize, and by him delivered to the governor of the gaol, nor the evidence of a person who heard sentence passed, is sufficient as a substitute for the record of conviction or a certificate thereof under this section: *Regina* v. *Bourdon*, 2 C. & K. 366.

(*s*) *Purporting.* The exact meaning to be attached to this word may be gathered from the concluding part of the section, to the effect that the certificate may be produced "without proof of the signature or official character of the person appearing to have signed the same."

(*t*) This means an officer of the court where the offender was convicted *or* an officer having the custody of the records of that court. A certificate from the clerk of the crown as to convictions at courts of oyer and terminer and general gaol delivery, or from clerks of the peace as to convictions at quarter sessions would be sufficient. As to his signature see *Regina* v. *Parsons*, L. R. 1 C. C. 24.

(*u*) The identity must of course be proved by evidence *aliunde* the certificate. The clerk who saw the prisoner sentenced or the gaoler who had him in custody under the sentence may be called for the purpose: see *Regina* v. *Crofts*, 9 C. & P. 219; *Regina* v. *Leng et al*, 1 F. & F. 77; s. c. entitled *Regina* v. *Levy et al*, 8 Cox C. C. 73. But it is not absolutely necessary to call as a witness a person who was present at the trial. It is in general enough to prove that the witness is the person who underwent the sentence mentioned in the certificate.

(*v*) See note *s*, *supra*.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 26. Founded upon the second report of the Common Law Commissioners, section 18. Applied to criminal cases: Stat. 29 & 30 Vic. cap. 41; Stat. Dom. 32 & 33 Vic. c. 29, s. 66.

ing witness (*b*) any instrument to the validity of which attestation is not requisite, (*c*) and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. 19 Vic. c. 43, s. 163.

Attesting witness need not be called where none was required by law.

(*b*) *i. e.* Proof by the subscribing witness may be made, but shall not be necessary; other modes, if more convenient, may, with respect to the writings embraced within this section, be adopted.

(*c*) The object of this section is to qualify the rule that "before an attested document can be received in evidence, the attesting witness or witnesses must be called, or his or their absence accounted for:" *Doe d Sykes et al* v. *Durnford*, 2 M. & S. 62; *Currie* v. *Child et al*, 3 Camp. 283; *Higgs* v. *Dixon*, 2 Stark. 180; *Cussons* v. *Skinner et al*, 11 M. & W. 161; *Doe d. McDonald* v. *Twigg et al*, 5 U. C. Q. B. 167; *Bennett* v. *McDonald*, *MS.* E. T. 3 Vic. R. & H. Dig. "Evidence," v. 2; *Tylden* v. *Bullen*, 3 U. C. Q. B. 10; *Fishmongers' Co.* v. *Dimsdale et al*, 12 C. B. 557; *Smithwicke* v. *Beary*, 1 Ir. C. L. R. 344. Some documents are often unnecessarily attested. Attestation at common law is unnecessary. It is only requisite when made so by some statute, rule of court, power, or other act passed or made by public bodies or private individuals having authority to impose the obligation. Such, for example, wills under the Eng. Stat. of Car. II. as amended by our Con. Stat. U. C. cap. 82, s. 13; memorials to deeds under our Stat. Ont. 31 Vic. cap. 20; or appointments to be made in the presence of witnesses, as prescribed in the power creating the right to appoint: see further Taylor on Evidence, s. 1638. But no law makes attestation necessary to the validity of a promissory note or bill of exchange. These and such like documents may be proved with much less expense than by the production of a subscribing witness, whose residence may be difficult to find, or, if found, far from the place of the trial, and who, if produced, in all probably will only be able to speak as to his signature but not as to the circumstances under which the writing was signed. It is now enacted that any instrument, though attested, to the validity of which attestation is not requisite, may be proved "by admission or otherwise as if there had been no attesting witness." But even before this act, in an action on an attested promissory note, it was considered repugnant to reason to hold it indispensable to produce the subscribing witness, when the defendant had admitted his signature, under circumstances which precluded him from disputing the note: *Perry* v. *Lawless*, 5 U. C. Q. B. 514. Nor was it necessary to call the subscribing witness when the document was proved by secondary evidence, for instance, the production of a copy: *Poole et al* v. *Warren*, 8 A. & E. 582. And it was held where a party refused to produce a deed at a trial, and a copy of it was in consequence duly proved, that the party could not afterwards exclude the copy by producing the original, and requiring it to be proved by the attesting witness: *Edmonds* v. *Challis et al*, 6 D. & L. 581. The test in every case will be—is this document one that requires attestation to make it a valid instrument? If it be, the witness must be called, or his absence accounted for, or his signature proved: *Bowman* v. *Hodgson*, L. R. 1 P. & D. 362. Unless the instrument prove itself by age or proper custody: *Mytton* v. *The Churchwardens and Overseers of the Poor of Thornbury*, 29 L. J. M. C. 109. Where proof must be given of the attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, and against whom it is sought to be used, into the witness-box, and extracting an admission of the execution from him: *Whyman* v. *Garth*, 8 Ex. 803. It is a question whether an attorney who attests a document (cognovit or warrant of attorney, R. G. pr. 26, or satisfaction piece, R. G. pr. 64) by direction of the court can be considered an attesting witness within the principle of the cases: see *Bailey* v. *Bidwell*, 2 D. & L. 245; *Streeter* v. *Bartlett*,

Comparison of disputed writing with genuine.

213. (*d*) Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, (*e*) shall be permitted to be made by witnesses; (*f*)

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5 C. B. 562; *Pocock* v. *Pickering*, 21 L. J. Q. B. 365; see further *Deffell et al* v. *White*, L. R. 2 C. P. 144. It is doubtful whether a deed can, in an *ex parte* case, be legally proved except by the subscribing witness when it is attested. In a recent case it was said by Vice-Chancellor Kindersley that it could not be: *In re Reay*, 1 Jur. N.S. 222; but Mr. Taylor pronounces the decision in this case to be a mischievous doctrine, and hopes that it will not become established law: Taylor on Evidence, section 1640; see also *Jearrad* v. *Tracey*, 7 L. T. N.S. 654.

(*d*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 27. Founded upon the second report of the Common Law Commissioners, section 19. Before this act, whenever the genuineness of a writing was in dispute, it was not allowable to put in evidence other writings by the same party admitted or proved to be genuine, for purposes of comparison, when the latter were not directly connected with the subject matter of the cause. A witness might speak from previously having seen the party write, or from having received writings from him, the genuineness of which there was no reason to doubt, but could not at the trial compare any such writing with the one in dispute, so as to pronounce an opinion upon the genuineness of the latter.

(*e*) For convenience of expression the writing here mentioned may be described as the "standard." Before admission it must be "proved to the satisfaction of the *judge* to be genuine." The mode of proof, it is understood, must be legal proof. The "standard" may be and in most cases will be collateral to the issues between the parties, and as a foundation for future evidence must be established to be genuine. In the case of *Moss* v. *Truscott*, which was tried at the Warwick summer assizes, 1856, before the then chief justice of the Common Pleas, it was proposed to put in, for the purpose of comparison only, certain documents which were not admitted to be in the handwriting of the defendant. The learned judge observed that he and not the jury must try in the first instance the collateral question whether those documents were genuine, and he observed that practically the effect would be to leave the whole question to him without the jury: Markham's C. L. P. Act, 3 ed. p. 155; see further *Egan* v. *Cowan*, 30 L. T. Rep. 223. Where a document is tendered in evidence for the purpose of contradiction, and its genuineness is disputed, a collateral issue of fact is at once raised: *Cooper* v. *Dawson*, 1 F. & F. 550. When such collateral issues arise, and evidence in relation to them becomes admissible at a stage of the case when it would otherwise be excluded, such evidence should be treated as applicable to the case generally: *The Royal Canadian Bank* v. *Brown et al*, 27 U. C. Q. B. 41. A judge at nisi prius admitted an anonymous letter for the purpose of comparison of handwriting. The letter had not been regularly proved, having been handed casually to a witness without the attention of the court or opposite counsel being called to it until the summing up of the defendant. The plaintiff at this stage of the proceedings denied that the letter was in his handwriting. There was a verdict for the defendant. The court set aside the verdict on the ground that an improper use was made of the letter, the plaintiff not having been duly apprised: *Egan* v. *Cowan*, 30 L. T. Rep. 223.

(*f*) The reasons that prompted the commissioners to recommend the changes carried into effect by this section are thus given:—"It seems to us indefensible in principle to allow a witness to institute a comparison with the *recollection* of writings which he may have seen long ago, and of which but a faint trace may remain on his mind, and yet to prohibit a fresh comparison with genuine writings, more especially when for the purpose of trying the accuracy of the witness, it is proposed to try the test of requiring his judgment on writing *which is not disputed*.

and such writings and the evidence of witnesses respecting

Still less defensible in our view is it to leave the jury to act on the judgment of a witness, who after all can only form that judgment on a comparison of the disputed writing with others, and yet to deny the jury the opportunity of forming their own judgment on the same materials." The real change wrought by this act is to allow the "standard" to be substantially produced in court instead of being ideal as formerly. And being produced, proved, and admitted, it is as much tributary to the judgment of the jurors as of the witness. The general wording of the section under consideration may perhaps be held to admit of the production of *experts*, or men whose business it is to compare styles and character of writing, and who in consequence are skilled in that science, if such it may be termed. This description of testimony may, at least, it is conceived, be received as rebutting evidence. All evidence of handwriting, except when the witness sees the document written, is in its nature comparison; it is the belief which a witness entertains upon comparing the writing in question either with an exemplar in his mind, derived from some previous knowledge, or from an exemplar exhibited to him when testifying. As to the first part, the knowledge of the proposition may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and periods and other circumstances under which the witness has seen the party write: *Garrells* v. *Alexander*, 4 Esp. 37; *Powell* v. *Ford*, 2 Stark. 164; *Lewis et al* v. *Sapio*, M. & M. 39; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which in the ordinary course of transactions induces a reasonable presumption that the letters or documents were the handwriting of the party: *Lord Ferrers* v. *Shirley*, Fitz. 195; Buller's Nisi Prius, 236; *Carey* v. *Pitt*, Peake, Add. Ca. 130; *Tharpe* v. *Gisburne*, 2 C. & P. 21; *Harrington* v. *Fry*, R. & M. 90; evidence of the identity of the party of course being added *aliunde* if the witness be not personally acquainted with him. These were the only two modes of acquiring a knowledge of handwriting which have hitherto been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting: *Rex* v. *Cator*, 4 Esp. 117; *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 703; Fitzwalter Peerage Case, 10 Cl. & Fin. 193; see also *Griffits* v. *Ivery*, 11 A. & E. 322; *Hughes* v. *Rogers*, 8 M. & W. 123; *Young* v. *Honner*, 2 Moo. & R. 536. But as to the second part of the proposition above stated and that which now constitutes a third mode. It is by satisfying the witness by some information or evidence that a written paper is in the handwriting of the party, and then desiring him to study that paper, so as to refresh his knowledge of the handwriting of the party, and fix an exemplar in his mind, and asking his belief respecting it, or perhaps (*sed qu.*) by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them and *acquire* a knowledge of the handwriting, and afterwards showing him the writing in dispute, and asking his belief whether they are written by the same person: *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 703. In an action for libel charging the plaintiff with having in a letter published a libel on the defendant, to which the defendant pleaded in justificatian that the plaintiff did in fact publish the libel in question, and it appeared that in the libel thus alleged to have been written by the plaintiff, the name of the defendant was spelt in a peculiar way: *Held*, in order to prove that the plaintiff wrote the libel, other documents written by him, in which the name was so *spelt*, were receivable in evidence: *Brookes* v. *Tichborne*, 5 Ex. 929.

the same, may be submitted to the Court and Jury, (*g*) as evidence of the genuineness or otherwise of the writing in dispute. 19 Vic. c. 43, s. 164.

How far a party may

214. (*h*) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, (*i*)

(*g*) That proof of handwriting may be submitted to the consideration of a jury, like every other species of evidence, is abundantly clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability upon which it is found to be unsafe to act, it may be, and constantly is, so submitted: *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 719, *per* Williams, J. The writings or "standards" collaterally introduced and the evidence of witnesses respecting the same may now both be submitted to the jury. It is for them to exercise an independent judgment upon the testimony of the witnesses, and by a process of reasoning in many respects similar to that of the witnesses, but, in view of the whole case submitted, of a much more extended and comprehensive character. In *Birch* v. *Ridgway*, 1 F. & F. 270, in an action on a bill of exchange, the acceptance being denied, documents, such as receipts, &c. not relevant to the issue, but found to be in the handwriting of defendant, were allowed to be put in evidence for the purpose of comparison. So where an attesting witness on cross-examination denied his handwriting, other documents admitted by him to be genuine were submitted to the jury for the purpose of comparison: *Cresswell* v. *Jackson*, 2 F. & F. 24. The question being whether a memorandum was in the handwriting of the defendant, and he having in the course of his cross-examination been induced to write something on a piece of paper, this was allowed to be shown to the jury for the purpose of comparison of handwriting under this section: *Cobbett* v. *Kilminster*, 4 F. & F. 490, *coram* Martin, B.; see further *Doe d. Devine et al* v. *Wilson et al*, 10 Moore P. C. 530. On a comparison of handwriting, *both* documents must of course be before the jury: *Arbon* v. *Fussell*, 3 F. & F. 152.

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 22. Founded upon the second report of the Common Law Commissioners. Applied to criminal cases: see Stat. 29 & 30 Vic. cap. 41: Stat. Dom. 32 & 33 Vic. cap. 29, s. 68. The origin of the section appears to be the New York Civil Code, ss. 1845, 1848. And the section itself settles a question which for a long time has caused great difficulty in the English system of jurisprudence. The law, with attendant difficulties, as it stood before this act, is thus put by the commissioners: "It occasionally happens that a witness called by a party in a cause, under a belief that he will prove a certain fact, turns round upon the party calling him and proves directly the reverse. The party is of course not precluded from proving by other testimony what the witness has negatived: see *Hardwell* v. *Jarman*, Bull N. P. 297; *Goodtitle* v. *Clayton et al*, 4 Burr. 2224; *Bradley* v. *Ricardo*, 8 Bing. 57; *Friedlander* v. *The London Assurance Co.* 4 B. & Ad. 193; *Palmer* v. *Trower*, 22 L. J. Ex. 32; but ought he to be allowed to discredit the witness by impeaching his veracity or credit by showing that he has made previous statements at variance with the evidence he has given in the box? The decisions are conflicting; the weight of authority tends to establish the negative, while the weight of reason and argument appears to be decidedly in favour of the affirmative:" Second report, section 13. The latter has been supported by Starkie, Phillips and Taylor, in their several treatises on evidence, and is the view adopted by the legislature in this act.

(*i*) There is reason and authority for this position. If the party producing a witness is prepared to give general evidence of bad character, why does he produce him at all? To produce a witness under such circumstances, if undisclosed, would be a fraud upon the court. The conduct of the party producing him would

but in case the witness, in the opinion of the Judge, proves adverse, (*j*) such party may contradict him by other evidence, (*k*) or by leave of the Judge, (*l*) may prove that the witness made at other times a statement inconsistent with his

discredit his own witness.

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be most reprehensible. His object would be to keep secret the infamous character of the witness, so long as that witness served the purpose intended, but to expose him the moment he became intractable. A party producing such a witness should never be allowed to say at one moment that he is a man of good character, and at the next that he is quite the contrary. His veracity is endorsed by his production. His conduct is at the risk of the party producing him, who, if disappointed in his expectations, is justly punished for his attempted deceit: see *Ewer et al* v. *Ambrose*, 3 B. & C. 746.

(*j*) A reference to the presiding judge is here intended. If in *his* opinion the witness prove adverse, then, &c. Whether adverse or not is for the judge and not for the court to determine: see *Greenough* v. *Eccles et al*, 5 C. B. N.S. 786. The word "adverse" as here used means hostile, and not simply unfavourable: *Coles* v. *Coles et al*, L. R. 1 P. & D. 70. It is for the judge to see whether the proposed evidence is controversial or be inconsistent with the witness's present statement, and it is for the jury finally to decide this when the evidence has been left to them: *Jackson et ux* v. *Thomason*, 1 B. & S. 745. Erle, J. in *Dear* v. *Knight*, 1 F. & F. 433, held a *witness* "adverse" simply because he made a statement contrary to what he was called to prove; and again in effect so held in *Pound* v. *Wilson*, 4 F. & F. 301. Where in trespass aginst the sheriff in seizing goods, the plaintiff called the witness who made the seizure and sale, who swore that the plaintiff, after giving notice of claim, withdrew the claim, and the plaintiff offered evidence to disprove the alleged fact of withdrawal, which evidence was rejected, and it appearing that this section was not brought under the consideration of the learned judge, the court ordered a new trial: *Robinson* v. *Reynolds*, 22 U. C. Q. B. 560.

(*k*) Before the C. L. P. Act, the rule on this subject was thus laid down in Buller's N. P. 297: "A party never shall be permitted to produce general evidence to discredit his own witness. * * But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." *Per* Cockburn, C. J. in *Greenough* v. *Eccles*, 7 W. R. 341: "I think in the act there has been a great blunder made by those who framed this section, and in the legislature by those who adopted it. Instead of the clause as to the opinion of the judge as to the witness being adverse being made to precede the third branch of the section, it has been made to precede the second branch. The better plan is to consider that the second part of the section is superfluous." And *per* Williams, J. in same case: "It is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relative to the issue—a right not only established by authority, but founded on the plainest good sense."

(*l*) "Even if the lord chief justice had been wrong, I should have been, as at present advised, of opinion that we have no jurisdiction to renew his ruling. In order, no doubt, to prevent the increase of causes of new trial, the legislature have, as it appears to me, in terms made the opinion of the judge, on this point, absolute, and therefore final:" *Greenough* v. *Eccles et al*, 5 C. B. N.S. 806, *per* Willes, J.

present testimony; (*m*) but before such last mentioned proof can be given, the circumstances of the supposed statement,

(*m*) A good example, and the one commented upon by the commissioners, is involved in *Wright* v. *Beckett*, 1 Moo. & R. 414. It was an action of trespass *quare clausum fregit*, brought to try the question whether the plaintiff had exclusive right to the soil of a piece of land. His counsel adduced four witnesses, whose evidence established that he and his predecessors had exercised immemorial acts of ownership over it. He produced a fifth witness to prove the same fact; but this witness contradicted the previous witnesses. Thereupon the plaintiff's counsel asked him if he had not given a different account of the facts to plaintiff's attorney a few days before. The question was objected to, but allowed to be put. The answer was evasive, whereupon plaintiff's counsel called plaintiff's attorney, and asked him whether the witness had, upon the occasion referred to, given him an account different to that given at the trial. This also was objected to, but allowed to be put. Afterwards a motion for a new trial was made upon the ground that the question ought not to have been allowed; but as the court was equally divided, no rule was granted: see also *Rex.* v. *Oldroyd*, R. & R. C. C. 88; *Dunn* v. *Aslett*, 2 Moo. & R. 122. Where in an action for damages done to plaintiff's mare by four "ferocious and mischievous dogs" of defendant, the witness for plaintiff, called to prove the mischievous nature of the dogs, and defendant's solicitor proved quite the contrary, the court refused to allow plaintiff to call an attorney's clerk to show that the witness had made a different statement: *Reed* v. *King*, 30 L. T. Rep. 290. In *Faulkner* v. *Brine et al*, 1 F. & F. 254, the defendant's attorney was allowed to be called to show that a witness had given to him a materially different statement to that which he gave in court. So in *Dear* v. *Knight*, 1 F. & F. 433, the defendant was allowed to cantradict his own witness by showing a statement made by him contrary to his sworn testimony in the box. But it is not necessary that the two statements should be absolutely at variance. It is enough if in the opinion of the judge the evidence offered has a tendency to contradict: *Jackson et ux* v. *Thomason*, 1 B & S. 745. A series of letters may be used for the purpose, though one only is inconsistent: *Ib.*; see further *Cresswell et al* v. *Jackson et al*, 4 F. & F. 1; *Coles* v. *Coles et al*, L. R. 1 P. & D. 70; see also *Ryberg* v. *Ryberg et al*, 32 L. J. Pr. & Mat. 112; in which the court and counsel engaged appear to have inadvertently ignored the existence of this section. The right to contradict witnesses under this section applies only to witnesses produced by a party, who, upon their examination-in-chief, prove adverse to the party producing them. When produced by the opposite party, the right to contradict them upon cross-examination exists independently of this section: see notes to section 215. The section, in effect, lays down three rules as to the power of a party to discredit his own witness:

1. He shall not be allowed to impeach his credit by general evidence of his bad character.
2. He may contradict him by other evidence relevant to the issue.
3. He may prove that he has made at other times a statement inconsistent with his present testimony.

"The law relating to the first two of these rules was settled before the passing of the act, while as to the third the authorities were conflicting—that is to say, the law was clear that you could not discredit your own witness by general evidence of bad character, but you might nevertheless contradict him by other evidence relevant to the issue. Whether you could discredit him by proving that he had made inconsistent statements, was to some extent an unsettled point:" *Greenough* v. *Eccles et al*, 5 C. B. N.S. 802, *per* Williams, J. To contradict a witness does not necessarily mean to discredit him in the sense in which the latter word is commonly understood by lawyers: see *Prescott* v. *Flinn et al*, 9 Bing. 19; *Tennant* v. *Hamilton*, 7 Cl. & Fin. 122. In cross-examining a witness for the pur-

sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. (*n*) 19 Vic. c. 43, s. 159.

Proof of contradictory statements by adverse witness.

215. (*o*) If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, (*p*) and inconsistent with his present testimony, (*q*) does not distinctly admit that he did make such statement,

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pose of testing his credit great caution is required. If the question put to him be relevant, his answer may be contradicted by independent evidence; but if irrelevant there can be, as a general rule, no contradiction, and his answer is conclusive: see section 215. To admit evidence contradictory of irrelevant statements would lead to inextricable confusion by raising in a suit an endless series of collateral issues: *Attorney-General* v. *Hitchcock*, 1 Ex. 91. Again, an adverse witness has no right, on cross-examination, to make voluntary statements against the party examining him which he could not give in the examination-in-chief. Such statements, if made, should, upon application of the party prejudiced, be expunged from the judge's notes, otherwise the examining party will be bound by them as his own evidence, and his opponent entitled to re-examine the witness upon such new or collateral matter: *Blewett* v. *Tregonning*, 3 A. & E. 554.

(*n*) As time, place, &c. and other circumstances calculated to refresh the memory of the witness in such a manner as to prepare him for the consequences of misstatement. The object of laying a foundation for the admission of contradictory evidence is more particularly to enable the witness to explain his previous statement. For this purpose, and for this purpose only, it is apprehended that the witness may be asked whether he ever made such previous statement, and at the same time may be mentioned to him the name of the person to whom or in whose presence he is supposed to have made it: see *Crowley et al* v. *Page*, 7 C. & P. 789. "It must be in the knowledge and experience of every man that a slight hint or suggestion of some particular matter connected with a subject, puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with that subject, which until that hint or suggestion was given were wholly absent from it. For this reason the proof that at a time past a witness has spoken on any subject does not lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present to his memory, and to allow the proof of his former conversation to be adduced without first interrogating him as to that conversation and reminding him of it, would in many cases have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection, which it is the duty of the court to afford to every person who appears as a witness:" The Queen's Case, 2 B. & B. 300, *per* Abbott, C. J.

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 23. Founded upon the second report of the Common Law Commissioners, section 14. This section sets at rest doubts caused by a conflict of authorities. It has been applied to criminal cases: Stat. Dom. 32 & 33 Vic. c. 29, s. 69,

(*p*) See note *j* to section 210.

(*q*) Two things are essential to the admissibility of proof as to a previous statement—first, that it be relevant to the subject matter of the cause, and, secondly, that it be inconsistent with the testimony of the witness at the trial. If a witness simply testify to a fact, his previous opinion as to the merits of the cause cannot

proof may be given that he did in fact make it; (*r*) but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. (*s*) 19 Vic. c. 43, s. 160.

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be held to be relevant for the purposes of this section: see *Elton* v. *Larkins*, 5 C. & P. 385; *Daniels* v. *Conrad*, 4 Leigh. Vir. R. 401.

(*r*) Of course if the witness admit the previous statement, there will be no necessity to give other evidence of it. If he deny it, evidence to prove it may be given independently of this section. But if he say *he does not recollect*, and so neither distinctly admit nor deny, then under this section the previous statement may be proved by independent evidence. Before this act the right to do so was doubtful: see *Pain* v. *Beeston*, 1 Moo. & R. 20; *Crowley et al* v. *Page*, 7 C. & P. 789; *Long* v. *Hitchcock*, 9 C. & P. 619. In applying this section to practice it must be remembered that immediately after asking the witness whether he made any previous state or representation inconsistent with his present testimony, he should be asked whether he made the statement in writing or by parol: The Queen's Case, 2 B. & B. 292. If a witness in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B. answer that he has heard of a quarrel between them, but does not know the cause of it, and such witness is not asked upon his cross-examination whether he has or has not made a declaration touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel: *Ib.* 299. So if he answer that he does not remember it, and is not asked on his cross-examination whether he has or not made a declaration respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration: *Ib.* If a witness in support of a prosecution has been examined in chief, and has not been asked on cross-examination as to any declaration made by him or acts done by him to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the accused to examine witnesses in his defence to prove such declaration or acts without first calling back such witness in chief to be examined as to the fact whether he ever made such declaration or did such acts: *Ib.* 311. If a witness is called on the part of the plaintiff or prosecutor, and give evidence against the defendant or accused, and if after cross-examination the defendant's or accused's counsel discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony, in such case the counsel for the defendant or accused is not permitted to give evidence of such corrupt act of such witness, without calling him back: *Ib.* Where in an action against a company for work done, plaintiff proved by a witness that the directors had at a certain meeting employed him to do it, and the witness was afterwards asked in cross-examination whether the chairman had not told the plaintiff on that occasion that whatever he did must be at the risk of himself and others, and that the company could not pay him, which the witness denied, and defendant having called another witness to contradict him in that respect, it was held that plaintiff might give evidence in reply by way rebuttal: *Cope* v. *The Thames Haven Dock and Railway Co.* 12 Jur. 923.

(*s*) See note *n* to previous section.

AMENDMENTS AT THE TRIAL. (*a*)

216. (*b*) When upon the trial in any Civil Action, (*c*) Variances may be

(*a*) By an amendment is understood the correction of an error. The court has an inherent jurisdiction to allow amendments when in furtherance of justice; but the exercise of this jurisdiction at common law was very uncertain. Repeated refusals to exercise it in cases where it might have been beneficially exercised led to the passing of a series of statutes, each one of which is more comprehensive than its predecessor. Power is conferred to amend errors caused by the misprision of officers of the court: 14 Ed. III. Stat. 1, cap. 6, which amendments are allowable either before or after judgment: 4 Hen. VI. cap. 3; 8 Hen. VI. caps. 12-15. So mistakes or misprisions of the parties are in certain cases cured after verdict or confession of judgment by the operation of statutes known as the Statutes of Jeofails: 32 Hen. VIII. cap. 30; 18 Eliz. cap. 14; 21 Jac. I. c. 13; 16 & 17 Car. II. cap. 8; 4 & 5 Anne, cap. 16, s. 2; 5 Geo. I. cap. 13. Until modern times there does not appear to have been any distinct power to make amendments at the trial of an action. This was the cause of great mischief, and the mischief induced specific remedies at the hands of the legislature. The legislature of this Province, imitating the legislature of England, passed very important statutes upon the subject of amendments. In 1831, an act was passed authorizing amendments of variances: 1 Wm. IV. cap. 1, s. 1, which was afterwards consolidated as Con. Stat. U. C. cap. 111, s. 1, and was in effect the same as the section here annotated. The Stat. 1 Wm. IV. cap. 1, s. 1, was taken from Eng. Stat. 9 Geo. IV. cap. 15. Afterwards, in 1836, a second act was passed, which considerably extended the powers of the court and judge to make amendments: 7 Wm. IV. cap. 3, s. 15. This was in effect the same as section 217 of the C. L. P. Act. The 7 Wm. IV. cap. 3, s. 15, was taken from Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 23. The powers of amendment now conferred by the C. L. P. Act are, however, of a much more extended and remedial character than any of the preceding.

First. If plaintiff or his attorney shall omit to insert or indorse on any writ or copy any of the matters required by the C. L. P. Act to be indorsed, an amendment may be allowed: section 48.

Secondly. It is in the power of the court or a judge at any time *before the trial* of any cause under certain circumstances to order that any person or persons not joined as plaintiff or plaintiffs in such cause shall be so joined, or that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from such cause: sections 63, 64.

Thirdly. In case it shall appear *at the trial* of any action that there has been a misjoinder of plaintiffs, or that some person or persons not joined as plaintiff or plaintiffs ought to have been so joined under the circumstances, such misjoinder or nonjoinders may be amended as a variance at the trial: sections 65, 66.

Fourthly. It is in the power of the court or judge, in case of the joinder of too many defendants at any time *before* the trial under certain circumstances, to order that the names of one or more of such defendants shall be struck out: section 68; so also if it appear *at the trial* that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial: *Ib.*

Fifthly. It is in the power of the superior courts of common law and every judge thereof, and every judge sitting at nisi prius, *at all times* to amend *all defects and errors*, whether there be anything in writing to amend by or not: section 222.

Sixthly. All such amendments as may be necessary for determining in the existing suit the real question in controversy between the parties, *shall* be so made: section 222

(*b*) Taken from our repealed statute 1 Wm. IV. cap. 1, s. 1, which was a transcript of the Eng. Stat. 9 Geo. IV. cap. 15.

(*c*) There is a similar enactment in criminal cases: Stat. Dom. 32 & 33 Vic. c. 29, s. 70.

amended in civil cases and in prosecutions for misdemeanors at the discretion of the Court or Judge holding plea thereof.

or Information for any Misdemeanor, (*d*) before any Court of Record holding Plea in Civil Actions, or any Judge sitting at *Nisi Prius*, (*e*) any variance appears between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, (*f*) such Court or Judge may (*g*) cause the Record

(*d*) It has been said that amendments should be made very sparingly in criminal cases: *Regina* v. *Cooke*, 7 C. & P. 559. In *Regina* v. *Hewins*, 9 C. & P. 786, it was said by Coleridge, J. that one objection to readily permitting of an indictment was that by it a presentment on oath of a grand jury was thereby altered: see further *Regina* v. *Christian*, Car. & M. 388; *Regina* v. *Newton*, 1 C. & K. 469.

(*e*) Amendments by and before courts of oyer and terminer and general gaol delivery, courts of general quarter sessions and recorders' courts, corresponding with those authorized by this enactment, are authorized by Con. Stat. U. C. cap. 111, s. 1.

(*f*) This section, it will be observed, is not very extended in its operation. The power is not to amend all variances, but only such as appear between "any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record." It will apply more especially to cases where plaintiff sues upon a written or printed contract, and a variance between the contract proved and declared upon appears at the trial. So it is apprehended if the variance arise as between the written or printed matter and a plea, or any subsequent or other pleading. If the variance be in an averment relating to a written instrument, an amendment may be made, although the instrument be not set out: *Masterman et al* v. *Judson*, 8 Bing. 224; and a variance between a written contract and the contract stated was allowed, although it did not appear by the record that the contract was in writing: *Lamey* v. *Bishop*, 4 B. & Ad. 479. But the section only applies to cases where matter in print or in writing is actually produced at the trial: *Brooks* v. *Blanshard*, 1 C. & M. 779. It was decided under this act that an averment as to a bill of exchange was amendable as to date: *Bentzing* v. *Scott*, 4 C. & P. 24; amount: *Sanderson et al* v. *Piper et al*, 7 Dowl. P. C. 632; and in the name of the party, though not a party to the action: *Parks* v. *Edge*, 1 C. & M. 429; and see *Pullen* v. *Seymour*, 5 Dowl. P. C. 164. A promise to pay by approved bills falling due "before" a certain day was amended by substituting "by" for "before:" *Lamey* v. *Bishop*, 4 B. & Ad. 474. So where a judgment was averred to be of one court, and when produced appeared to be of another: *Briant* v. *Eicke*, Moo. & M. 359. A statement in the declaration that the plaintiff caused to be left with the defendant "a copy of the writ of subpœna" was altered into "a copy of so much of the said writ of subpœna as related to the said defendant:" *Masterman et al* v. *Judson*, 8 Bing. 224. It was said by Alderson, B. in *Hopkins* v. *Francis*, 13 M. & W. 668, that a variance between the pleading and record on a plea of nul tiel record might be amended under this section: but see *Davis* v. *Dunn*, 1 Dowl. N.S. 317. Where the proposed amendment would have totally altered the nature of the allegation, as when the declaration stated a judgment of *non pros.* and the evidence shewed a discontinuance, an amendment was refused: *Webb* v. *Hill et al*, 3 C. & P. 485. Amendments have been refused in cases of gross negligence: see *Jelf* v. *Oriel et al*, 4 C. & P. 22. But on this point the cases are not consistent: see *Parks* v. *Edge*, 1 C. & M. 429; *Brown* v. *Dean*, 2 N. & M. 322.

(*g*) This confers a discretionary power, as to which see Lord Kenyon's observations in *Wilson* v. *Rastall*, 4 T. R. 757. As to reviewing the exercise of the judge's discretion, see section 220 and notes thereto; see further note *w* to section 48 of this act.

to be forthwith amended in such particular by some officer of the Court, (*h*) on payment of such costs (if any) to the other party as such Court or Judge may think reasonable, (*i*) and thereupon the trial shall proceed as if no such variance had appeared. (*j*) 1 Wm. IV. c. 1, s. 1.

Upon such terms respecting costs as may seem reasonable.

217. (*k*) When upon the trial in any civil action, or in any information in the nature of a quo warranto or proceedings on a mandamus, before any Court of Record holding Plea in civil actions, or any Judge sitting at Nisi Prius, any variance appears between the proof and the recital or setting forth on the record, writ or document, on which the trial is proceeding, of any contract, name or other matter, (*l*) in any

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(*h*) The amendment under this section must be made during the trial, *i. e.* before verdict: *Roberts* v. *Snell*, 1 M. & G. 577; but it seems that the judge by consent may make an amendment not applied for till after the delivery but before recovery of the verdict: *Ib.*; and the amendment should be then in fact made: see note *v* to section 219.

(*i*) The costs of the amendment under this section are in the discretion of the judge, and his decision in this respect will certainly not be reviewed by the court: *Tomlinson* v. *Bollard*, 12 L. J. Q. B. 257; and see *Smith* v. *Brandram*, 2 M. & G. 250; *Guest* v. *Elwes*, 5 A. & E. 118.

(*j*) This of course is the direct effect of the amendment, which has a retrospective effect.

(*k*) Taken from our repealed statute 7 Wm. IV. cap. 3, s. 15, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 23.

(*l*) The amendments authorized by the act should be liberally allowed: *Stainsbury* v. *Matthews*, 4 M. & W. 347, *per* Parke, B.; *Smith* v. *Knowelden*, 2 M. & G. 561; *Evans* v. *Fryer*, 10 A. & E. 609. Not to be refused because of the harshness of the action: *Doe d. Marriott* v. *Edwards et al*, 1 Moo. & R. 319; see also *Doe d. Loscombe et al* v. *Clifford*, 2 C. & K. 448; or because there is a demurrer on the record which may be affected by it: *Duckworth* v. *Harrison*, 5 M. & W. 427; and see *Pater* v. *Baker*, 3 C. B. 843, *per* Wilde, C. J. The amendment may be on the very point in issue, though previous notice given that the point will be insisted on: *Gayler* v. *Farrant et al*, 4 Bing. N. C. 286; and though the party has gone to trial with the determination of contesting the statement as it originally stood: *Pidwill* v. *Scheer*, 8 A. & E. 301. Amendment allowed by substituting for an absolute warranty a warranty "except as to one foot:" *Hemming* v. *Parry*, 6 C. & P. 580; by substituting a promise to guarantee for a promise to pay: *Hanbury et al* v. *Ella et al*, 1 A. & E. 61; by substituting a count for not accepting goods for a count for goods sold: *Jacob* v. *Kirk*, 2 Moo. & R. 223; or for a count for work, labor and materials: *Clark et al* v. *Bulmer et al*, 11 M. & W. 243. So declaration on a promissory note amended as to date, parties and duration: *Beckett et al* v. *Dutton*, 7 M. & W. 157; and see *Moilliet et al* v. *Powell*, 6 C. & P. 233. So special acceptance of a bill substituted for a general acceptance: *Higgins* v. *Nichols*, 7 Dowl. P. C. 551; see also *Caunt* v. *Thompson*, 18 L. J. C. P. 125. Amendment allowed as to statement of consideration in an action for breach of promise of marriage: *Harvey* v. *Johnston*, 17 L. J. C. P. 298; and of the consideration for a gua-

particular or particulars, in the judgment of such Court or

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rantee: *Dimmock et al* v. *Sturla*, 14 M. & W. 758; *The Pacific Steam Navigation Co.* v. *Lewis*, 16 M. & W. 783. In debt on bond amount of penalty amended: *Hill et al* v. *Salt*, 2 C. & M. 420. So in case for a fraudulent misrepresentation, variance as to representation amended: *Mash* v. *Densham*, 1 Moo. & R. 442. So in an action against carrier's contract to carry altered to one to forward: *Parry* v. *Fairhurst et al*, 2 C. M. & R. 190. Amendment allowed in the terms of a demise in an avowry in replevin: *Leader* v. *Smith*, 1 U. C. Q. B. 366. So amendments allowed of variances in actions for libel and slander: *Smith* v. *Knowelden*, 2 M. & G. 561; *Jenkins* v. *Phillips*, 9 C. & P. 766; *Southee* v. *Denny*, 17 L. J. Ex. 151; *Pater* v. *Baker*, 3 C. B. 866; *Jackson* v. *Simpson*, 4 U. C. Q. B. 287. So in a plea of usury as to dates and amount: *Wright* v. *Marralls*, 8 U. C. Q. B. 511. So in the name of a parish: *Doe d. Marriott* v. *Edwards*, 6 C. & P. 208. The day of a demise: *Doe d. Edwards* v. *Leach*, 3 Scott N. R. 501; *Doe d. Simpson* v. *Hall*, 5 M. & G. 795; *Doe d. Sinclair* v. *Arnold*, H. T. 4 Vic. *MS* R. & H. Dig. "Amendment," ii. 8. The Christian name of one of the lessors of the plaintiff in ejectment: *Doe d. Miller et al* v. *Rogers*, 1 C. & K. 390; *Doe d. Ausman* v. *Munro*, 1 U. C. Q. B. 160. So in trespass, the name of the close: *Howell* v. *Thomas et al*, 7 C. & P. 342; but see *Doe* v. *Roe*, Dra. Rep. 170; or other description of the close: *Stanton et al* v. *Windeat*, 1 U. C. Q. B. 30. An avowry under 11 Geo. II. cap. 19, s. 22, converted into an avowry at common law: *Roberts* v. *Snell*, 1 M. & G. 57; see further *Ward* v. *Pearson*, 5 M. & W. 16; *Ivey* v. *Young*, 1 Moo. & R. 545; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Read* v. *Dunsmore*, 9 C. & P. 588; *Nalder* v. *Batts*, 1 D. & L. 700. Names of parties not served struck out of a declaration: *Zavitz* v. *Hoover*, M. T. 1 Vic. *MS.* R. & H. Dig. "Amendment," ii. 1. Substitution of "promise and undertaking" for "promises and undertakings:" *Church* v. *Barnhart*, Dra. Rep. 456. So variance between pleadings and record produced: *Lawrence et al* v. *Hardy*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Amendment," ii. 7. But where by the introduction or omission of facts, parties, terms, or otherwise, an entirely different transaction from that stated would be substituted, the amendment is generally refused: *David* v. *Preece et al*, 5 Q. B. 440; *Boucher* v. *Murray*, 6 Q. B. 362; *Doe d. Anderson et al* v. *Errington*, 1 U. C. Q. B. 159; *Doe d. Cuvillier et al* v. *James*, 4 U. C. Q. B. 490. It is an objection to an amendment that it will introduce an entirely new contract or new breach, and require the pleas to be remodelled: *Brashier* v. *Jackson*, 6 M. & W. 549; or occasion a different set of issues: *Callandar* v. *Dittrich*, 4 M. & G. 68. Thus where a demise and breach of agreement for quiet enjoyment were stated, it was held that the judge had no power to treat the agreement as for a future lease, with a breach in the defect of title to demise: *Brashier* v. *Jackson*, 6 M. & W. 549. So where several defendants sued in contract, and no evidence against some, amendment by striking out names of latter refused: *Cooper* v. *Whitehouse et al*, 6 C. & P. 545. So where wife of plaintiff improperly joined: *Rischmuller et al* v. *Uberhaust*, 10 U. C. Q. B. 612. But see now section 65, *et seq.* of this act. On a plea of nul tiel record in debt on a recognizance of bail, a variance in amount of judgment recovered refused: *Davis* v. *Dunn*, 1 Dowl. N. S. 317; see also *Hopkins* v. *Francis*, 13 M. & W. 668. So alteration of names to a contract set up by a plea refused: *The Bank of British North America* v. *Sherwood*, 6 U. C. Q. B. 552. Amendment by adding a count refused: *Henderson* v. *Harper*, 1 U. C. Q. B. 528. It has been held that the judge at nisi prius has no power to supply omissions, as where in trespass for taking "mirrors and handkerchiefs," there was a justification as to the mirrors but none as to the handkerchiefs: *John* v. *Currie*, 6 C. & P. 618; and see *Doe d. Parsons* v. *Heather*, 8 M. & W. 158; *Bye* v. *Bower et al*, Car. & M. 262; *Doe d. Poole et al* v. *Errington*, 1 A. & E. 750; *Frankum* v. *The Earl of Falmouth et al*, 2 A. & E. 452; *Serjeant et al* v. *Chafy*, 5 A. & E. 354; *Forman* v. *Dawes et al*, Car. & M. 127; *Knight* v. *McDouall et al*, 12 A. & E. 438; *Cooke* v. *Stratford*, 13 M. & W. 379; *Winterburn* v.

Judge not material to the merits of the case, (*m*) and by which the opposite party cannot be prejudiced in the conduct of his action, prosecution or defence, (*n*) the Court or Judge may (*o*) cause the record, writ or document, to be forthwith amended by some officer of the Court, or otherwise, both in the part of the pleadings where the variance occurs, and in every other part of the pleadings which it may become necessary to amend, (*p*) on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another Jury, or both of payment of costs and postponement, as such Court or Judge thinks reasonable; (*q*) and in case such variance exists in some particular in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may be prejudiced thereby in the conduct of his action, prosecution or defence, such Court or Judge may cause the same to be amended, upon payment of costs to such opposite party, and the withdrawal of the record or postponement of the trial, as

Or the Court may allow the record to be withdrawn.

Brooks et al. 2 C. & K. 16; *Warren* v. *Lugger et al*, 18 L. J. Ex. 256. It has been doubted in the Queen's Bench whether an amendment can be made so as to defeat a motion in arrest of judgment: *Atkinson* v. *Raleigh et al*, 3 Q. B. 79; but decided in the Common Pleas that it is no objection to an amendment that it may have that effect: *Harvey* v. *Johnston*, 17 L. J. C. P. 298. In *Bowers* v. *Nixon*, 2 C. & K. 374, Maule, J., expressed an opinion that the power of amendment did not apply to a case in which the party had designedly framed his pleading so as to give rise to the objection; but see *Whitwill* v. *Scheer*, 8 A. & E. 301. An amendment which will render the pleading demurrable will not be allowed: *Evans* v. *Powis*, 1 Ex. 601; nor will an amendment, the effect of which will be contrary to justice: *Corbey et al* v. *Cotton et al*, 3 U. C. L. J. 50.

(*m*) The word "merits" means the substantial merits which the parties have come to try: *Smith* v. *Knowelden*, 2 M. & G. 565; *The Pacific Steam Navigation Co.* v. *Lewis*, 16 M. & W. 783; *Duckworth* v. *Harrison*, 5 M. & W. 429, *per* Alderson, B.

(*n*) It is always a matter of some difficulty to ascertain whether or not the opposite party will be prejudiced by the proposed amendment. It is necessary in every application of the kind to look at the circumstances of the particular case. One test is this—Suppose the party comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it if amended? If so he cannot in general be prejudiced by the amendment: see *Gurford* v. *Bayley*, 3 M. & G. 781; *Duckworth* v. *Harrison*, 5 M. & W. 427; *Cooke* v. *Stratford*, 13 M. & W. 379; *Adams* v. *Atkinson*, 9 Ir. C. L. R. App. xviii.

(*o*) See note *g* to section 216.

(*p*) See note *h* to section 216.

(*q*) See note *i* to section 216.

aforesaid, as the Court or Judge may think reasonable. (*r*) 7 Wm. IV. c. 3, s. 15.

After amendment, the trial to proceed as though no such variance had appeared.

218. (*s*) In case after any amendment as aforesaid the trial be proceeded with, the same shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared. (*t*) 7 Wm. IV. c. 3, s. 15.

On trial at nisi prius, order for amendment

219. (*u*) In case such trial is had at *Nisi Prius*, the order for the amendment shall be endorsed on the Record, and returned therewith; (*v*) and thereupon such papers,

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(*r*) The first part of the section provides for amendments in case the variance be not material to the merits of the case, *and* by which the opposite party cannot be prejudiced. The latter part of the section allows amendments, though prejudicial to the opposite party, upon such terms as may render them as little prejudicial as possible. The court will always take care that if one party obtain leave to amend the other party shall not be prejudiced nor delayed thereby: *Alder* v. *Chip*, 2 Burr. 756, *per* Lord Mansfield; see also *Bradworth* v. *Forshaw*, 10 W. R. 760; *White* v. *The South Eastern Railway Co. Ib.* 564. An amendment is in general only allowed on payment of costs: see *Wall* v. *Lyon*, 9 Bing. 411; *Metcalfe* v. *Booth*, 7 D. & L. 15; including, if necessary, the costs of the trial: *Higgins* v. *The Corporation of the City of Toronto*, 9 U. C. L. J. 44; *Hooker* v. *Gamble et al*, *Ib.* 44. The court allowing the amendment has a discretionary power to fix the amount of costs: see *Tomlinson* v. *Bollard*, 4 Q. B. 642; and the court will not review the exercise of such discretion: *Ib.* Where the amendment is allowed on payment of costs, such payment is a condition precedent to the amendment: see *Rishworth* v. *Dawes*, 16 M. & W. 440; *Levy* v. *Drew*, 5 D. & L. 307; *Thompson et al* v. *Parish*, 5 C. B. N.S. 685; and as a matter of precaution it would be well to have the rule direct the payment of the costs so that payment of them may be enforced in any event: *Field* v. *Sawyer*, 6 C. B. 71. A party giving an order is in general bound by its terms: *Girad* v. *Austen*, 1 Dowl. N. S. 703; *King* v. *Simmonds et al*, 7 Q. B. 289. If the order be not served it may be abandoned by the party obtaining it: *Black* v. *Sangster*, 1 C. M. & R. 521; *Pugh* v. *Kerr*, 6 M. & W. 17; and in one case it was held that where the order was abandoned after service the opposite party had no right to costs incurred before the abandonment, on the supposition that the order would be acted upon by the party who obtained it: *Brown* v. *Millington*, 22 L. J. Ex. 138. If the party obtaining the order for amendment delay to pay costs and to act on the order, it may be rescinded: *Morley* v. *The Bank of British North America*, 10 U. C. L. J. 128.

(*s*) Taken from our repealed Statute 7 Wm. IV. cap. 3, s. 15, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 23.

(*t*) This is the necessary effect of an amendment which is retrospective in its operation. The amendments here inte. led are amendments at the trial. After amendment the court of Error and Appeal can only look at the amended pleadings: see *Mellish* v. *Richardson*, 1 Cl. & Fin. 224; *Indermaur* v. *Dames*, 36 L. J. C. P. 181; *Tetley et al* v. *Wanless*, L. R. 2 Ex. 279, *per* Willes, J.

(*u*) Taken from our repealed Statute 7 Wm. IV. cap. 3, s. 15, which is a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 23.

(*v*) The amendment, if allowed at nisi prius, should be in fact made on the record at nisi prius: *Doe d. Ausman* v. *Munro*, 1 U. C. Q. B. 277; and leave will

rolls and other records of the Court from which such record issued, as it may be necessary to amend, shall be amended accordingly, (*w*) and the order for amendment shall be entered on the roll or other document upon which the trial is had. (*x*) 7 Wm. IV. c. 3, s. 15.

to be endorsed on the postea, rolls and records to be amended accordingly.

220. (*a*) Any party dissatisfied with the decision of the Judge at *Nisi Prius*, respecting his allowance of any such amendment, (*b*) may apply to the Court from which the record issued for a new trial upon that ground; (*c*) and in case such Court thinks the amendment improper, a new trial shall be granted accordingly, on such terms as the Court may think fit, or the Court shall make such other order as to them may seem meet. (*d*) 7 Wm. IV. c. 3, s. 15.

Party dissatisfied with the amendment may apply for new trial.

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not be given at nisi prius to amend the record afterwards: *McFarlane* v. *Brown*, 5 U. C. Q. B. 471. But where a judge's order had been obtained to alter the *venire facias* to another assize, it is no objection that the trial took place there without the allegation being in fact made: *Hawkins* v. *Patterson*, 15 U. C. Q. B. 158.

(*w*) *i. e.* Original pleadings, &c. on files of court of which the record is a transcript.

(*x*) This contemplates an order for the amendment at the time when granted and that endorsed "on the roll or other document upon which the trial is had."

(*a*) Taken from our repealed act 7 Wm. IV. cap. 3, s. 15, which is a transcript of the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 23.

(*b*) The appeal, it will be observed, is given respecting the allowance of the amendment, and not the refusal of it. Even as to the former the right to appeal from the exercise of the judge's discretion has been doubted: *Parks* v. *Edge*, 1 C. & M. 429. But in several cases it has been held that there can be no appeal from the decision of the judge refusing the amendment: *Doe d. Poole et al* v. *Errington*, 1 A. & E. 750; *Whitwill* v. *Scheer*, 8 A. & E. 309; *Jenkins* v. *Phillips*, 9 C. & P. 766. On this point, however, the decisions are not consistent: see *Pullen* v. *Seymour*, 5 Dowl. P. C. 164; s. c. entitled *Pullen* v. *Seaven*, 2 Gale, 132; and *Higgins* v. *Nichols*, 7 Dowl. P. C. 551; *Lawrence* v. *Tindal*, M. T. 5 Vic. *MS.* R. & H. Dig. "Amendment," ii. 11; *Crawford* v. *Cocks et al*, 6 Ex. 287; *Brennan* v. *Howard* 25 L. J. Ex. 285; see also note *w* to section 48 of this act.

(*c*) *i. e.* Upon the grounds of the improper allowance of the amendment.

(*d*) It has been held that a judge at nisi prius has no power to allow a plaintiff to amend his record by filling up the proper day of nisi prius after the cause was called on, and the jury called, though not sworn, and the court ordered a *venire de novo*: *Doe d. Benner* v. *Burd*, 8 U. C. Q. B. 9. So it was held that the judge had no power to add a new count supporting the cause of action in another way, but abandoning nothing that had been stated, and a new trial was ordered without costs: *Brown et al* v. *Boulton*, 8 U. C. Q. B. 386. So it was held that a judge at nisi prius has no power to amend a notice of title in ejectment: *Morgan et al* v. *Cook et al*, 18 U. C. Q. B. 599. Nor to strike out the name of the wife of plaintiff, who was improperly joined in an action of assumpsit: *Rischmuller et ux* v.

Instead of amendment, the Judge may direct the jury to find facts according to the evidence, and if variance be immaterial, Court may give judgment according to the merits.

221. (*e*) In any such case of variance, (*f*) the Court or Judge, instead of causing the record to be amended as aforesaid, (*g*) may direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on the record; (*h*) and notwithstanding the finding on the issue joined, if the Court in which the action is pending thinks the variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, (*i*) such Court shall give judgment according to the very right and justice of the case. (*j*) 7 Wm. IV. c. 3, s. 16.

Uberhaust, 10 U. C. Q. B. 612. In the latter case a new trial was ordered without costs: *Ib.* But now, under section 222 of this act, a notice of title may be amended: *Chadsey* v. *Ransom*, 17 U. C. C. P. 629.

(*e*) Taken from our repealed act 7 Wm. IV. cap. 3, s. 16, which is a transcript of the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 24.

(*f*) *i. e.* Under section 216 or 217.

(*g*) As directed in sections 216 and 217.

(*h*) This is discretionary with the judge, and it is presumed no appeal would lie from the exercise of his discretion refusing to do what this section says he may do: see note *b* to section 220. The section only applies where the facts have been found by the jury for the express purpose of obtaining the judgment of the court under it, and not where they have been found only for the determination of the issues on the record: *Warwick* v. *Rogers et al*, 5 M. & G. 340.

(*i*) Plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that defendant "wrongfully and injuriously" diverted the same. The defendant pleaded that plaintiff was not entitled to the watercourse by reason of the possession of the mill, and also that the water ought not to run and flow to the mill. The jury (being directed by the judge to find specially) found that the defendant had diverted the stream, and prevented it from supplying water necessary for the proper enjoyment of the plaintiff's premises as they existed before the mill was erected, but found no right in respect to the mill. *Held* that on this finding the variance in the declaration was material, and so the court refused to give judgment for plaintiff: *Frankum* v. *Earl Falmouth et al*, 2 A. & E. 452. But in a declaration for an escape, with pleas of not guilty and did not arrest, where at the trial the plaintiff's evidence showed that defendant did not arrest, but had omitted to do so, the judge refusing to amend left the question of omission to the jury, who found the omission especially, and assessed the damages at £30; whereupon a verdict was entered for the defendant on both issues and the special finding indorsed on the record. *Held* that the variance was immaterial, and did not prejudice: *Guest* v. *Elwes*, 5 A. & E. 118; see also *Knight* v. *McDouall et al*, 12 A. & E. 438; *Chanter* v. *Lees et al*, 4 M. & W. 295; s. c. in error, 5 M. & W. 698; *Ketchum et al* v. *Ready*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Amendment," ii. 6.

(*j*) The court has no power to impose terms in giving judgment on a special finding under this section: *Guest* v. *Elwes*, 5 A. & E. 118; *Serjeant et al* v. *Chafy*, *Ib.* 354; unless such power be reserved to them by consent of parties: *Cooke* v. *Stratford*, 13 M. & W. 379; and see *Perry* v. *Watts*, 3 M. & G. 775; *The Pacific Steam Navigation Co.* v. *Lewis*, 16 M. & W. 783. The court in *Guest* v. *Elwes*,

222. (*k*) The Courts and every Judge thereof, and any Judge sitting at *Nisi Prius*, or for the trial of causes, (*l*) may, (*m*) at all times, (*n*) amend all defects and errors in The Courts may and must make all such amendments

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5 A. & E. 118, see note *i* to this section, ordered the master to tax plaintiff his general costs of the cause but to allow to defendant the costs of the issues, and that each party should pay his own costs of the motion to enter judgment according to the very right and justice of the case. The judgment of the court under this section may be reviewed in a court of error: *Chanter* v. *Leese et al*, 5 M. & W. 698. A term in a special case that the court shall be at liberty to amend the pleadings gives no additional power beyond that possessed by a judge at nisi prius: *Chapman et al* v. *Sutton*, 3 D. & L. 646.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 222. Founded upon the first report of the Common Law Commissioners, section 88.

(*l*) *Qu.* Does this extend to the court of error and appeal? See *Wilkinson* v. *Sharland*, 11 Ex. 33. In England the powers of amendment were held not to extend to inferior courts of record: *Wickes* v. *Grove*, 2 Jur. N.S. 212; but this section is applicable to county courts, the only inferior court of record of civil jurisdiction in this Province. The title of this act is "An act to regulate the procedure of the superior courts of law, and of the county courts."

(*m*) *May.* The enactment so far is permissive, but the discretionary power conferred is to be exercised in a liberal spirit. Nothing is said about review; that is left to the general law: *Wilkin* v. *Reed*, 15 C. B. 200, *per* Maule, J.; and the general law does not preclude a party unsuccessful before a judge from making a substantive application to the court for amendment: *Ib. per* Jervis, C. J.; *Brennan* v. *Howard*, 25 L. J. Ex. 289. But if the judge who makes an order under this section has jurisdiction as to the subject matter of the order, then whether he makes it rightly or wrongly it is not in general for the court to interfere: *Emery* v. *Webster*, 9 Ex. 242, affirmed in 10 Ex. 901; *Brennan* v. *Howard*, 25 L. J. Ex. 289; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34.

(*n*) The power is *at all times* to amend. The amendment may be made at any time *before*, *at*, or *after* the trial: see *Morgan* v. *Pike*, 25 L. & Eq. 281; and although delay may be a ground for refusing an amendment on the eve of a trial, it is no ground for ultimately refusing it, unless it would involve some prejudice to the opposite party, as by reason of the absence or death of a witness: *Tricket* v. *Jarman*, 25 L. & Eq. 414. The court has power after a trial upon a motion for judgment *non obstante veredicto*, or for a new trial to amend a defect in a pleading, so as to raise the real question in controversy, though no advantage was taken of an offer to allow amendments at the trial: *Parsons* v. *Alexander*, 5 El. & B. 263. At the trial it appeared that defendant entered a gaming house, and there lost at billiards £65, for which he gave an I.O.U. and subsequently sent plaintiff an unstamped cheque. The cheque was not received in evidence. The judge intimated generally that he would make what amendments were necessary; neither party asking for an amendment, the question was left to the jury whether the account was stated of money lost at gambling. The jury found for the defendant. *Held* that the court *in banc* had, without consent, power to amend the plea by making it apply to an account stated concerning the consideration of the cheque, so as to raise on the record the question really tried: *Ib.* The power to amend after trial by the *addition* of a plea was doubtful: *Metzner* v. *Bolton*, 23 L. T. Rep. 22; *Charnley* v. *Grundy*, 14 C. B. 614, *per* Jervis, C. J. After trial a defendant was allowed, upon payment of costs, to amend a plea of not guilty "by statute," by inserting several additional statutes in the margin: *Edwards* v. *Hodges*, 15 C. B. 77. In one case after a motion in arrest of judgment and after proceedings in error for a defect in a declaration, leave was given

in any civil proceedings any proceeding in civil causes, (*o*) whether there is anything

to plaintiff to amend upon paying the costs of the motion in arrest of judgment of the proceedings in error and of the application to amend: *Wilkinson* v. *Sharland*, 11 Ex. 33; see further *Marcanski* v. *Cairns*, 1 MacQ. H. L. C. 212, 766. Particulars were amended after final judgment: *Cannan et al* v. *Reynolds et al*, 5 El. & B. 301. On an issue, a plea of nul tiel record, a variance between the sum recovered, as stated in the declaration, and that on the record, was on motion for judgment allowed to be amended according to the record: *Hunter* v. *Emmanuel*, 24 L. J. C. P. 16. Where there is a manifest defect in the pleadings which has not been taken advantage of at the trial, but is attempted to be taken advantage of on a motion for judgment *non obstante veredicto*, or for a new trial, the court will without hesitation amend the pleadings: *Parsons* v. *Alexander*, 3 W. R. 510; see also *Wilkinson* v. *Sharland*, 1 Jur. N.S. 405. Where plaintiff sued on an agreement by defendant to store with him, plaintiff, all defendant's wheat during the season, alleging as the consideration that the plaintiff would store it, and would rent another storehouse, and claiming damages for the expense of such renting, and at the trial plaintiff's witnesses failed to prove that part relating to the storehouse, the declaration was amended by striking it out. The plaintiff was then called for the defence, and proved the agreement as first set out. His counsel did not again amend, and the jury found for the plaintiff, adding that they believed the storehouse to be in the contract. The court in term allowed the declaration to be restored to its original form, and refused a new trial: *Petrie* v. *Tannahill*, 22 U. C. Q. B. 608. Where on a motion on arrest of judgment the court below has allowed an amendment, the court of error will not consider the propriety of the amendment, but will decide upon the sufficiency of the plea as amended: *Indermaur* v. *Dames*, 36 L. J. C. P. 181. Amendment before C. L. P. Act allowed of *fi. fa.* lands after sale under it by sheriff: *Fleming* v. *Wilkinson*, T. T. 1 & 2 Vic. *MS.* R. & H. Dig. "Amendment," i. 1. But refused after arrest as to a *ca. sa.* which omitted to state the amount for which judgment had been recovered: *Billings et al* v. *Rapelje et al*, E. T. 4 Vic. *MS.* R. & H. Dig. "Amendment," i. 2. So before C. L. P. Act amendment of *ca. sa.* by insertion of correct Christian name of plaintiff refused: *Allison* v. *Wagstaff*, M. T. 7 Vic. *MS.* R. & H. Dig. "Amendment," i. 3. But amendment of *ca. re.* as to address, cause of action, and teste allowed: *Myers* v. *Rathburn*. Tay. Rep. 127. *Fi. fa.* amended so as to have relation to the day of the entry of judgment: *Andruss* v. *Page*, Tay. Rep. 348. So amendment by sheriff of return of *fi fa.* allowed: *Lemoine* v. *Raymond*, 2 U. C. Q. B. 379. So allowed after assessment of contingent damages on a demurrer subsequently decided against plaintiff: *Breakenridge* v. *King*, 4 O. S. 297; *Maxwell* v. *Ransom*, 1 U. C. Q. B. 281. Since allowed under like circumstances under C. L. P. Act: *Fraser* v. *Hickman*, 12 U. C. C. P. 213. Defendant allowed to amend after judgment against him on demurrer: *McCrae* v. *Hamilton*, M. T. 5 Vic. *MS.* R. & H. Dig. "Amendment," ii. 10; *Hamilton* v. *Davis et al*, 1 U. C. Q. B. 526. But the court, in the exercise of its discretion, will sometimes refuse amendments in such cases: *Philips* v. *Smith*, Dra. Rep. 303; *Metcalfe* v. *McKenzie et al*, 2 U. C. Q. B. 404; *Bacon* v. *McBean et al*, 4 U. C. Q. B. 104; *McLellan* v. *Rogers*, 12 U. C. Q. B. 651. Amendment of record allowed after appeal to the king in council: *Rowand* v. *Tyler*, 5 O.S. 500. Postea amended by judge's notes, and judgment by postea after appeal: *Rochleau* v. *Bidwell*, 2 O. S. 319. Discontinuance allowed under very peculiar circumstances, in order to prevent the loss of a large sum of money: *The Commercial Bank of Canada* v. *Cameron et al*, 17 U. C. Q. B. 237. After four terms elapsed amendments cannot be made without a terms notice: *Doe d. Lick* v. *Ausman*, 1 U.C. Q.B. 399. Leave was refused in an action which had slept for years, during which time defendant had died, and the statute of limitations had barred the claim: *Pearce* v. *Preston*, 11 W. R. 35.

(*o*) The power of amendment extends to *all* defects and errors, not merely to declarations and pleas, and other pleadings, but to *any* proceeding in civil causes

This will apply to the writs, verdict, postea, judgment, and in short all the various steps in an action at law: see *Gregory* v. *Cotterell et al*, 5 El. & B. 571; also *Bell* v. *Postlethwaite*, *Ib.* 695; *Hayne* v. *Robertson*, 17 C. B. 548; *Kendil et al* v. *Merrett*, 18 C. B. 173. Leave to amend a writ of *capias* issued in an action for seduction was granted after arrest upon the application of plaintiff, and upon payment of costs, by striking out the words "in an action on promises," and inserting "in an action on the case:" *Legear* v. *Lacroix*, *MS.* Chambers, Feb. 26, 1857, *per* Hagarty, J. Upon a trial by record the court amended the declaration by inserting therein the true date: *Noble* v. *Chapman*, 14 C. B. 400; and the true amount of the original judgment: *Hunter* v. *Emmanuel*, 15 C. B. 290. In an action for breach of contract to employ the plaintiff as an actor for three years at a weekly salary of £8, the declaration claimed general damages for a wrongful dismissal; but the plaintiff in his particulars of demand merely claimed £32 for four weeks' salary. The defendant paid £32 into court, and the plaintiff's attorney, under the mistaken impression that the plaintiff was entitled under that form of declaration to recover for four weeks' salary only, took the money out of court and gave notice of taxation of costs, which were accordingly taxed and paid. Under the circumstances, the plaintiff's attorney having discovered his mistake within a few days afterwards, obtained a judge's order to set aside the replication and all subsequent proceedings, with leave to the plaintiff, upon refunding the money so paid and the costs, to amend his declaration and particulars of demand, with liberty to plead *de novo* being given to the defendant. *Held* order correctly made: *Emery* v. *Webster*, 9 Ex. 242. It has been held that a judge at nisi prius may amend a declaration by altering the form of action, for example, so as to make the declaration in case instead of trespass: *May* v. *Footner*, 5 El. & B. 505. Action on a contract by plaintiff to deliver to defendant at C. a cargo in March, alleging as a breach that defendant would not accept or pay for the goods. Pleas, first, *non assumpsit*, and second, that plaintiff was not ready and willing to deliver at C. in March. It appeared that defendant had by letter requested plaintiff to postpone the shipment; that the ship arrived in C. on the evening of 31st March, and consequently that the cargo was not ready for delivery till April. The judge on plaintiff's application amended the declaration by inserting an averment that, at defendant's request, plaintiff delayed the shipment, and that defendant promised to accept a delivery of that shipment with reasonable speed, and exonerated plaintiff from delivering in March: *Held* properly made: *Tennyson* v. *O'Brien*, 5 El. & B. 497. Upon a plea of "not guilty" by statute, where the defence was upon several statutes, some of which were omitted from the margin, an amendment was allowed by the insertion of them: *Edwards* v. *Hodges*, 15 C. B. 477. It would seem also that a judge at nisi prius may allow a count to a declaration to be added: *Taylor* v. *Shaw*, 1 C. L. R. 1057, *per* Lord Campbell, C. J.; *Hailes* v. *Marks*, 9 W. R. 808, *per* Pollock, C. B. But this is a matter of pure discretion and not of obligation: *Ritchie et al* v. *VanGelder*, 9 Ex. 762; *Bridger et al* v. *Gay*, 23 L.T. Rep. 65; and the exercise of discretion not the subject of an appeal: *Brennan* v. *Howard*, 1 H. & N. 138. An equitable plea was added on the morning of the trial: *Morris* v. *Miller*, 2 F. & F. 551. Plaintiff was allowed to add a count for work and labour at the trial without terms, and defendant allowed to pay money into court on it: *Robson* v. *Turnbull*, 1 F. & F. 365. So the addition of a count in trover to an action for money had and received was allowed: *Cornish* v. *Abingdon*, 1 F. & F. 562. Plea amended by striking out averments not proved and qualifying those which were proved: *Hailes* v. *Marks*, 9 W. R. 808. So alteration in representation in an action for fraudulent representation: *Roles* v. *Davis*, 4 H. & N. 484. Grounds of suspicion on a plea of justification to an action for false imprisonment amended: *Hailes* v. *Marks*, 7 H. & N. 56. Where a pleading is amended, any formal defects in other parts of the pleading, rendered necessary by the amendments, will also be amended: *Buckland* v. *Johnson*, 18 Jur. 775. Declaration in libel amended by the addition of a written letter: *Saunders* v. *Bate*, 1 H. &

N. 402. Declaration amended in action on the case by servant against master for injuries: *Farrer* v. *Cock*, 2 F. & F. 536. Where in an action upon an agreement a plaintiff obtained a verdict, and a rule was afterwards made absolute to enter a verdict for defendant, the court under special circumstances and on special terms allowed the rule to be amended by directing a nonsuit to be entered: *Sillen* v. *Holloway*, 14 C. B. N.S. 336. A writ of mandamus was amended by striking out the word "company:" *Regina* v. *The Derbyshire, &c. Railway Co.* 3 El. & B. 788. After plea pleaded that plaintiffs were not a body corporate, the court allowed plaintiffs to amend by substituting the name of the director of the bank: *La Banca Nazionale Sede di Torino* v. *Hamburger*, 11 W. R. 1074. An amendment was allowed as to the indorsement upon a pluries writ of summons issued before C. L. P. Act, by altering the date of the first writ to its true date, so as to save the statute of limitations: *Cornish et al* v. *Hockin*, 1 El. & B. 602; s. c. 22 L. J. Q. B. 142; but see *Bricker et al* v. *Ancell*, 23 U. C. Q. B. 481. Notice of writ also amended: *Leigh* v. *Baker*, 3 Jur. N.S. 668. So declaration amended by inserting true date of judgment recovered: *Noble* v. *Chapman*, 14 C. B. 400. In an action for not accepting excuse for non-delivery allowed to be added to declaration: *Tenayson* v. *O'Brien*, 5 El. & B. 497. So in an action for wrongful dismissal amendment may be allowed by alleging a usage of dismissal on three months' notice: *Metzner* v. *Bolton*, 23 L. J. Ex. 130. Declaration for eviction amending by altering nature of eviction: *Carpenter* v. *Parker*, 3 C. B. N.S. 206. Amendment allowed in ejectment by adding names of two trustees who had legal estate: *Blake et al* v. *Done*, 7 H. & N. 465. By addition of a count: *Cornish* v. *Abingdon*, 1 F. & F. 562; *Ellston* v. *Deacon*, L. R. 2 C. P. 20; by striking out a count: *Berresford et al* v. *Geddes*, *Ib.* 285; but not by striking out all the names of parties to suit and substituting new names: *Robinson* v. *Bell*, 9 U. C. C. P. 21; as to assignment of breach in declaration: *Carpenter* v. *Parker*, 3 C. B. N.S. 206; as to special cases see *Notman et al* v. *The Anchor Assurance Co.* 6 C. B. N.S. 536; *The Mersey Dock and Harbour Commissioners* v. *Jones*, 29 L. J. C. P. 239; *Pennington* v. *Cardale*, 10 W. R. 544. Non-joinder of a partner plaintiff in debt amended: *Williams* v. *Groves*, 1 F. & F. 341. Amendment by allowing representative of a dead man, who never was a party to the proceedings, refused: *Clay* v. *Oxford*, L. R. 2 Ex. 54. Amendment by substituting as defendants for local board of health the name of their clerk refused at trial: *Pryor* v. *The Local Board of Health of West Ham*, 15 L. T. N.S. 250. Joinder in demurrer allowed to be added to record at nisi prius: *Boulton* v. *Fitzgerald et al*, 1 U. C. Q. B. 476. Irregularity in award of *venire* amended: *Whitelaw* v. *Davidson*, 6 U. C. Q. B. 534. So mistake in demurring to right plea allowed even after verdict: *Perry* v. *Grover*, 5 U. C. Q. B. 468. Amendment of verdicts: *Moore* v. *Boyd et al*, 15 U. C. C. P. 513; *Feize* v. *Thompson*, 1 Taunt. 121; *Callagher* v. *Strobridge et al*, Dra. Rep. 107; *Regina* v. *Fall et al*, 1 Q. B. 636. Even after motion in arrest of judgment: *Gouldrich* v. *McDougall*, 2 O.S. 212; *Beasly* v. *Darling et ux*, *Ib.* 214; *Chadwick* v. *McPherson*, 2 U. C. Q. B. 379; *Baldwin qui tam* v. *Henderson*, 4 U. C. Q. B. 361; *City Bank* v. *Eccles*, 5 U. C. Q. B. 633; *Ponton* v. *Moodie*, 7 U. C. Q. B. 301; *Moore* v. *Boyd et al*, 15 U. C. C. P. 513. Judgment rule amended as to amount of damages: *Averill* v. *Powell*, M. T. 2 Vic. *MS.* R. & H. Dig. "Amendment," iii. 11. So by the addition of amount of costs: *Wright* v. *Landell*, Tay. Rep. 304. So name of intestate in judgment against administrator: *Willard* v. *Woolcot*, Dra. Rep. 211. So amendment allowed as to different proceedings in consequence of mistake as to cause of action: *Edison* v. *Hogadone*, M. T. 3 Vic. *MS.* R. & H. Dig. "Amendment," iii. 14. Addition of a count allowed: *Ellston* v. *Deacon*, L. R. 2 C. P. 20. When a plea is in accordance with the construction put on a statute by the judge at nisi prius, and leave is given to move the court, it is not necessary to amend the plea by adding the exact words of the statute: *Tulley* v. *Corrie*, 16 L. T. N.S. 796.

Amendment refused where the allowance of it would be to assist the plaintiff in committing a fraud on a foreign government: *Brennan* v. *Howard*, 1 H. & N.

in writing to amend by or not, (*p*) and whether the defect or error be that of the party applying to amend or not, (*q*) and all such amendments may be made with or without costs, (*r*)

as may be necessary to full justice.

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138. In an action against a person for giving a false character, the words in the declaration were "dismissed from the employment of the defendant, &c., on account of the dishonesty, &c.," an amendment "while in the employment of the defendant, &c., guilty of dishonesty" was refused: *Wilkin* v. *Reed*, 15 C. B. 192. In an action for obstruction of a watercourse, where the right was traversed, an amendment so as to narrow the right, was refused: *Cawkwell* v. *Russell*, 26 L. J. Ex. 34. Refused so as to enable plaintiff, who had failed in the cause of action stated, to recover on a different one: *Bradworth* v. *Forshaw*, 10 W. R. 760; see also *Unwin* v. *Adams*, 1 F. & F. 312; *Robson* v. *Doyle*, 18 Jur. 652. Refusal to allow the question of highway to be pleaded by way of amendment in an action of trespass: *Adams* v. *Smith*, 1 F. & F. 311. Though the court may amend after judgment in a special case by inserting an omitted fact, they will not do so if fact disputed: *Pennington* v. *Cardale*, 10 W. R. 544; and the court will not allow a special case to be amended by stating a point which the parties had not raised for consideration: *Hills* v. *Hunt*, 15 C. B. 1. Nor to amend the proceedings by the addition of the defendant's wife where he alone is sued for the debt: *Gerrard* v. *Guebelei*, 13 C. B. N.S. 832; see also *Bolingbroke et ux* v. *Kerr*, L. R. 1 Ex. 222. Nor in an action against an infant to amend an appearance by an attorney after proceedings in error so as to substitute an appearance by guardian: *Carr* v. *Cooper*, 1 B. & S. 230. Refused as to particulars of plaintiff's claim where the action had slept for years: *Pearce* v. *Preston*, 11 W. R. 35. Where two of the plaintiffs contracted under seal to do certain work which was done by them, but not according to the agreement, and three sued for the doing of it, and plaintiffs were nonsuited on the production of the contract, the nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused: *Bricker et al* v. *Ancell*, 23 U.C. Q.B. 481. Refusal to allow replication of Statute of Limitations to a plea of set-off: *Brancker* v. *Crozier*, 16 L. T. N. S. 391. Refusal to amend a special case by the insertion of a fact after judgment: *Ganthony* v. *Witten*, 17 L. T. N. S. 117. So amendment of rule nisi refused after it was discharged: *Kynniard* v. *Leslie*, 12 Jur. N.S. 468. A judge at nisi prius has no power to strike out a plea to which there is a demurrer: *Thomas* v. *Walters*, 22 L. T. Rep. 200. Misjoinder not a "defect or error" such as contemplated: *Robson* v. *Doyle et al*, 3 El. & B. 396. Application must be made under ss. 63 to 68.

(*p*) Formerly judges at nisi prius could only amend the record when there was something in writing or in print to amend by: see ss. 216, 217, and notes thereto. This section is an extension of that law.

(*q*) An amendment may be re-amended or annulled: *Morgan et al* v. *Pike*, 14 C. B. 479; *Petrie* v. *Tannahill*, 22 U. C. Q. B. 608.

(*r*) Every pleading is to be taken subject to such amendments as the law as it now stands permits the court or judge to make: *Buckland* v. *Johnson*, 15 C. B. 165, *per* Maule, J. A discretion must be exercised in each case in view of all the circumstances of the case; and with reference to terms, the case should be disposed of upon full consideration of such circumstances. If an order for leave to amend be abandoned after service, the opposite party has in general no right to costs incurred before the abandonment on the supposition that the order would be acted upon by the party obtaining it: *Brown* v. *Millington*, 22 L. J. Ex. 138. Where defendant must have known throughout what was the material question in dispute, notwithstanding some defect in the pleadings, he is not entitled to the costs of amendment: *Buckland* v. *Johnson*, 15 C. B. 145; *St. Losky et al* v. *Green et al*, 9 C. B. N.S. 370; s. c. 3 L. T. N.S. 297. Where judgment was given for the

and upon such terms as to the Court or Judge seems fit, (*s*)

plaintiff on demurrer to defendant's pleas with costs, which costs were to include the costs of the day for the last assizes, the cause having been made a *remanet*, the court on discovering that the defendant had a cross action against the plaintiff at the same assize, of which they were not aware at the time they gave their former judgment, and that the causes had by consent of both parties been made *remanets*, allowed the amendment to be made on payment of the costs of the demurrer only: *McKenzie* v. *Gibson*, 7 U. C. Q. B. 527. *Semble* that under any circumstances this would have been the proper course: *Ib.* Plaintiff declared against defendant as a stockholder in a railway, to which defendant pleaded and demurred. The issues in fact were first tried, and resulted in a verdict for the plaintiff, with leave to defendant to move to enter a nonsuit, which rule was taken out during the same term in which the demurrer was set down for argument, and upon the latter being called on for argument plaintiff asked leave to amend, which was granted on payment of costs. An amended declaration was afterwards served, and the defendant's costs were taxed by the master upon the amendment, and the costs of the issues in fact and rule nisi disallowed. *Held* that defendant was entitled to all the costs of the demurrer and application to amend and of the costs in chambers, and of the application for revision: *Fraser* v. *Hickman*, 12 U. C. C. P. 213. Where in an action on two promissory notes there was at the trial a variance between the defendant's proof and his plea, and amendments though necessary to the determination of the real question in controversy between the parties were refused, and plaintiffs in consequence had a verdict, the court, upon the application of defendants, directed the amendments to be made and ordered a new trial, costs, including the costs of the rule, to abide the event: *Bank of Montreal* v. *Reynolds et al*, 24 U. C. Q. B. 381.

(*s*) The court always takes care that if one party to an action be allowed to amend, the other party shall not be prejudiced or delayed thereby: *Alder* v. *Chip*, 2 Burr. 755. In trials at nisi prius an amendment may in many cases make necessary a postponement of the trial. One test of the propriety of refusing a postponement is to see whether the party against whom the amendment is made could, if the trial were postponed, get other evidence: *Tennyson* v. *O'Brien*, 5 El. & B. 500, *per* Wightman, J. In an action on a contract an amendment of the declaration was made at nisi prius for the purpose of raising the real question in controversy between the parties and leave given to defendant to amend his plea; but defendant objected to the amendment being made, and requested a postponement of the trial, which the judge refused; thereupon defendant refused to alter his plea and to appear further, whereupon the jury, under the direction of the judge, assessed the damages. On a motion for a new trial, it was held that no injustice being suggested to have been sustained by the defendant in consequence of the refusal to postpone the trial, the discretion of the judge in that respect ought not to be reversed: *Ib.* 497; see further *White* v. *The South Eastern Railway Co.* 10 W. R. 564; *Bradworth* v. *Foshaw*, *Ib.* 760; *Riley* v. *Baxendale et al*, 6 H. & N. 445. The power of the court to review the decision of the judge at the trial in granting or refusing an amendment under this section is very doubtful. It will be observed that it is not as in case of amendments under the previous sections conferred in express terms by the legislature: see s. 220 and notes thereto. In *Emery* v. *Webster*, 1 Jur. N.S. 383, Coleridge, J. said: "The judge had power to make the order. This court cannot enquire whether he exercised it rightly or wrongly." In *Holdan et al* v. *Ballantyne et al*, 29 L. J. Q. B. 150, Cockburn, C. J., said: "We have no power to review the decision of the judge at the trial." In *Brennan* v. *Howard*, 4 W. R. 610, Pollock, C.B., said: "I do not think we have power to review the exercise of a purely discretionary authority." But even if the court has the power under its common law jurisdiction it will be slow to exercise it where the granting or refusing of the amendment is a matter of dis-

and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made. (*t*) 19 Vic. c. 43, s. 291.

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cretion: *Morgan et al* v. *Pike*, 14 C. B. 473; *Schuster et al* v. *Wheelwright*, 8 C. B. N. S. 383. In *Smith* v. *Wallbridge*, 18 U. C. C. P. 184, Adam Wilson, J., said: "In reviewing the decision of a judge we must be satisfied he was wrong before we can interfere, for, as has been said, 'gravely to doubt is to affirm.'" In *Martyn* v. *Williams*, 1 H. & N. 817, the court disallowed an amendment made at the trial on the ground that the amendment made the pleading reasonably open to a demurrer.

(*t*) Between the language used in the commencement and that used in conclusion of this section there is a marked distinction. The former part of the section empowers courts and judges to amend all defects and errors at any time, and these the court or judge *may* order. But the latter part of this section relates to such amendments "as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties." And these latter it is declared "*shall* be so made." While the former part of this section is permissive as to the exercise of powers of amendment, the latter part is clearly imperative: *Taylor* v. *Shaw*, 21 L. T. Rep. 38, *per* Crompton, J.; *Ritchie et al* v. *Van Gelder*, 9 Ex. 762; *Brennan* v. *Howard*, 1 H. & N. 141, *per* Bramwell, B.; *St. Losky et al* v. *Green et al*, 9 C. B. N.S. 375, *per* Byles, J.; *Cordery* v. *Colvin*, 14 C. B. N.S. 375, *per* Byles, J.; *Bank of Montreal* v. *Reynolds et al*, 24 U. C. Q. B. 383, *per* Draper, C. J. This distinction, though now firmly established, was at one time doubted: see *Hughes* v. *Bury*, 1 F. & F. 374; *The Times Fire Assurance Co.* v. *Hawke*, 28 L. J. Ex. 317; *McKenzie et al* v. *Van Sickles et al*, 17 U. C. Q. B. 226. At one time and by some judges it was supposed that the court or judge should be influenced in allowing or refusing an amendment by the fact that the action or defence was a hard one, or contrary to certain ideas of morality which the law had not made obligatory, but that notion, so far as the latter part of this section is concerned, must now be taken as exploded: see *Doe d. Marriott* v. *Edwards et al*, 1 Moo. & R. 319; *Wright* v. *Marralls*, 8 U. C. Q. B. 511, before C. L. P. Act; *Brennan* v. *Howard*, 1 H. & N. 141, *per* Bramwell, B.; *Hughes* v. *Bury*, 1 F. & F. 374, *per* Crowder, J.; *Bank of Montreal* v. *Reynolds et al*, 24 U. C. Q. B. 381, *per* Draper, C. J. *Contra*: *McKenzie et al* v. *Vansickles et al*, 17 U. C. Q. B. 227, *per* Robinson, C. J.; *Brennan* v. *Howard*, 1 H. & N. 140, *per* Pollock, C. B., and Willes, J. All amendments necessary to bring out the real question in controversy between the parties should be made: *St. Losky et al* v. *Green et al*, 9 C. B. N. S. 370. To determine what is the substantial question between the parties is to determine not a matter of law but of fact, which matter of fact must be determined by the judge on a careful consideration of the pleadings and evidence: *Wilkin* v. *Reed*, 15 C. B. 205, *per* Maule, J. But the statute does not contemplate amendments in every matter which could by possibility be started in the course of the trial. It has been thought by some of the judges that the presiding judge is bound to make an amendment asked for, if by so doing *some* question *might* be raised between the parties; but this impression is clearly incorrect: *Ib.* 192; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34. It was intended by the C. L. P. Act to limit the powers of amendment to the introduction of matters which the parties hoped and *intended* to try in the cause, and not to authorize amendments which might raise questions which never were contemplated by the parties: *Wilkin* v. *Reed*, 15 C. B. 206, *per* Maule, J. The declaration in an action for giving a false character to one P. a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he dismissed P. from his employment was the

decrease of his business, and that the defendant recommended the plaintiff to try P. and knowingly suppressed and concealed from plaintiff the fact that P. had been dismissed from his employment on account of dishonesty. At the trial it appeared that P. had been guilty of dishonesty while in the defendant's employment, but that defendant had not mentioned that fact to plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employment on account of his dishonesty, but really for the reason which defendant had assigned to plaintiff. The judge at the trial refused to allow the declaration to be amended, by inserting an allegation "that P. whilst in the defendant's employment, was guilty of dishonesty," instead of the allegation "that P. had been dismissed from the employment of the defendant on account of dishonesty." *Held* that the amendment was properly refused—the matter in controversy between the parties being *not* whether the defendant had fraudulently suppressed the fact that P. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him: *Wilkin* v. *Reed*, 15 C. B. 192. So an amendment of a special case for the purpose of letting in a question neither considered nor presented by the parties for consideration, was refused: *Hills* v. *Hunt*, 15 C. B. 1. Again, to hold that a judge is *bound* to add *a new plea* whenever it is necessary to let in the defence as it appears upon the evidence would be to put an end to trial by jury altogether. No man could ever know what case he was going to meet: *Taylor* v. *Shaw*, 21 L. T. Rep. 58; *Charnley* v. *Grundy*, 14 C. B. 608; *Corby et al* v. *Cotton et al*, 3 U. C. L. J. 50. The statute does not render it *imperative* on the court or a judge to allow one plea to be substituted for another: *Ritchie et al* v. *Van Gelder*, 9 Ex. 762. Where the defendant pleaded never indebted to an action for money lent, and issue was joined thereon, the court, in the exercise of discretion, refused to allow the defendant to substitute a plea that the money was lent for the purpose of purchasing shares in a foreign lottery and reselling them in England: *Ib.* But suppose the judge at nisi prius refuses to make an amendment where by law he is *bound* to make one, what is the remedy? If the court simply grant a new trial they send the parties down to try a question which is *not* that in dispute! There is a better remedy. If the judge at the trial improperly refuse to amend, the party aggrieved by his refusal can go directly to the court and make a substantive application for an amendment, and ask the court to grant it by virtue of its general jurisdiction: *Brennan* v. *Howard*, 1 H. & N. 141. *per* Bramwell, B.; and this was the course adopted with success in *The Bank of Montreal* v. *Reynolds et al*, 24 U. C. Q. B. 381. Perhaps also the judge refusing to amend could be prevailed upon to direct the jury to find the fact or facts according to the evidence, and state the finding on the record, so that the court, notwithstanding the finding on the issues joined, where the alleged variance is immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of his action or defence would give judgment according to the very right and justice of the case: see section 221 and notes thereto. The latter course would do away with the necessity either of amendment or new trial, and so be a considerable saving of costs to the parties affected thereby.

(*u*) From a very early period there has been some rule of practice to enable a defendant to get rid of an action commenced against him, which plaintiff does not think proper to bring to trial. The provision at common law was trial by proviso—a mode of procedure so called because of a proviso inserted in the *venire facias*, as follows: "And have then there the names of the persons and this writ, *provided* always that if two writs should thereupon come to you, one of them only you return and execute." And this for a long time was the only mode by which defendant could obtain indemnity for his expenses or have tried an

The British Act of 14 Geo. II. c. 17, not to be in force in U. C.

223. (*a*) The Act of the Parliament of Great Britain, passed in the fourteenth year of the reign of King George the Second, intituled, *An Act to prevent inconveniences from delays of causes after issue joined*, (*b*) so far as the same relates to judgment as in case of a nonsuit, shall not be in force in Upper Canada. (*c*) 19 Vic. c. 43, s. 149.

Costs of the day provided for.

224. (*d*) In case a notice of trial or assessment be given (*e*) and not duly countermanded, (*f*) and in case the party who gave the notice of trial or assessment do not bring the issue to trial or assess the damages, (*g*) such party shall for such default pay the costs of the day to the party to whom such notice was given. (*h*) 2 Geo. IV. c. 1, s. 36; 19 Vic. c. 43, s. 148.

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action which was kept unjustly hanging over him. Trial by proviso is still the only means of forcing an actual trial of the matter litigated. As to indemnity for expenses incurred in consequence of plaintiff's neglect to proceed to trial according to notice, technically called "costs of the day," a more summary proceeding was enacted by Stat. 14 Geo. II. cap. 17. This statute enabled a defendant in certain cases, upon showing the default of plaintiff to move the court for "judgment as in case of a nonsuit," the effect of which if allowed was to give him costs as if plaintiff had been in fact nonsuited. But this proceeding, though an improvement upon the common law mode of "trial by proviso," has been itself found susceptible of beneficial alteration. The enactments following are intended to simplify the mode of procedure in such cases and thus lessen the expense of obtaining judgment as in case of a nonsuit.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 100.

(*b*) Eng. Stat. 14 Geo. II. cap. 17.

(*c*) The provisions of 14 Geo. II. cap. 17, are repealed as to judgment in case of a nonsuit without any exception as to pending actions: *Doe d. Leigh* v. *Holt*, 8 Ex. 130, *per* Alderson, B.; see also *Morgan* v. *Jones*, 8 Ex. 128. The common law right to take down a cause by proviso is expressly preserved by Eng. C. L. P. Act 1852, s. 116.

(*d*) Taken from our old King's Bench Act, cap. 1, s. 36.

(*e*) See section 201 and notes thereto.

(*f*) Where there has been a countermand of notice of trial defendant is not entitled to any costs of the day: *Irwin* v. *Meenaghan*, 3 Ir. L. R. 285.

(*g*) It is now settled that the costs occasioned by the cause being made a remanet are costs in the cause, and go to the party who ultimately succeeds: *Bentley* v. *Carver et al*, 2 C. B. 817; *Gibbins et al* v. *Phillips*, 8 B. & C. 437.

(*h*) Costs of the day are in effect the same as those paid on the withdrawal of a record: *Walker* v. *Lane*, 3 Dowl. P. C. 504. The rule for them in Upper Canada was peremptory and absolute in the first instance: *Chisholm* v. *Simpson*, Dra. Rep. 2. But in England the practice in this respect differed in the several courts: Queen's Bench, *Alderley* v. *Storey*, 2 Dowl. N. S. 335; Common Pleas, *Russell* v. *Hill*, 6 Jur. 106; and Exchequer, *Scott* v. *Marshall*, 2 C. & J. 60. However, in

Rule for costs of the day on affidavit.

225. (*i*) The rule for costs of the day (*j*) for not proceeding to trial or assessment pursuant to notice, or not coun-

all the courts to obtain the rule a motion in court by counsel was necessary. It might be made at any time while the cause was in existence, that is, before execution executed, through several terms after default made by plaintiff: *Redit* v. *Lucock*, 2 C. & M. 337; and notwithstanding the lapse of four terms without a step in the cause might be made without a term's notice: *French* v. *Burton*, 2 C. & J. 634. The rule may now in this Province be obtained as of course without a motion in court, and as to the *time* within which it can be obtained the practice is the same as before the act: section 225. The rule being absolute in the first instance, the opposite party is not bound to show cause though a notice of motion be served upon him. His course is afterwards to move to discharge the rule: *Sleeman et al* v. *The Governor and Company of the Copper Miners of England*, 5 D. & L. 451. Non-payment of costs of the day is not a sufficient ground for staying proceedings until the costs are paid: *Becket et al* v. *Durand*, 6 U. C. L. J. 19; see also *Shoreditche* v. *Gilbard et al*, 8 Dowl. P. C. 296. But there may be an extreme case when staying proceedings for non-payment of costs of the day would be the proper course. Defendant may so act as to waive all benefit to the stay, even if otherwise entitled to it: *Deering* v. *Palmer*, 6 Ir. L. R. 209. As to what constitute costs of the day, see *Pegg* v. *Pegg*, 1 Cham. R. 190; s. c. 7 U. C. Q. B. 220. Costs of a special jury not costs of the day: *Whitehead* v. *Brown*, 2 O. S. 345. As to when defendant is entitled to costs of the day, see note *j infra*.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 99.

(*j*) The following is the rule made use of in our court of Queen's Bench. "Upon reading the affidavit of, &c., it is ordered that the attorneys of both parties shall attend the master, and he shall examine the matter and tax the defendant's costs, for that the plaintiff hath not proceeded to trial pursuant to his notice, which costs when taxed shall be paid by the plaintiff if it shall appear to the master that costs ought to be paid." Such a rule must be issued from the principal office in Toronto. Deputies have no power to issue it: *White et al* v. *Shire*, 7 U. C. L. J. 206. The rule will not be granted with a stay of proceedings: *Eager* v. *Cuthill*, 3 M. & W. 60; *Gibbs* v. *Goles*, 7 Dowl. P. C. 325; *Friden* v. *Bray*, 9 Dowl. P. C. 329.

The rule in use, it will be noticed, leaves it discretionary to tax the costs "if it shall appear to the master that costs ought to be paid," which seems equivalent to the common expression, "costs of the day, if any." All objections to the allowance of such costs should be taken before the master upon taxation, and not reserved for a subsequent application to the court: *Rainforth* v. *Hamer*, 3 C. L. R. 298.

If the record has not been entered for trial or assessment on the day for which notice was given defendant, showing this establishes a *prima facie* right to the costs: *O'Neil* v. *Barnhart*, 5 O. S. 453. There may be a sufficient excuse for not having proceeded to trial, but it is for plaintiff to show that excuse when moving to discharge the rule: *Ib.* And it has been held although plaintiff offered to enter the record *after* the commission day of the assize to which defendant objected, yet that the latter was entitled to costs of the day: *Ib.* A proposal to refer made after the commission day of the assizes is clearly no sufficient excuse for not having proceeded pursuant to notice: *Eaton* v. *Shuckburgh*, 2 Dowl. P. C. 624. And where the cause was with consent of defendant entered after the commission day, although no notice of trial had been given, defendant was considered entitled to his costs: *Doe d. Tenbroek* v. *Cole*, H. T. 5 Vic. *MS.* R. & H. Dig. "Costs," ii. 5. But where plaintiff having given notice did not enter his record in time and defendant agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go

termanding in sufficient time, may be drawn up on affida-

to trial, he was refused costs: *Crawford* v. *Cobbledike*, M. T. 5 Wm. IV. *MS. Ib.* "Costs," ii. 3. Where a cause not ready in its turn was put to the foot of the docket with the consent of defendant and not afterwards tried, costs were refused: *Bank of Upper Canada* v. *Covert et al*, M. T. 6 Wm. IV. *Ib.* "Costs," ii. 6. Costs were allowed to a defendant who by agreement with plaintiff accepted short notice of trial, where the latter did not proceed pursuant to his notice: *Harris* v. *Hawkins*, 3 O. S. 142. So where plaintiff's attorney sent notice of countermand to his agent, but it arrived too late for service: *Spafford* v. *Buchanan*, 4 O. S. 325. Where after the jury was sworn in an ejectment case, the defendant objected that the *jurata* was defective, and the judge being of that opinion, and defendant refusing to consent to an amendment, the judge discharged the jury, the defendant was refused costs of the day: *Doe d. Crooks et ux.* v. *Cummings*, 2 U. C. Q. B. 380. In this case, though plaintiff failed in proceeding to trial according to notice, it is obvious that the cause of failure arose from the defendant's own objection *after* the jury was sworn and his refusal to consent to an amendment. The defendant did not wish the trial to go on, but strove to frustrate and render abortive the plaintiff's desire to proceed, and having succeeded in his endeavour, it was right to hold that he should not afterwards be allowed to complain of having been put to costs on the occasion: *Ib.* Wherever it appears that plaintiff, though ready and willing to try, has been prevented solely by default of defendant, in all probability with a view to costs of the day, the court will refuse them: *Pope* v. *Fleming*, 1 L. M. & P. 272; see also *Sleeman et al* v. *The Governor and Company of the Copper Mines of England*, 17 L. J. Q. B. 113. Not only upon the authority of decided cases but upon principle plaintiff ought not to be asked to pay costs not occasioned by his own default: *Waters* v. *Weatherby*, 3 Dowl. P. C. 328; *Brett* v. *Stone*, 1 D. & L. 140. Although neither party appear when the cause is called on for trial and is in consequence struck out of the docket, still if defendant can show that any costs of the day have been incurred by him he may recover them: *Allott* v. *Bearcroft*, 4 D. & L. 327; *White et al* v. *Shire*, 7 U. C. L.J. 206. But the better opinion is now contrary to the ruling of this case: *Morgan* v. *Fernyhough*, 11 Ex. 205; *Crofts* v. *McMaster et al*, 9 U. C. L. J. 211. It is in fact defendant's fault that he incurred any costs that were fruitless, because if he had been present at the trial he might have nonsuited plaintiff, and so ended the proceedings in the action: *Morgan* v. *Fernyhough*, 11 Ex. 207, *per* Pollock, C. B. Costs not allowed where both parties at fault: *Warne* v. *Hill*, 7 C. B. N.S. 726; *Leech* v. *Gibson*, 10 W. R. 354; *Smith* v. *Marshall*, 33 L. J. Q. B. 382; *Greenaway* v. *Holmes*, 2 C. L. R. 745. Where a plaintiff has reasonable excuse for not proceeding to trial and has been guilty of no default, the defendant is not entitled to the costs of the day: *Pell* v. *Linnell et al*, L. R. 3 C. P. 441. The cause list is in the discretion of the presiding judge; he has entire control of it, and may take the cases as he pleases: *Dunn* v. *Coutts*, 16 L. & Eq. 137; s. c. 17 Jur. 347; and may postpone a trial on the ground of the absence of a material witness of either party or for any other cause sufficient in his opinion: *Turner* v. *Meryweather*, 7 C. B. 251. And if plaintiff instead of applying for a postponement withdraw his record, he is bound to pay costs of the day: *Greenaway* v. *Holmes*, 2 C. L. R. 745; see also *Skinner* v. *London, Brighton and South Coast Railway Co.* 1 L. M. & P. 191. The default of plaintiff it would appear must be a wilful default: *Ogle* v. *Moffatt*, Barnes, 138; *Eastern Union Railway Co.* v. *Symonds*, 4 Ex. 502; *Scott* v. *Crosthwaite*, 6 U. C. L.J. 159; *Adshead* v. *Upton et al*, 22 U. C. Q.B. 429. Where the jury, unable to agree, were discharged by the presiding judge from giving a verdict, and plaintiff afterwards discontinued, it was held that defendant was not entitled to costs of the day: *Wall* v. *London and South Western Railway Co.* 25 L. J. Ex. 93. Nor would plaintiff be entitled to these costs though he succeed on the subsequent trial. Wherever by the fault or defect of finding by the jury, the parties go to trial a

vit (*k*) without motion made in Court. (*l*) 19 Vic. c. 43, s. 148.

TOWN AND COUNTRY CAUSES.

Town causes and Country causes distinguished.

226. (*m*) In the Superior Courts, causes in which the venue is laid in the United Counties of York and Peel, or in the County of York alone, when no longer united with the said County of Peel, (*n*) shall be called Town causes, and all other causes shall be called Country causes. (*o*) 19 Vic. c. 43, s. 150.

If plaintiff neglects to go to trial within a certain time

227. (*p*) In case issue be joined in any cause, in either of the Superior Courts, (*q*) and the Plaintiff neglects to bring such issue on to be tried, (*r*) at the times following, that is

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second time, the party ultimately successful is entitled only to the costs of the trial in which he succeeds: *Brown* v. *Clarke*, 12 M. & W. 25. Failure in proceeding to assessment of damages is, as respects costs of the day, subject to the same rules as failure to proceed to trial: *The King's College* v. *Maybee*, 2 U. C. Q. B. 94; and has been so considered by the legislature: see section 224.

(*k*) There is no particular form of affidavit made necessary. It may be as follows: "1. That issue was joined in this cause on, &c. and notice of trial given thereon for the last assizes holden at, &c. 2. That the above-named plaintiff did not proceed to the trial of the said action, nor countermand such notice in due time according to the practice of the court." The affidavit need not *necessarily* show that the costs have been actually incurred by defendant: *Powell* v. *James*, 1 D. & L. 415; but in general it is incumbent upon the party applying for costs to show that costs have been incurred: *Ray* v. *Sharp*, 4 Dowl. P. C. 354.

(*l*) The question as to the proper time for the issue of the rule is involved in much doubt: *Adshead* v. *Upton et al*, 22 U. C. Q. B. 429. A rule obtained *during* the assizes is irregular; for as the judge of assize may allow the record to be entered at any time during the assizes, there can be no default till the assizes are over: *per* McLean, C. J. Such rule may issue in vacation at any time *after* the assizes for which the notice was given: *per* Adam Wilson, J. The rule of court, R. G. pr. 120, was not intended to allow a rule for costs of the day to be obtained *sooner than the term* following the assizes, or in any *subsequent* vacation, *per* Hagarty, J.

(*m*) Taken from C. L. P. Act, 1856, section 150.

(*n*) See statutes 25 Vic. cap. 27, and 29 & 30 Vic. cap. 71, as to the separation of York and Peel.

(*o*) The C. L. P. Act, 1856, section 150, introduced into Canada a practice which had long prevailed in England, of dividing causes into *town* and *country* causes. The object of the section is to prepare the way for the section following, in which separate provision as regards judgment for not proceeding to trial or assessment pursuant to notice is made for each class of cases.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 101.

(*q*) Held to be retrospective: *Dunn* v. *Coutts*, 17 Jur. 347.

(*r*) If there be issues in fact and in law to different pleadings on the same record, plaintiff as a general rule is not bound to go to trial on the issues in

to say, in Town causes (*s*) where issue is joined (*t*) in, or in the vacation before Hilary, Trinity or Michaelmas Term, and the Plaintiff neglects (*u*) to bring the issue on to be tried at

after issue joined, Defendant may give notice to plaintiff

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fact until the determination of the issues in law. His default can only be reckoned from the latter date: *Duberley* v. *Page et al*, 2 T. R. 391; *Gordon* v. *Smith*, 6 Bing. N.S. 273; *Brewer* v. *Pierpoint et al*. E. T. Ex. 1847, Mor. Dig. 161; *Ferguson* v. *Mahon*, 2 Jur. 820; *Connop et al* v. *Levy*, 6 D. & L. 282; *Chrisp* v. *Attwell*, 1 L. M. & P. 454. Contra—*Leach* v. *Dulmage*, E. T. 3 Vic. *MS.* R. & H. Dig. "Judgment in case of nonsuit," ii. 2. But after judgment on demurrer to certain pleas, plaintiff is still bound to proceed to trial on the remaining pleas upon which issues in fact are joined: *Paxton et al* v. *Popham et al*, 10 East. 366; *Martin* v. *Stone*, 6 Jur. 372.

(*s*) As to the distinction between town and country causes see section 226 of this act.

(*t*) It is probable that in accordance with the old practice as to judgment in case of nonsuit defendant will not be entitled to enter a suggestion for judgment under this section until the issue has been in fact completed: *Heath* v. *Boxall*, 7 Dowl. P. C. 19; *Rickards et ux.* v. *Middleton*, 1 M. & G. 53; *Brook* v. *Lloyd*, 1 M. & W. 552; *Martin* v. *Martin*, 2 Bing. N. C. 240; *Gilmore* v. *Melton*, 2 Dowl. P. C. 632; *Jackson* v. *Utting et al*, 10 M. & W. 640; *Pinkus* v. *Sturch et al*, 5 C. B. 474; *Wilson* v. *Westbrooke*, E. T. 4 Vic. *MS.* R. & H. Dig. "Judgment in case of nonsuit," i. 7; *McLellan et al* v. *Smith*, T. T. 4 & 5 Vic. *MS. Ib* ; *Gibson* v. *Washington*, 1 U. C. Q. B. 410; *Elvige* v. *Boynton*, *Ib.* 279; *Doe d. Anderson* v. *Todd et al*, *Ib.* 279; *McCague* v. *Clothier*, *Ib.* 517. The time will not begin to run till the last issue is joined, where there are several issues: *Crowther* v. *Duke*, 7 Dowl. P. C. 409.

(*u*) The right of defendant to avail himself of this provision is made to depend upon the neglect of plaintiff. Where a plaintiff proceeded at law and in equity, and after issue joined in the action elected to proceed in equity, the defendant was allowed to give notice under this section to the plaintiff to bring the issue on to be tried: *Mortimore et al* v. *Soares*, 1 E. & E. 399. If the cause, though regularly brought down for trial by plaintiff, be not tried, owing to no default of plaintiff, there is no power to enter the suggestion: *Mewburn* v. *Langley*, 3 T. R. 1; *Henkin* v. *Guerss*, 12 East. 247; *Ham* v. *Greg*, 6 B. & C. 125; *Kendell* v. *Bailey*, 2 Dowl. P. C. 113; *Gilbert* v. *Kirkland*, *Ib.* 153; *Ladbroke* v. *Williams*, 3 D. & L. 368; *Lumley* v. *Dubourg*, 14 M. & W. 295; *Hansby* v. *Evans*, 7 Dowl. P. C. 198; *Spurr* v. *Rayner*, *Ib.* 467; *Rizzi* v. *Foletti*. 5 C. B. 852; *Jackson* v. *Carrington*, 4 Ex. 41; *Laws et al* v. *Bott*, 16 M. & W. 362; *Rogers* v. *Vandercom*, 4 D. & L. 102; *Chapman* v. *Heslop*, 12 Q. B. 928; *The Bank of Upper Canada* v. *Covert et al*, M. T. 6 Wm. IV. *MS.* R. & H. Dig. "Judgment in case of nonsuit," i. 2; *The Bank of Upper Canada* v. *Bethune et al*, M. T. 6 Wm. IV. *MS. Ib.* ; *Bradbury* v. *Flint*, M. T. 4 Vic. *MS.* R. & H. Dig. *Ib.* 4; *Penniman* v. *Wince*, 4 O.S. 335; *Doe d. Burnside* v. *Hector*, T. T. 4 & 5 Vic. *MS* R. & H. Dig. "Judgment in case of nonsuit," ii. 3; *Doe d. Dodge* v. *Rose*, 4 U. C. Q. B. 174; *Hodson* v. *Stevens*, 5 U. C. Q. B. 625; *Doe d. Anderson* v. *Todd et al* 1 U. C. Q.B. 279. Indeed if plaintiff has once brought his case down for trial though made a *remanet* or result in a nonsuit or a verdict for plaintiff, which is subsequently set aside by the court, it is a question whether defendant can avail himself of this section and so compel plaintiff to try a *second* time: see *King* v. *Pippett*, 1 T. R. 492; *Brown* v. *Rudd*, 1 Dowl. P. C. 371; *Gilbert* v. *Kirkland*, 2 Dowl. P. C. 153; *Ashley* v. *Flazman*, *Ib.* 697; *Hawley* v. *Shirly*, 5 Dowl. P. C. 393; *Jones* v. *Hows*. *Ib* 600; *Laws et al* v. *Bott*, 16 M. & W. 362; *Warren* v. *Smith*, 5 O. S. 728; and if not

to bring issue to trial, &c.

or before the second Assizes following such term, (*v*) or if issue be joined in or in the vacation before Easter Term, then if the Plaintiff neglects to bring the issue on to be tried at or before the first Assizes after Easter Term, (*w*)—and in Country causes, (*x*) where issue is joined in, or in the vacation before Hilary or Trinity Term, and the Plaintiff neglects to bring the issue on to be tried at or before the second Assizes following such Term, or if issue be joined in, or in the vacation before Easter or Michaelmas Term,—and the Plaintiff neglects to bring the issue on to be tried at or before the first Assizes after such term; or in case issue be joined in any cause in any County Courts, if the Plaintiff neglects to bring the issue on to be tried at the first sittings of the Court after issue joined, then upon such neglect in any of the Courts respectively, and whether the Plaintiff has in the meantime given notice of trial or not, the Defendant may give twenty days' notice to the Plaintiff (*y*) to bring the issue on to be tried at the Assizes, or sittings of the County Court next after the expiration of the notice; (*z*) and if the Plaintiff

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then a further question is whether he has any other remedy than that of trial by proviso, as to which see note *s*, *infra*.

(*v*) The court, after a preremptory undertaking to try at a particular assize declined to entertain a motion for judgment until the sittings were concluded, because *possibly* the case might still be entered by the sitting judge: *Burn* v. *Cook*, 1 L. M. & P. 736; see also *Adshead* v. *Upton et al*, 22 U. C. Q. B. 429.

(*w*) This part of the section as to the periods fixed within which trials must take place in town causes, varies from the English enactment, in consequence of a difference as to the times of holding the assizes in this Province. Trinity Term is now abolished: Stat. 29 & 30 Vic. cap. 40, s. 2.

(*x*) As to country causes this provision is a *verbatim* copy of the English enactment. As to what are country causes, see section 226.

(*y*) The notice intended is a twenty days' notice *before the assizes*, and not twenty days' notice before the time for plaintiff to give notice of trial for that assizes: *Judkins* v. *Atherton*, 3 El. & B. 987. The defendants' attorney may give the twenty day's notice, although it is only for the purpose of obtaining his own costs: *Knight* v. *Gaunt*, 22 L. J. Q. B. 167. It may be noticed that under this practice plaintiff's position is a better one than that under the old practice. Before defendant can legally give the twenty days' notice, there must be such a default on the part of the plaintiff in point of time as would have entitled defendant to move for judgment as in case of nonsuit. And after the expiration of that notice plaintiff may now have still *another* assize before judgment can be obtained against him under this section.

(*z*) Where a defendant has given the twenty days' notice to proceed to trial, the plaintiff may come to the court, and, on satisfactorily explaining the delay, obtain an extension of time: *Farthing* v. *Castles*, 22 L. J. Q. B. 167.

afterwards (*a*) neglects to give notice of trial for such Assizes or Sittings, or to proceed to trial as required by the notice given by the Defendant, the Defendant may suggest on the record that the Plaintiff has failed to proceed to trial, although duly required so to do, (which suggestion shall shall not be traversable, but only be subject to be set aside if untrue,) (*b*) and

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(*a*) The word "afterwards" as here used means after the service of the twenty days' notice. If after that plaintiff do not proceed to trial he is to be in the same situation as a plaintiff formerly was who did not proceed to trial after giving a peremptory undertaking to try: *Judkins* v. *Atherton*, 3 El. & B. 987. The record must be made perfect in the event of death of any of the parties before the entry of the suggestion: *Larchin et al* v. *Buckle*, 1 L. M. & P. 740; *Pinkus* v. *Sturch et al*, 5 C. B. 474. The suggestion may be in this form—And now on, &c. the defendant suggests and gives this honorable court to be informed that the plaintiff has failed to proceed to trial, although duly required so to do. Therefore, &c. It is presumed that defendant will not be in a position to enter the suggestion in cases which, if decided before this act, he could not obtain judgment, as in case of nonsuit. For example, where there are several defendants and issue joined only as to one: *Crowther et al* v. *Duke et al*, 7 Dowl. P. C. 409; *Jackson* v. *Utting et al*, 2 Dowl. N. S. 543; see also *Spafford* v. *Buchanan et al*, 4 O. S. 326; and this although the defendants against whom issue is incomplete are dead, unless that be regularly suggested: *Pinkus* v. *Sturch et al*, 5 D. & L. 515; see also *Checchi et ux.* v. *Powell et al*, 6 B. & C. 253. But one of several defendants, where all have pleaded, might obtain judgment as in case of nonsuit: *Jones* v. *Gibson et al*, 5 B. & C. 768; *Bridgeford* v. *Wiseman et al*, 16 M. & W. 439; *Rhodes et al* v. *Thomas et al*, 2 D. & L. 553; though one or more have suffered judgment by default: *Stuart* v. *Rogers*, 4 M. & W. 649; *Hadrick* v. *Haslop et al*, 16 L. J. Q. B. 442.

(*b*) A plaintiff moved to set aside a judgment signed under this section in the Eng. C. L. P. Act, upon the ground that plaintiff was prevented from trying the cause by the wrongful act of defendant, and in support of his application showed that in compliance with the defendant's notice to bring the issue on to be tried, he gave notice of trial, and on delivering the record told the associate that he had kept it back in order that his cause might be the last in the list, as his witnesses were in the country, and that he gave defendant's attorney notice that he should not be able to try until the last day of the sittings, but afterwards received a note from the marshal that it would be taken on that day, and it was accordingly taken, although an application had been made to the presiding judge for a postponement. And *per* Coleridge, J.: "The grievance complained of is that your case was improperly taken by the officer of Lord Campbell. You applied to Lord Campbell to have it taken in a different order, and he refused your application. The cause list is in the discretion of the presiding judge; he has the entire conduct of it, and may take the case as he pleases. Every case is supposed to be ready when it is placed in the list. I cannot interfere with Lord Campbell's discretion." Rule refused: *Dunn* v. *Coutts*, 17 Jur. 347. The truth or untruth of the suggestion will substantially depend upon the nature and circumstances of plaintiff's default. The presumption of neglect may be combated by showing a sufficient excuse. The following have been held *not* to be sufficient: the absence of a material witness: *Mussell* v. *Faithful*, 11 Jur. 270; inability to proceed without fresh evidence: *Draine* v. *Russell et ux.* 10 Jur. 392; *Doe d. Ringer* v. *Blois*, 8 Dowl. P. C. 18. The following have been held to be *sufficient*: the pendency of a negotiation for a settlement only broken off by defendant when too late to proceed to trial: *Alford* v. *Fellowes*, 9 Dowl. P. C. 326; *Fosbery* v. *Butler et al*, 2 Dowl. N.S. 390; see also *Watkins* v. *Giles*, 4 Dowl. P. C. 14; the pendency of a case involving

the Defendant may sign Judgment for his costs; (*c*) but the Court or a Judge (*cc*) may extend the time for proceeding to trial with or without terms; (*d*) and no rule for trial by pro-

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the same points of law: *Handells* v. *Pawsey*, 11 Jur. 849; the pendency of a commission to examine witnesses: *Waddy* v. *Barnett*, 15 L. J. Q.B. 8; *Bordier* v. *Barnett et al*, 3 D. & L. 370; delay at the request of defendant: *Doe d. Steppins* v. *Lord*, 1 Dowl. P. C. 419; *Jenkins* v. *Charity*, *Ib.* 197; *Doe d. Davidson et al* v. *Gleesor* 9 U. C. Q. B. 607; stay of proceedings until the delivery of particulars: *Wilkie* v. *Gipson*, 7 L. J. C. P. N.S. 65; or until security for costs: *Gandell* v. *Motte*, Ex. T.T. 1847, *MS.* Mor. Dig. 167; a summons by defendant to put off the trial taken out at so late a period that plaintiff anticipated being put to inconvenience if he prepared for trial: *Rendell* v. *Bailey*, 2 Dowl. P. C. 113; proceedings taken against plaintiff by defendant in chancery: *Partridge* v. *Salter*, 5 Dowl. P. C. 68; *Dobson* v. *Brocklebank*, 7 Ex. 316; the threatened insolvency of defendant; *Truscott* v. *Latour*, 9 Ex. 420. Upon the latter point reference may be made to *Lettice* v. *Sawyer*, 4 Jur. 74; *Holland* v. *Henderson*, 4 M. & W. 587; *Frodsham* v. *Rust*, 4 Dowl. P. C. 90; *Mann* v. *Williamson*, 7 M. & W. 145; *Smith* v. *Davis*, 9 Dowl. P. C. 50; *Fisher* v. *Lediard*, *Ib.* 545; *Topping* v. *Brown*, *Ib.* 582; *Featherstone* v. *Bourne*, 2 Dowl. N.S. 389; *Badman* v. *Pugh*, 1 D. & L. 540; *Gavin* v. *Allan*, 21 L. J. Ex. 80. So in a special jury cause that neither party would pray a tales: *Phillips* v. *Dance*, 9 B. & C. 769. Where defendant had applied at Chambers to put off the trial, and the hearing had been postponed so that the commission day was close at hand, it was considered that plaintiff was justified in countermanding and that there was no neglect on his part: *Rendell* v. *Bailey*, 2 Dowl. P. C. 113.

(*c*) The costs will be chiefly composed of costs of the day, as to which see section 225.

(*cc*) Relative powers, see note *w* to section 48.

(*d*) The plaintiff may apply for the extension of time immediately after the service of the notice: *Farthing* v. *Castles*, 22 L. J. Q. B. 167. The application should be made within the twenty days: *Horner* v. *Spencer et al*, 1 F. & F. 412, *per* Martin, B. But this is not imperative: *Nosotti* v. *Hudson*, L. R. 3 C. P. 293. The court has no power to extend the time for proceeding to trial *indefinitely* upon application of plaintiff under this proviso: *Bridgwater* v. *Griffiths*, 17 Jur. 438. It is apprehended that the practice regulating the extention of time will be in many respects analogous to the old practice of peremptory undertaking. Several of the cases decided under the old, will be in point under the new practice. Whenever before this act plaintiff, by showing a reasonable excuse for not proceeding to trial might discharge the rule for judgment as in case of nonsuit, upon entering into the peremptory undertaking, he will, as a general rule, have good grounds to resist an application under this act. Thus where he was prevented by defendant from proceeding to trial: *Penniman* v. *Wince*, 4 O. S. 335; *Doe d. Anderson* v. *Todd et al*, 1 U. C. Q.B. 279; where plaintiff's proceedings have been stayed by an injunction from chancery: *Doe d. Burnside* v. *Hector*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "Judgment in case of nonsuit," ii. 3; where owing to some special circumstances plaintiff is acting *bona fide* on the advice of counsel: *Armstrong* v. *Benjamin*, 1 U. C. Q.B. 414: or where the attorney for plaintiff was unable to see his client, who resided some distance from him: *Richards* v. *Hamer*, 5 C. B. 582; where owing to the misconduct of a former attorney in the cause, plaintiff is unprepared to try: *Howard* v. *Crofts*, 6 C. B. 620; where defendant has tampered with plaintiff's witnesses: *Bates* v. *O'Donahoe*, 3 U. C. Q. B. 178; or deceived plaintiff as to the production of evidence which he promised to produce: *Doe d. Rees* v. *Dick*, 6 U. C. Q. B. 621; or keeps out of the way a material

viso shall hereafter be necessary. (*e*) 19 Vic. c. 43, s. 151; 19 Vic. c. 90, s. 15.

TRANSMISSION AND DELIVERY OF NISI PRIUS RECORDS, &c.

On receiving notice, Deputy Clerks

228. (*f*) Every Deputy Clerk of the Crown shall, within twenty-four hours after notice in writing delivered to him in

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witness for plaintiff: *Appleyard* v. *Todd*, 6 M. & G. 1019; the unexpected want of a particular witness or document: *Jordan* v. *Martin et ux*, 8 Taunt. 104; *Greenhill* v. *Mitchel*, 6 Taunt. 150; *Wilkinson* v. *Willats*, 6 D. & L. 280; *Montfort* v. *Bond*, 2 Dowl. P. C. 403; *Wyatt* v. *Nicholls*, 9 Dowl. P. C. 327; *Doe d. De Reimer* v. *Glass*, 4 U. C. Q.B. 255; or unexpected difficulties in the way of plaintiff's proceedings: *Draine* v. *Russell et ux*, 10 Jur. 392; and perhaps plaintiff's sudden but temporary inability to meet the expenses necessary to the support of his case: *Radford* v. *Smith*, 7 Dowl. P. C. 26; *Joyce* v. *Ellis*, 6 M. & G. 691. It is presumed that even if there be power under this section to grant a second extension of time, that power will be rarely exercised. Under the old practice a rule for judgment after a peremptory undertaking and default was absolute in the first instance: *Benham* v. *Shaw*, Dra. Rep. 121; *Mastin* v. *Garrow*, M. T. 2 Vic. *MS.* R. & H. Dig. "Judgment in case of nonsuit," iv. 1; and against this rule plaintiff was seldom relieved: *Matthewson* v. *Glass*, 1 U. C. Q. B. 516. In one case after default in proceeding to trial pursuant to a peremptory undertaking where defendant obtained a rule nisi for judgment, which was enlarged to be heard in Chambers, and plaintiff showed cause, stating that "he had given notice of trial in pursuance of his undertaking, but that in consequence of the absence of two material and necessary witnesses in the United States, he was unable to proceed to trial; that both said witnesses are now residing in Toronto, and that he will be able to proceed at the ensuing Toronto assizes, that he made efforts to obtain the presence of said witnesses, but could not succeed and that if he is compelled to commence a new action many of the claims for which the action is brought will be barred by the "Statute of Limitations," the peremptory undertaking was extended until the then next ensuing Toronto assizes: *Maitland* v. *Brown*, 3 U. C. L. J. 49, *per* Burns, J.

(*e*) By the Eng. C. L. P. Act, s. 16, it is enacted that "nothing herein contained shall affect the right of a defendant to take down a cause for trial after default by the plaintiff to proceed to trial *according to the practice of the court.*" The 42nd rule of H. T. 1853, establishes the practice of the court thereafter to be that "no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, *and no rule for a trial by proviso shall be necessary.*" Our statute has no section similar to the 116th section of the Eng. C. L. P. Act, and the part of the section here annotated makes statutory that which was provided for by rule 42 of H. T. 1853, and in part by our R. G. pr. 38. Why there should be this difference between the two acts is not apparent: *Summerville* v. *Joy*, 5 U. C. L. J. N.S. 259, *per* Gwynne, J. The better opinion is that there is nothing in our statute to deprive a party of his right to bring down a cause by proviso: see *Carscallen* v. *Moodie et al*, 2 Prac. R. 254. If our statute contemplated abolishing trial by proviso altogether, and making the section here annotated a substitute for it also, one would suppose that instead of abolishing the *rule* for a trial by proviso they would have abolished the trial by proviso itself: *Summerville* v. *Joy*, 5 U. C. L. J. N.S. 259, *per* Gwynne, J.

(*f*) Taken from our repealed statute 14 & 15 Vic. cap. 118, s. 6, as amended by 20 Vic. cap. 57, s. 3.

of the Crown to transmit Nisi Prius record to Toronto, sealed up, &c.

his office, for that purpose, (*g*) and payment of the necessary postage, enclose, seal up and transmit by post to the proper principal office at Toronto, addressed to the Clerk thereof, any record of *Nisi Prius* in his custody mentioned in such notice, together with all exhibits filed at the trial, (*h*) and in default thereof, (*i*) he may be adjudged guilty of a contempt of Court, and be dealt with in the discretion of the Court accordingly; (*j*) and if, after such notice, the *Nisi Prius* record be not in court at the time of moving any rule requiring a reference thereto, the party moving may, on filing an affidavit of the service of notice, and that the record, on search, has not been found in the said principal office, (*k*) be

Failure to be a contempt.

After such notice, a party may move although the record be

(*g*) The notice may be in the following form:

In the Q. B. &c.

A. B. *Plaintiff*,
v.
C. D. *Defendant*.

To ———, deputy clerk of the crown in and for the county of, &c.

Sir—Take notice, that you are required, within twenty-four hours after receipt of this notice, to enclose, seal up and transmit by post to the proper principal office at Toronto, addressed to the clerk thereof, the record of nisi prius in this cause now in your custody, together with all exhibits filed at the trial.

Dated, &c. E. F. ——— *Attorney*.

(*h*) There must not only be the notice in writing served on the clerk in his office, but payment of the necessary postage and an affidavit thereof and of search to entitle the party interested to avail himself of the provisions of this section.

(*i*) Whenever a deputy clerk of the crown is required to transmit any roll, record or paper in any cause to the principal office in Toronto, it is his duty to enclose and seal up the same in an envelope and to address such envelope to the clerk of the crown in the proper office, and he may thereupon deliver such sealed envelope to the attorney who has required the transmission thereof (taking a receipt from him), or may send the same by post: R. G. pr. 148.

(*j*) Before the court would grant an attachment it is apprehended it would require to be satisfied, not only of the payment of necessary postage, but of the personal service of the notice on the deputy clerk.

(*k*) The affidavit of service should be intituled in the court and cause, and may be as follows:

In the Q. B. &c.

A. B. *Plaintiff*,
v.
C. D. *Defendant*.

I, E. F. of &c. make oath and say as follows:

1. That on the ——— day of ——— last I did personally serve ———, deputy clerk of the crown in and for the county of, &c., with a true copy of the notice in writing hereto annexed, by handing the same to him in his office at, &c.

2. That I did at the same time and place pay to the said ——— the sum of ———, being the necessary postage in that behalf.

allowed by the Court to move such rule without the production of the Record of *Nisi Prius*. (*l*) 14 & 15 Vic. c. 118, s. 6; 20 Vic. c. 57, s. 3.

not in Court; first filing affidavit of notice.

229. (*m*) The said Deputy Clerks of the Crown shall, after the time for the moving for new trials has expired, (*n*) deliver to the Attorney of the party entitled to the Postea, any record in their custody upon getting a receipt for the same, but they shall not deliver to any party any Exhibit filed, without a Judge's order to that effect. (*o*) 14 & 15 Vic. c. 118, s. 2.

When and how Deputy Clerks shall deliver record or exhibits to Attorney or parties.

230. (*p*) After verdict or non-suit, the Attorney of the party entitled to the Postea in the cause shall prepare the same. (*q*) 14 & 15 Vic. c. 118, s. 4.

Attorney entitled to postea to prepare the same.

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3. That I did on the ——— day of ——— instant search in the principal office of this honourable court in Toronto for the said record, and was informed by the clerk of this honourable court then being in the said office that the said record had not been received by him, &c. (*or* that the said record is not to be found in the said principal office).

It is apprehended that the latter clause of the affidavit might if necessary be embodied in a separate affidavit to be made by the person making the search in Toronto.

(*l*) The courts almost universally decline to hear motions for new trials unless either the record be in court the time of the motion or the party applying is in a position to file the affidavit or affidavits made necessary by this section. Thus where a deputy clerk of the crown had been in due time instructed by the agents of the defendant's attorney, though not formally notified under the statute, to forward the nisi prius record to the principal office in Toronto, but had neglected to do so till the fifth day of term, the court refused a rule *nisi* for a new trial, although the judge who tried the cause entertained a very strong opinion against the justice of the verdict: *Kitchin* v. *McIntyre et al*, 16 U. C. C. P. 484.

(*m*) Taken from section 2 of our repealed act 14 & 15 Vic. cap. 118.

(*n*) No motion for a new trial or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of term if the cause be tried in term, or when the cause is tried out of term after the expiration of the first four days of the ensuing term unless in either case entered in the list of postponed motions by leave of the court: R. G. pr. 40.

(*o*) The duty of the deputy clerk is twofold: 1. As to the record. 2. As to exhibits filed. It is made his duty to deliver the record to the attorney of the party entitled to the postea upon getting a receipt for the same; but he is not to deliver the exhibits to any party without a judge's order to that effect.

(*p*) Taken from section 4 of our repealed act 14 & 15 Vic. cap. 118.

(*q*) Where plaintiff has succeeded on any part of his declaration, and the pleas on which issues are found for the defendant do not go to the whole cause of action, the plaintiff is in general entitled to the postea: *Staley* v. *Long*, 3 Bing. N. C. 781;

RULES FOR NEW TRIALS, OR TO ENTER A VERDICT OR NONSUIT. (r)

Grounds to be stated in Rule Nisi for new trial.

231. (s) In every rule *Nisi* for a new trial or to enter a verdict or nonsuit, (t) the grounds upon which such rule has

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Smith v. *Brown*, 5 Dowl. P. C. 736. But the plaintiff has no right to the postea where he is not entitled to any costs: *Grout* v. *Glasier*, 1 Dowl. N.S. 58. In some cases it may happen that plaintiff, though entitled to the postea, but not having a certificate to entitle him to full costs where a certificate is necessary, may refuse to enter judgment, and in such cases the defendant may apply to a judge to order the delivery of the postea to him, defendant, or to attend with it to allow judgment to be signed, and defendant may thereupon not only sign judgment for himself on his own count if entitled to do so on any count of the declaration, but may sign judgment for plaintiff on the other count or counts: *Taylor* v. *Nesfield*, 4 El. & B. 462; *Cross* v. *Waterhouse*, 10 U. C. L. J. 73.

(r) Motions either for a new trial or to enter a verdict or nonsuit, can only be made in that court in which the suit has been commenced and carried down to trial. So points, if reserved at the trial, can only be reserved for the same court: see *Vansittart* v. *Taylor*, 4 El. & B. 910. Where the motion was by mistake made in the wrong court, the right court entertained it after the expiration of the time for moving: *Johnson* v. *Warwick*, 17 C. B. 516. But a suggestion of perjury on the part of the defendant and his witnesses, and discovery of fresh evidence since the expiration of the time for moving, was held to be no ground for a new trial after the time for moving: *Gambart* v. *Mayne*, 14 C. B. N.S. 320. Where a plaintiff has died intestate since the trial, a new trial cannot be moved on behalf of his widow or next of kin without letters of administration being first taken out: *Lloyd* v. *Ogleby*, 5 C. B. N. S. 667. So where pending a rule for a new trial the plaintiff died, it was held that no cause could be shown against the rule until there was a personal representative: *Shoman* v. *Allen*, 1 M. & G. 96, note *c*. A verdict having been found for the defendant, the plaintiff obtained a rule nisi for a new trial, but defendant having died since the trial the rule was drawn up calling upon "his legal representatives or their attorneys" to shew cause, and was served upon the latter: *Held* that cause might be shewn by counsel acting for the executors named in the will, though there had been no probate: *Thomas* v. *Dunn*, 1 C. B. 139. But where after verdict for plaintiff, with leave reserved to enter a nonsuit or verdict for defendant, defendant died before motion made, it was held that the motion, with the assent of the executors, might be made in his name: *Freeman* v. *Rosher*, 13 Q. B. 780; see also *Wright* v. *Skinner*, 17 U. C. C. P. 317.

(s) The first part of this section is taken from Eng. Stat. 17 & 18 Vic. cap. 125. s. 33. Founded upon the second report of the Common Law Commissioners, section 25.

(t) If the verdict be in favor of one of several defendants and against the others, and the latter apply to set it aside, the rule must call upon the successful defendants as well as the plaintiff to show cause: *Belcher* v. *Magnay et al*, 3 D. & L. 70. The court has no power to grant a new trial to one of several defendants upon his application only when a verdict has been found in favor of the others unless they assent or be made parties to the rule: *Doe d. Dudgeon et al* v. *Martin et al*, 2 D. & L. 678; see further *Regina* v. *Gompertz et al*, 9 Q. B. 824; *Qu.* Where a sole defendant has a verdict upon two issues, each of which goes to the whole cause of action, and the verdict upon one of these issues is unsatisfactory, will the court, at the instance of the plaintiff, grant a new trial upon the whole record, and thereby avoid the verdict on the other issues? *Baxter* v. *Nurse*, 6 M. & G. 935. New trials will not be granted merely on the extreme right of the party applying, but only to advance the substantial ends of justice: *Brown* v. *Street*, 1 U. C. Q. B. 124; *Doe d. Graham* v. *Edmondson*, *Ib.* 265; see also *Nevils* v. *Willcocks*, Tay. Rep. 365; *Honeyman* v.

Lewis, 23 L. J. Ex. 204; and will not be granted when an expensive litigation would be protracted about a trifling matter: *Petrie* v. *Taylor*, 3 U. C. Q. B. 457. Where a fact in issue has been already determined by a jury, a new trial will not be granted upon affidavits disclosing additional evidence, unless it be clearly shown that the opposite party has set up a case of fraud or perjury: *Pistrucci* v. *Turner*, 28 L. T. Rep. 104. A new trial will not be granted on affidavits disclosing only corroboratory evidence: *Scott* v. *Scott*, 9 L. T. N.S. 454; *Fawcett* v. *Mothersell*, 14 U. C. C. P. 104; *Regina* v. *McIlroy*, 15 U. C. C. P. 116. The court will not in general interfere on the ground that the verdict is contrary to evidence or the weight of evidence, even though the court or judge who tried the cause would have been better satisfied with a different verdict: see *Creighton* v. *Chambers*, 6 U. C. C.P. 282; *Brown* v. *Malpus*, 7 U. C. C.P. 185; *Nolan* v. *Tipping*, *Ib.* 524; *Arthur* v. *Lier*, 8 U. C. C. P. 180; *Hawkins* v. *Alder*, 18 C. B. 640; *Scott* v. *Scott*, 9 L. T. N.S. 454; *Regina* v. *Chubbs*, 14 U. C. C. P. 32; *Irwin* v. *Collwell*, 12 Ir. C. L. R. 144. An inconsistency in the verdict of a jury is not necessarily a ground for a new trial: *Ellyatt* v. *Ellyatt et al*, 11 L. T. N.S. 44. The party moving will in general be restricted to objections taken by him at nisi prius: *Regina* v. *Fick*, 16 U. C. C. P. 384; *Hall* v. *Shannon*, E. T. 2 Vic. *MS.* R. & H. Dig. "New Trial," xi. 5: *Manners* v. *Boulton*, M. T. 7 Vic. *MS. Ib.* same title, xi. 7; *Doe d. Morrough et al* v. *Maybee*, 2 U. C. Q.B. 389. But this is not an inflexible rule: see *Abley* v. *Dale*, 11 C. B. 378; *Eades* v. *McGregor*, 8 U. C. C. P. 260; *Manners* v. *Boulton*, 6 O S. 663; *Stephens* v. *Allan*, 2 U. C. Q. B. 282; *Doe d. Morrough et al* v. *Maybee*, *Ib.* 389; *Horlor* v. *Carpenter*, 27 L. J. C. P. 1; *Jones* v. *The Provincial Insurance Co.* 26 L. J. C. P. 272; *Kennedy* v. *Freeth*, 23 U. C. Q. B. 92; *Houghton* v. *Thompson*, 25 U. C. Q. B. 557. New trial granted for misdirection, though amount involved under £1: *Haine* v. *Davey et al*, 4 A. & E. 892. But it is not every misdirection for which a new trial will be granted. Unless the misdirection immediately apply to the subject matter and go directly to the point which the jury has to determine, limiting and directing their verdict in point of fact, it is unimportant with reference to the right of the suitor to a new trial: *The Earl of Norbury* v. *Kitchen*, 7 L. T. N.S. 685, *per* Pollock, C. B. An expression of a wrong opinion by the judge as to a matter of fact is clearly no misdirection: *Greenough* v. *Parker*, 4 L. T. N. S. 473; nor is the erroneous ruling as to a matter collateral to the issue: *Henman* v. *Lester*, 12 C. B. N. S. 776; nor the observation of a judge not calculated improperly to sway the jury to give their verdict either one way or the other: *Lloyd* v. *Jones*, 7 B. & S. 475. But when the misdirection does not come under any of the foregoing exceptions, the court must set aside the verdict, and has no discretion to refuse to do so: *Parker* v. *Cathcart*, 17 Ir. C. L. R. 778. The improper reception of evidence to explain a written contract is no ground for a new trial unless it lead to misdirection: *Bruff* v. *Conybeare*, 13 C. B. N. S. 276; *Spring* v. *Cockburn et al*, 19 U. C. C. P. 63. Non-direction is not a ground for a new trial unless the verdict be contrary to the weight of evidence: *Ford* v. *Lacey*, 30 L. J. Ex. 351; *The Great Western Railway Co. of Canada* v. *Braid*, 8 L. T. N. S. 31. A verdict will not be set aside as perverse unless the jury, having no discretion, decided against law and the judge's charge: *Brown* v. *Malpus*, 7 U. C. C. P. 185; *Adams* v. *The Great Western Railway Co.* 10 W. R. 84; and it must appear that the judge laid down the law correctly, and that the verdict as it stands is not correct: *Todd* v. *The Liverpool and London Globe Insurance Co.* 18 U. C. C. P. 192. Where a plaintiff is disappointed in procuring testimony, he should withdraw his record or take a nonsuit, and a defendant in a like case should apply for a postponement: *The Corporation of Longueuil* v. *Cushman*, 24 U. C. Q. B. 602. If instead of doing so the party go to trial upon weak evidence, he will rarely be relieved from an adverse verdict: *Ib.*; see also *Walcott* v. *Stolicker et al*, 16 U. C. C. P 555. Where defendant having a witness in court, did not call him, relying upon the weakness of his adversary's case and desiring to have the last word with the jury, the court, though dissatisfied with a verdict adverse to him, refused to set it aside: *Hurrell et al* v.

been granted shall be shortly stated therein; (*u*) but in case of any omission, the Court may permit the rule to be amended and served again on such terms as are deemed reasonable. (*v*)

Court may allow amendments.

19 Vic. c. 43, s. 168.

Simpson et al, 22 U. C. Q. B. 65. To entitle plaintiff to move to set aside a nonsuit and enter a verdict for himself, it must be shown that he obtained leave for that purpose from the judge at nisi prius: *Treacher* v. *Hinton*, 4 B. & Al. 413. And instead of entering a verdict for him, the court may in its discretion grant a new trial: *Higgins* v. *Nichols*, 7 Dowl. P. C. 551; *Wilkins* v. *Bromhead et al*, 7 Scott, N. R. 921; *Doe d. Wyatt* v. *Stagg*, 5 Bing. N. C. 564. So to entitle a party to enter a nonsuit, leave at nisi prius is necessary: *Minchin et al* v. *Clement*, 1 B. & Al. 252; *Rickets* v. *Burman*, 4 Dowl. P. C. 578; and no such leave can be reserved except by consent of parties: *Sutor* v. *McLean*, 8 U. C. C. P. 200. The court will not entertain the application where the verdict is for the defendant: *Campbell* v. *The Corporation of Elgin*, M[illegible] C. P. not reported. Where a plaintiff, in deference to the judge's ruling, accepts a nonsuit, he is not precluded from afterwards moving against it: *Hatton* v. *Fox*, 8 U. C. Q. B. 177. But if the nonsuit be in deference to the judge's opinion expressed, not in favour of a nonsuit but of the defendant upon the evidence, there can be no relief: *Wood* v. *Bowden*, 23 U.C. Q.B. 466; *Taylor* v. *Rose et al*, 24 U. C. Q.B. 446. The plaintiff may take a nonsuit at any time before the pronouncing of the verdict by the jury: *Van Allan* v. *Wigle et al*, 7 U. C. C. P. 459. On a nonsuit on a point of law, counsel, in arguing to set it aside, may take advantage of every point of law: *Powell* v. *Norris*, Rowe Ir. Rep. 617. The judge has no power to allow a record to be withdrawn after jury sworn on account of the unexpected absence of a witness. In such a case plaintiff must submit to a nonsuit: *Swift* v. *Swift*, 3 Ir. C. L. R. 218. Where leave is reserved at nisi prius to move to enter a verdict, if the court should be of opinion that there was evidence to go to the jury in support of an issue, reasonable evidence to maintain the issue is meant, and not evidence which would merely lead to conjecture: *Reid* v. *Hoskins*, 26 L. T. Rep. 149; *Avery* v. *Bowden*, *Ib.* 119; s. c. 6 El. & B. 953, 962, 973; *Wheelton et al* v. *Hardisty et al*, 8 El. & B. 232, 262; *Toomey* v. *The London, Brighton and South Coast Railway Co.* 3 C. B. N. S. 146; *Deverill* v. *The Grand Trunk Railway Co.* 25 U. C. Q. B. 517; *Wright* v. *Skinner*, 17 U. C. C. P. 317; *Ryder* v. *Wombwell*, 19 L. T. N.S. 491: *Giblin* v. *McMullen*, L. R. 2 P. C. 317.

(*u*) The grounds must be *specifically* stated in the rule. The following are insufficient "on grounds set forth in affidavits filed": *Drayson et al* v. *Andrews*, 10 Ex. 472; "on the ground of misdirection:" *Montgomery* v. *Dean*, 7 U. C. C. P. 513; "on the grounds of objections taken at the trial, for the misdirection of the learned judge at the trial, for the rejection of material evidence;" *Strange* v. *Dillon*, 22 U. C. Q. B. 223; "that the instrument or chattel mortgage produced at the trial of this cause, and under which the plaintiff claimed, together with the several renewals thereof, and the statements, papers and affidavits to the same respectively attached, and all the proceedings had and taken thereunder, are informal and irregular, and not according to the consolidated statutes of Upper Canada:" *Ib.* But it has been held sufficient to state "that the verdict is against law and evidence," without stating in what manner it is against evidence: *Cameron* v. *Milloy*, 14 U. C. C. P. 340; and sufficient to state that "the judge's direction to the jury that the plaintiff was entitled only to nominal damages was wrong:" *Watson* v. *Lane*, 2 Jur. N.S. 119.

(*v*) Where a rule stated that it was granted "on the grounds set forth in the affidavits annexed," the court permitted an amendment by striking out these words, and inserting "that since the trial of this cause the plaintiffs have discovered new and material evidence of a partnership between, &c.": *Drayson et al* v. *Andrews*,

232. (*a*) If a new trial be granted on the ground that the verdict is against evidence, the costs of the first trial shall abide the event, unless the Court otherwise order. (*b*) 19 Vic. c. 43, s. 168. When costs to abide the event.

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10 Ex. 473, note *b*. It will, however, be prudent to state the grounds fully in the first instance. The courts are not inclined to grant fresh rules *nisi* containing grounds omitted in the former rules: *Robertson* v. *Barker*, 2 Dowl. P. C. 39.

(*a*) Taken from C. L. P. Act 1856, s. 168, the origin of which was Eng. Stat. 17 & 18 Vic. cap. 125, s. 44.

(*b*) This provision, which is prospective only, *Jenkins* v. *Betham et al*, 15 C. B. 168, applies where a wrong has been done through the fault of the jury. It does not extend to cases where a new trial is granted on fresh matter disclosed by affidavits. In such a case the party who succeeds on the rule should pay the costs of his affidavits in any event: *Abbott* v. *Bult*, 1 Jur. N. S. 93. Where a new trial is ordered on the ground that the verdict is against the weight of the evidence, it is usually only on payment of costs: *Peters* v. *Wallace*, 5 U. C. C. P. 238; *Doe d. Wilks* v. *Massecar*, 5 U. C. Q. B. 455. When on the ground that verdict perverse without costs: *Logan* v. *Ryan*, 10 U C. Q. B. 15; *Sanderson et al* v. *The Kingston Marine Railway Co.* 4 U. C. Q.B. 340. When the party who succeeds on the first trial fails on the second he neither pays nor receives the costs of the first trial: *Evans* v. *Robinson*, 11 Ex. 40; *Eccles et al* v. *Harper*, 14 M. & W. 248. Where a new trial is ordered on a point not raised at the trial, it is usual to make the party applying pay costs: *Abley* v. *Dale*, 11 C. B. 392. But in such a case a new trial may be ordered, costs to abide the event: see *Houghton* v. *Thompson*, 25 U. C Q. B. 557; *Wilson* v. *Baird*, 19 U. C. C. P. 101. In an action by a clerk against his employer, the declaration contained a special count for wrongful dismissal and the common count for work and labour. The plaintiff on the first trial had a verdict on the special count. A new trial was ordered, costs to abide the event. On the second trial defendant obtained a verdict on the special count, but plaintiff obtained a verdict on the common count. *Held* that the plaintiff was not entitled to the costs of the first trial: *Dawson* v. *Harris et al*, 11 C. B. N. S. 801. "The event" means the ultimate event of the cause, and therefore if the verdict on the second trial be set aside and on the third trial the event is the same as on the first trial, the party succeeding thereon is entitled to the costs of the first trial: *Meule et al* v. *Goddard*, 5 B. & Al. 766. But the words "event of the trial," used in a special act of Parliament, were held not to mean "event" as used in an ordinary action: *Hardy* v. *Fetherstonhaugh*, L. R. 4 Q. B. 725. This section has not altered the rule which in England precludes the granting of a new trial upon the ground of the verdict being against evidence, where the damages are under £20: *Hawkins* v. *Alder*, 18 C. B. 640. Where the plaintiff's counsel persists in offering evidence against the opinion of the presiding judge, and in claiming damages from the jury founded on that evidence, although it was inadmissible and the judge so ruled, if the jury give such a verdict as to convince the court that the evidence so forced in must have influenced their minds, as in no other way can the amount of it be reasonably accounted for, the verdict should be set aside *without* costs: *Shaver* v. *The Great Western Railway Co.* 6 U. C. C. P. 321. If plaintiff, being discontented with the damages, obtain a new trial, "costs to abide the event," and recovers no more on the second trial than on the first, he will have the costs of the first trial only, but the defendant is not entitled to the costs of either: *Hudson et al* v. *Marjoribanks*, 1 Bing. 393; see further *Canham* v. *Fisk*, 2 C. & J. 126; *Austen* v. *Gibbs*, 8 T. R. 619; *Sherlock* v. *Barnerd*, 8 Bing. 21; *Howarth* v. *Samuel*, 1 B. & Al. 566. If a plaintiff set aside his verdict for smallness of damages, a new trial may be ordered, costs to abide the event, *i. e.* the event of the plaintiff recovering more

County Courts may set aside non-suits or grant new trials.

233. (*c*) In cases in the County Courts, verdicts or non-suits may be set aside and new trials granted, or Judgments be arrested, upon the like grounds and principles as in the Superior Courts, (*d*) but no motion for any such purpose shall be entertained after the rising of the Court on the second day of the term ensuing the rendering of the verdict or the non-suit. (*e*) 8 Vic. c. 13, s. 43.

ARREST OF JUDGMENT, AND JUDGMENT *NON OBSTANTE VEREDICTO.* (*f*)

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than he did by the first verdict: *Jones et al* v. *McDowell*. 12 U.C.Q.B. 214; *Craig et al* v. *Corcoran*, 24 U. C. Q. B. 406. Interpleader issues appear to come within the meaning of the provision: *James* v. *Whitbread et al*, 2 L. M. & P. 407. In cases not coming within the scope of it, as a general rule the costs of the first trial will not be allowed to the party who failed upon it, though he succeed in the second: R. N. pr. 44. Where plaintiff who had obtained a verdict which was set aside afterwards discontinued, it was held that defendant was not entitled to any costs subsequent to the period when issue was joined: *Reynolds* v. *Hickman*, 9 L. T. N.S. 757. Where plaintiff who had obtained a verdict for £80 on a rule to reduce the verdict to nominal damages, consented, at the suggestion of the court, to reduce his verdict to £40, he was held entitled to the costs of opposing the rule: *Wilson* v. *The Lancashire and Yorkshire Railway Co.* 9 C. B. N.S. 647; see also *Delisser* v. *Towne*, 1 Q. B. 333. But where a verdict for defendant was moved against, and the defendant, at the suggestion of the court, rather than have a new trial, consented to a nominal verdict for one shilling and the rule was silent as to costs, plaintiff was held entitled to the costs of the application for a new trial: *Lowe* v. *Morrice*, 5 Prac. R. 36.

(*c*) Taken from section 43 of the old County Courts Act, 8 Vic. cap. 13, s. 43.

(*d*) See sections 231, 232, 234.

(*e*) A county judge arranged with the bar of his county "to transact all term business in vacation," and acting under such arrangement set aside a verdict and judgment after the term succeeding the sittings in which the verdict was rendered. *Held* that such an arrangement was illegal, and an appeal from the decision was allowed with costs: *Smith* v. *Rooney*, 12 U. C. Q. B. 661.

(*f*) Either party to a suit with reference to the pleading of his adversary is entitled to question its sufficiency in point of fact and in point of law. To do the one is to plead. To do the other demur. A party may now by leave of the court or a judge plead and demur at the same time: section 109. But demurrer is not the only remedy given to a party who intends to object to the legal sufficiency of his adversary's pleading. It is a well settled principle in pleading that upon the whole record there must be disclosed a legal cause of action and ground of defence. It is in the power of the court after verdict upon the application of either party to review all the pleadings, and according to their legal sufficiency or insufficiency to arrest, reverse, or sustain the judgment. Often the exercise of this right of review at the instance of one party wrought a serious injustice upon his opponent. The effect of it was to suffer with impunity a party to an action, conscious of a defect in his adversary's case, for the time to pass it by and first raise the objection when that adversary had succeeded in obtaining judgment in his favour. Whereas the objection, if taken before trial, might have saved to both parties the trouble and expense of a trial upon the issues raised. Such a course of procedure was felt to be a reproach to our system of jurisprudence. As

234. (*g*) Upon any motion made in arrest of Judgment or for Judgment *non obstante veredicto* (*h*) by reason of the non-averment of some material fact or facts, or of some material allegation (*k*) or other cause, (*l*) the party whose pleading

Proceedings on motions in arrest of judgment or for judgment *non-obstante*.

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a remedy the Common Law Commissioners, though recommending the preservation of the right to arrest judgment and to move for judgment *non obstante veredicto*, added the qualification that the motion be allowed "only upon terms of payment of all the costs, including those of trial, incurred since the pleading to which the party takes exception." They further recommended that if the motion were grounded upon the omission of some material statement of fact provision should be made for the suggestion and trial of the fact, though the cause of action had been previously submitted to a jury. These suggestions have been in effect adopted by the legislature in the three following sections.

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 143. Founded upon the first report of the Common Law Commissioners, ss. 86, 87. The section is a most useful one, and will enable the courts to dispose of cases finally upon their merits: *Manley* v. *Boycot*, 2 El. & B. 59, *per* Campbell, C. J.

(*h*) No motion in arrest of judgment or for judgment *non obstante veredicto* shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term; or when the cause is tried out of term after the expiration of the first four days of the ensuing term, unless in either case entered in a list of postponed motions by leave of the court: R. G. pr. 40. This was the old rule: *Thomas* v. *Jones*, 4 M. & W. 28. The motion cannot be made after the time limited unless by consent: *Harrison et al* v. *The Great Northern Railway Co.* 11 C. B. 542. The motion may be made after a judgment by default as well as an ordinary judgment after defence, but cannot be made after a judgment on demurrer, for any fault that might have been taken advantage of on the demurrer: *Edwards* v. *Blunt*, 1 Str. 425; *Creswell* v. *Packham*, 6 Taunt. 630. Error will lie after judgment has been arrested: *Cooke* v. *Oxley*, 3 T. R. 654, note *a*.

(*k*) For examples see *Galloway* v. *Jackson et al*, 3 M. & G. 960; *Ladd* v. *Thomas et al*, 12 A. & E. 117; *Ireland* v. *Harris*, 14 M. & W. 432; *De Medina* v. *Grove et al*, 15 L. J. Q. B. 284; *Davies* v. *Williams*, 10 Q. B. 725. It has been held after verdict in the case of several counts in a declaration, some bad and some good, that there cannot be an arrest of judgment but a *venire de novo*: *Emblin* v. *Dartnell*, 12 M. & W. 830; and that in the case of one count containing several causes of action, some good and some bad, the court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good causes of action only: *McGregor* v. *Graves*, 3 Ex. 34; *Kitchenman* v. *Skeel et al*, *Ib.* 49.

(*l*) The relief may be obtained under this section upon any motion in arrest of judgment by reason of the non-averment of some material fact or facts, &c., "*or other cause.*" *Qu.* Does this mean that in *every case* of a motion to arrest judgment, &c., a suggestion of what is necessary to remedy the defect may be entered? If so, the act proceeds further than was recommended by the Common Law Commissioners, who proposed the entry of the suggestion only upon motions "founded on the non-averment of some alleged material fact or facts, or material allegation." They recommended that a suggestion of the truth "of the omitted fact" should be permitted. But there may be motions in arrest of judgment, &c., as well for insufficient allegations or improper allegations, or for legal insufficiency, as for the omission of necessary allegations of fact. The misjoinder of causes of action where general damages have been assessed, as for example an action for

is alleged or adjudged (*m*) to be therein defective, may, by leave of the Court, suggest the existence of the omitted fact or facts or other matter which if true would remedy the alleged defect; (*n*) and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, (*o*) or such further time as the Court or a Judge may allow, (*p*)

Suggestion of facts by party whose pleading is objected to.

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work done for a testator and for work done for his executors, may be mentioned as an instance: *Kitchenman* v. *Skeel et al*, 3 Ex. 49; *Bignell* v. *Harpur*, 4 Ex. 773. Though this section admits of a suggestion of "the omitted facts *or other matter*," it is not easy to perceive what state of facts can be suggested to remedy such a defect as that last above mentioned. In an action against defendant for throwing rubbish into a stream so as to be carried down the stream into the mill pond of plaintiff, and by choking it up to obstruct his mill, the defendant pleaded as to the throwing, a right by prescription to throw into the stream near his mill the ashes and sweepings necessarily arising there, identifying with these the rubbish complained of. But the plea did not contain an averment that during the period of prescription the rubbish had been carried down to the plaintiff's mill in the manner alleged in the declaration. A verdict having been found for defendant on this plea, plaintiff moved for judgment *non obstante*. *Held* that plaintiff was entitled to judgment; but on affidavit that the fact was proved at the trial, the rule was suspended to allow defendant to enter a suggestion of the omitted fact: *Murgatroyd* v. *Robinson*, 7 El. & B. 391; s. c. 3 Jur. N. S. 615. A rule was issued to arrest judgment on a promissory note which as set out on the declaration did not appear to be negotiable, and leave given to the plaintiff to amend his declaration on payment of defendant's costs of the motion to arrest the judgment: *Martin* v. *Wilber*, 9 U. C. C. P. 75.

(*m*) *Alleged or adjudged, &c.* From the use of these words it would appear that the suggestion may be made either before or after judgment.

(*n*) Wherever a thing is to be done by leave of the court, the usual and the wise course has been to require proof by affidavit that there is a fit case for the interference of the court. A party asking for leave under this section must go further than merely raising a doubt. He must go so far as to produce an impression on the mind of the court that the final decision may probably be in his favour, and this both on the fact and the law: *Manley* v. *Boycot*, 2 El. & B. 60, *per* Crompton, J. It is not enough to satisfy the court that the application is not made for delay. Sufficient probable grounds for the entry of the suggestion must be shown: *Ib.* 59, *per* Campbell, C. J. The affidavit must at least show in clear and unambiguous terms that the fact, the non-averment of which is to be supplied by the suggestion, exists: *Ib.* 60, *per* Coleridge, J. To entitle a party to take advantage of this enactment he must lay before the court a clear and satisfactory case: see *Fisher* v. *Bridges*, 2 E. & B. 128, note *a*, *per* Campbell, C. J.; see also *Ricketts* v. *Noble*, 18 L. J. Ex. 408; *Crake* v. *Powell*, 21 L. J. Q. B. 183; *Parsons* v. *Alexander*, 24 L. J. Q. B. 277; *Murgatroyd* v. *Robinson*, 7 E. & B. 391.

(*o*) This, unlike the time limited for appearance to an ordinary writ of summons or to suggestions for reviving judgments is eight, not ten days: see section 2, schedule A, form No. 1; sections 134, 141, schedule A, form No. 11. The difference deserves to be noted, because as to the former though eight days is the period limited by the Eng. C. L. P. Acts, our act makes it ten. As to the section here annotated, the period is eight days both in our and the English C. L. P. Acts.

(*p*) *Court or Judge.* Relative powers: see note *w* to section 48.

and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action. (*q*) 19 Vic. c. 43, s. 217.

If suggestion be found true.

235. (*r*) If the fact or facts suggested be admitted or be found to be true, (*s*) the party who suggested them shall be entitled to such Judgment as he would have been entitled to if such fact or facts or allegations had been originally stated in the pleading (*t*) and proved or admitted on the trial, together with the costs of and occasioned by the suggestion and proceedings thereon; (*u*) but if such fact or facts be found untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled. (*v*) 19 Vic. c. 43, s. 218.

If untrue.

CONFESSIONS, FILING THE SAME, AND JUDGMENTS THEREON.

As to judgment on cognovits.

236. (*a*) Final judgment upon a *cognovit actionem* or Warrant of Attorney to confess judgment given or executed before the suing out of any process, (*b*) may, at the option of

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(*q*) *i. e.* As to plea and all subsequent proceedings to judgment.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 144.

(*s*) These words are of ambiguous import as regards the onus of proof. The affirmative of the issue will generally be upon the party who makes the suggestion.

(*t*) *Such pleading, i. e.* his original pleadings, to remedy a defect in which the suggestion is made.

(*u*) To be awarded, it is presumed, in one and the same judgment roll with the original demand and recovered by one and the same execution.

(*v*) Upon failure of proof of the suggestion, the judgment will be for the party disproving the suggestion either in arrest of judgment or *non obstante veredicto*, as the case may be. As to the costs see s. 319 and notes thereto.

(*a*) Taken from C. L. P. Act, 1856, s. 10, and County Court P. Act, 1856, s. 6.

(*b*) A *cognovit* is a confession by the defendant, of the plaintiff's cause of action to be just and true, whereby judgment is entered against him without trial.

A *Warrant of Attorney* is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment. An action does not lie on a warrant of attorney: *Sherborn* v. *Lord Huntingtower*, 13 C. B. N.S. 742.

In this province at one time cognovits were much more in general use than warrants of attorney. And here the practice with respect to cognovits has always varied from that of England. In England the cognovit differs from the warrant of attorney in this, that the action must be commenced by the issue of a writ before a cognovit can be taken which in the case of a warrant of attorney is unnecessary. Here no such difference has ever, in fact, existed between these two in-

struments. It has been usual to take cognovits before the issue of a writ, and the courts have sustained the practice: *Walton* v. *Hayward* 2 O.S. 473. The object was to save expense. Though no writ was in fact issued, yet the judgment roll on a cognovit has always pre-supposed a writ and declaration. The cognovit may be taken at any stage of a cause; but if after plea pleaded it is proper that it should contain an agreement to withdraw the plea. From what has been said, it will be observed that this section is merely declaratory of an existing practice in this province at the time the act was first passed. Perhaps it will be held that the act goes further than the old practice. As it now expressly enacts that final judgment may be entered on a cognovit given before the suing out of process, it may be inferred that the judgment roll need not for the future pre-suppose the issuing of a writ. A judgment entered on a cognovit without common bail held to be irregular: *Goslin* v. *Tune*, 1 U. C. Q. B. 277. It is now enacted by section 54 of this act that "in no case shall it be necessary for the plaintiff to enter an appearance for the defendant." A judgment entered upon a cognovit by a deputy clerk of the crown, no previous proceedings having been had in his county, was held void: *Laverty* v. *Patterson*, 5 U.C. Q.B. 641; *Commercial Bank et al* v. *Brondgeest et al*, *Ib.* 325. Where a cognovit was given by one practising attorney and witnessed by another, who was absent from the province, leave was given to enter judgment upon proof of the handwriting of the defendant and the witness: *Cleal* v. *Latham*, 1 U. C. Q. B. 412; *King* v. *Robins*, Tay. Rep. 299. The court gave leave to enter judgment against one defendant, the other being dead, and a suggestion to that effect entered of record: *Nichall* v. *Cartwright et al*, Tay. Rep. 464. Where there are several defendants and a cognovit intituled in the cause against all is executed by some only, judgment cannot be entered against the latter alone: *Roach* v. *Potash et al*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. "Judgment," 8. Where a cognovit was given with a stay of execution till a future day, and a memorandum was endorsed deferring payment of part of the debt for a longer time, and at the day of judgment was entered for the whole amount, the court restrained the levy according to the memorandum, with costs: *Fisher et al* v. *Edgar*, 5 O.S. 141; *Alexander* v. *Hervey*, T. T. 7 Wm. IV. *MS.* R. & H. Dig. "Judgment," 9. Where defendants, as executors in right of their testator, gave a cognovit which might be held to bind them personally, upon which a judgment against them as individuals was entered, the court allowed the judgment to be amended, and set aside an execution issued against defendants in their individual capacities: *Gorrie* v. *Beard et al*, 5 U. C. Q. B. 626. No warrant of attorney to confess judgment in any action or *cognovit actionem* given by any person has any force unless there be present some attorney on behalf of such person expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney must subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney: R. G. pr. 26. This rule does not probably apply to cases where an attorney is himself plaintiff: *McLean* v. *Cumming*, Tay. Rep. 184. Where one of the bail to a sheriff, whose principal had left the province, acting under the impression that his principal would not return, gave a cognovit to the sheriff, proceedings were stayed upon an affidavit of merits: *Roberts* v. *Hasleton*, Tay. Rep. 32. Costs in such a case: see *Hasleton* v. *Brundige*, Tay. Rep. 84. *Semble*, if a cognovit be so given, with a power to enter judgment and issue execution, but by contemporaneous verbal agreement it is understood immediate execution should not issue, the court will in some cases act upon the agreement: *Parker et al* v. *Roberts*, 3 U. C. Q. B. 114. If plaintiffs improperly described, are so described in the subsequent proceedings, defendant, who signed cognovit without exception, cannot afterwards take advantage of the error: *Ib.* Leave to enter up judgment upon a cognovit or warrant of attorney above one and under ten years old, is to be obtained by order of a judge made *ex parte*, and if ten years old and more upon a summons to show

the Plaintiff, be entered in any office of either of the said Superior Courts, (*g*) and in like manner and like circumstances final judgment may be entered on a *cognovit actionem* or Warrant of Attorney to confess judgment for an amount not exceeding four hundred dollars, in any County Court, (*h*) unless a particular office or some particular County Court for that purpose be expressly stated in the *cognovit* or warrant. (*i*) 19 Vic. c. 90, s. 6; 19 Vic. c. 43, s. 10.

Confessions and cognovits given after this Act to be registered.

237. (*j*) No confession of judgment or *cognovit actionem* shall be valid or effectual to support any judgment or writ of execution, unless, within one month after the same has been given, the same, or a sworn copy thereof, be filed of record in the proper office of the Court in the County in which the person giving such confession of judgment or *cognovit actionem* resides; (*k*) and a book shall be kept in every such office to be called the Cognovit Book, in which shall be entered the names of the Plaintiff and Defendant in every such confession or cognovit, the amount of the true debt or arrangement secured hereby, the time when judgment may be entered and execution issued thereon, and the day when such confes-

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cause: R. G. pr. 27. The court refused leave on a cognovit fifteen years old, where plaintiff had taken an assignment of personal property, though unproductive in satisfaction of his debt: *Grant* v. *McIntosh, Executors of*, 4 O. S. 184. Leave was granted when the cognovit was seven years old, upon an affidavit from the plaintiffs of the whole debt being due, and also stating that having received a letter from defendant, the plaintiff believed him to be still alive: *Oliphant* v. *McGinn*, 4 U. C. Q. B. 170.

(*g*) *In any office*, &c. "Any" must relate either to one of the principal offices at Toronto or to any of the offices of deputy clerks of the crown in other counties.

(*h*) In accordance with previous legislation and the current of authorities, it may be presumed that when a plaintiff enters up judgment on a cognovit in a superior court, where the same falls within the cognizance of the county court, that only county court costs will be taxed.

(*i*) It seems clear that this statement, if made, must be in the body of the document. The intituling of a cognovit would only indicate one of two courts, and not one of several offices. Warrants are not usually intituled in any court. *Quære.* As to the effect on costs of stating the principal office in Toronto of any one or other of the superior courts where the amount confessed is $400 or less?

(*j*) Taken from the C. L. P. Act, 1857, section 17.

(*k*) The true construction of this section is that if judgment be entered within the month, the filing the cognovit and the entry of its particulars in the cognovit book are unnecessary, for then the case does not fall within the spirit and intent of the enactment: *The Commercial Bank of Canada* v *Fletcher*, 8 U. C. C. P. 181;

sion or cognovit, or copy thereof, is filed in the said office; (*l*) and such book shall be open to inspection by any person during office hours, on the payment of a fee of twenty cents. (*m*) 20 Vic. c. 57, s. 17.

JUDGMENT AND WRITS OF EXECUTION. (*n*)

McLean v. *Stuart et al*, 2 Prac. R. 367. A defendant seeking to set aside a judgment on a cognovit as not having been filed in the county in which he resided at the time of giving the cognovit must clearly show that he was not so resident at that time: *Irvin* v. *Ham*, 9 U. C. L. J. 80. If filed in the proper county immaterial discrepancies between the sworn copy filed and the original cognovit constitute no ground for setting aside the judgment entered in the cognovit: *Ib.*

(*l*) This provision as to entry in the book does not make the validity or efficacy of the cognovit depend on the fact of entry. Such an entry is rather the duty of the officer of the court than of the party: *The Commercial of Canada* v. *Fletcher*, 8 U. C. C. P. 183, *per* Draper, C. J.

(*m*) Inspection can only be had on payment of the fee mentioned, and that "during office hours."

(*n*) The description of property seizable under execution in this Province in some respect differs from the laws of England. Personal property commonly described as goods and chattels is, both in England and in this Province, liable to seizure. Real estate, commonly described as lands and tenements, in this Province, though not in England, may be seized and sold in satisfaction of debts, whether simple contract or specialty, in the same manner as goods and chattels. This was a principle that existed in many of the British colonies of North America from an early period. An attempt made in some of the colonies to dispute the principle to the detriment of English creditors led to the passing of Eng. Stat. 5 Geo. II. cap. 7, intituled, "An Act for the more easy recovery of debts in his Majesty's Plantations and Colonies in America." It enacts as follows: "That from and after, &c., the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with *all just debts, duties, and demands of what nature or kind soever*, owing by any such person to his Majesty, or any of his subjects, and shall and may be *assets* for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estate, towards the satisfaction of such debts, duties and demands, and in like manner as *personal estates* in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts:" section 4. The construction of this section has been the subject of doubt and of some diversity of opinion. The leading case in this Province upon the statute is *Gardiner* v. *Gardiner*, 2 O. S. 520. The perusal of it, particularly the judgments of Robinson, C. J., and Macaulay, J., who, though differing in one very material point, in the main agreed in opinion, will put the reader in possession of the whole law upon the subject. Whatever differences of opinion there were, the law is now settled.

It appears that from 1791, when this Province became a separate colony, little use was made of the act of Geo. II., owing to doubts whether that statute applied to this Province in consequence of our adoption of the laws of England by the 32 Geo. III. cap. 1. The issuing of writs against lands was obstructed by these doubts till 1804, when the case of *Gray* v. *Willocks* occurred and suspended all

the proceedings under the statute during the several years in which that case was pending. It was ultimately decided in appeal, in 1809, in favor of the application of the statute to this Province, and the point being no longer doubtful resort was frequently had to the statute: *Gardiner* v. *Gardiner*, 2 O. S. 547, *per* Robinson, C. J. And when in course of time the act in practice was closely examined and its meaning thoroughly sifted, importance was attached to the fact that it not only made real estate liable for and chargeable with the payment of debts of every description but *assets* for their satisfaction. Under the operation of the statute it was held that real estate in this Province descended to the heir, subject to the payment of debts and liable to be seized and sold therefor in proceedings against an administrator or executor, without making the heir at law a party to such proceedings: *Gardiner* v. *Gardiner*, 2 O. S. 520. This anomaly in consequence presents itself—real estate *quoad* the satisfaction of debts is treated as personalty, and yet for all other purposes retains its character of real estate. It is an anomaly not unknown even in England. Estates *pur autre vie* are turned into personalty for some special purposes, but nevertheless the nature of the estate is unaltered, 29 Car. II. cap. 3, s. 12; 14 Geo. II. cap. 20, s. 9, 2 O. S. 556, *per* Robinson, C. J. The statute 5 Geo. II. cap. 7, not only declares that real estate shall be assets for the satisfaction of debts, but enacts the manner in which it shall be converted, for the purpose of paying debts, viz., "subject to the same remedy, proceedings, and process for seizing, extending, selling, &c., *in like manner* as personal estates are seized, extended, sold," &c. The remedy with respect to personal estate is by judgment and execution against the debtor, if alive, or against his executor or administrator, if deceased. To sell real estate upon a judgment against an executor or administrator is inconsistent with the law of England. It is a mode of procedure peculiar to the colonies, and one which exists in this Province solely by virtue of the statute of Geo. II., which applies only to the colonies. The usual form of execution against personal property both in England and this Province is a *fi. fa.*, and this form is in this Province under the operation of the statute of Geo. II. also used as regards real estate: see further *Sickles et al* v. *Asselstine*, 10 U. C. Q.B. 203; *Topping et al* v. *Yardington et al*, 6 U. C. C. P. 347; *Mein et al* v. *Short et al*, 9 U. C. C. P. 244; *Mason* v. *Babington*, 17 U. C. C. P. 149; *Bullen et al* v. *A' Beckett*, 9 Jur. N.S. 473; *Peck* v. *Bucke*, 2 Chan. Cham. 294. It is now by provincial statute expressly declared that under the said imperial statute the title and interest of a testator or intestate in real estate in this Province might be and hereafter may be seized and sold under a judgment and execution recovered by a creditor of the testator or intestate against his executor or administrator, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living: 27 Vic. c. 15, s. 1. Previous sales of this nature are also by the same act confirmed: s. 2. The usual form of execution against lands and tenements in England is the *elegit*, which, though not abolished in this Province, is in a great measure superseded by the *fi. fa.* against lands. In most of the British Colonies of North America, goods and chattels, lands and tenements, were at one time included in one and the same writ of *fi. fa.* This was the practice in this Province until 1803, when it was enacted that process should not issue against lands until the return of process against goods: 43 Geo. III. cap. 1, s. 1. Separate writs of execution may now issue against goods and lands at the same time: Stat. Ont. 31 Vic. c. 25, s. 1. But the lands cannot be sold in less than a year: *Ib*; nor until the writ against goods has been returned *nulla bona*: *Ib.* s. 2; and the return of *nulla bona* cannot be properly made until the goods have been exhausted: *Ib.* s. 3; and if the amount required to be levied be made out of the goods the person issuing the writ against lands is not entitled to the expense thereof: *Ib.* s. 4. But writs against lands and goods are to have the same binding effect as heretofore: *Ib.* s. 5. Where there are rival execution creditors, some having writs against goods and others against land, there may be difficulty in the way of the sheriff executing the writs: see *Gleason* v. *Gleason et al*, 4 Prac. R. 117.

When final judgment may be entered.

238. (*o*) The party in whose favour a verdict has been rendered, or when the Plaintiff has been non-suited at the trial, the Defendant may, in the Superior Courts, enter final judgment on the fifth day, (*p*) and in the County Courts on the third day of the Term next following such verdict or nonsuit, (*q*) and thereupon sue out execution. (*r*) 19 Vic. c. 43, ss. 182, 184; 8 Vic. c. 13, s. 42.

After verdict or nonsuit, Judge may certify that execution ought to issue forthwith.

239. (*s*) In case the Plaintiff or Demandant in any action or suit (*t*) becomes nonsuit, (*u*) or a verdict be given or damages assessed for the Plaintiff or Demandant, Defendant or Tenant, (*v*) the Judge before whom any issue joined in any such action is tried, or before whom damages are assessed, (*w*)

(*o*) This is a consolidation of C. L. P. Act 1856, s. 184, with section 42 of the old County Courts Act, 8 Vic. cap. 13.

(*p*) The first four days of the term next after the trial are allowed for a motion to set aside the verdict or nonsuit or for other motion of that kind: R. G. pr. 40.

(*q*) The county court term is only one week in duration: Stat. Ont. 32 Vic. cap. 6, s. 2.

(*r*) "And *thereupon sue out, &c.*," *i. e.* upon the entry of final judgment. Of course until judgment entered, execution cannot in general be regularly issued.

(*s*) Taken from 16 Vic. cap. 175, s. 27, of which it is a verbatim copy, and substantially the same as Eng. Stat. 1 Wm. IV. cap. 7, s. 2. The statute is a remedial one, and meant to protect against frauds, and to secure suitors in the fruits of their verdicts. It should therefore receive a liberal construction: *Patterson* v. *Hall*, 11 U. C. Q. B. 360, *per* Robinson, C. J.

(*t*) The English statute of William was held to apply to actions commenced before it came into operation, but tried afterwards: *Bell* v. *Smith*, 5 C. & P. 10; and though at first looked upon as limited to actions on contract was afterwards held to apply to all cases where the judge might think execution ought to issue at an early period: *Barden* v. *Cox*, 1 Moo. & R. 208; *Younge* v. *Crooks*, *Ib.* 220.

(*u*) Where in an action for criminal conversation in consequence of the prevarication of one of plaintiff's witnesses, plaintiff elected to be nonsuited. Tindal, C. J. upon deliberation, certified for execution for costs to be issued at the expiration of one month: *Hambidge* v. *Crawley*, 5 C. & P. 9, note.

(*v*) Where in an action for goods sold and delivered, and on an account stated there was a demurrer to the count on the account stated, which had not been argued at the time of the trial, when plaintiff had a verdict, the presiding judge certified for immediate execution upon plaintiff undertaking to enter a *nolle prosequi* to the count demurred to: *Allsopp* v. *Smith*, 7 C. & P. 708. *Qu.* Can the judge certify for speedy execution when one of two defendants has tendered a bill of exceptions? *Dresser* v. *Clarke*, 1 C. & K. 569.

(*w*) It is in the discretion of a county judge to make an order for immediate execution in such cases as he has authority to try, whether instituted in a superior court or in his own court: *Patterson* v. *Hall*, 11 U. C. Q. B. 359; *McKay* v. *Hall*, 4 U. C. C. P. 145; *Gildersleeve* v *Hamilton*, 11 U. C. C. P. 293. He can therefore

may certify under his hand on the back of the Record, at any time before the end of the Sittings or Assizes, that in his opinion (*x*) execution ought to issue in such action forthwith, (*y*) or at some day to be named in such certificate, and subject or not to any condition or qualification, and in case of a verdict or damages assessed for the Plaintiff, then either for the whole or any part of the sum found by such verdict or assessment, (*z*) in all which cases costs may be taxed in the usual manner, and judgment may be entered and execution issued forthwith or afterwards on any day in vacation or term, according to the terms of such certificate, and the *postea* with such certificate as a part thereof, shall be entered of record as

Taxing costs.

Execution.

Entering postea.

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order immediate execution in cases sent down to him for trial, under 23 Vic. c. 42, s. 4: *Patterson* v. *Hall*, 11 U. C. Q. B. 359. The judge before whom the trial is had is *the* judge authorized to certify: see *Carpenter* v. *Lee*, 1 Dowl. N.S. 706. So it is apprehended where a superior court case is tried by a judge of a county court under the privisions of section 17 of the Law Reform Act, Ont. 32 Vic. c. 6, or a county court case tried by a superior court judge under the same section. But in the last mentioned cases judgment may be entered on the fifth day after the verdict, unless the judge who tried the cause certify on the record under his hand that the case is one which in his opinion should stand to abide the result of a motion, or unless a judge of one of the superior courts otherwise order: *Ib.*

(*x*) The statute is more particularly intended to apply when the judge, on the facts appearing at the trial, thinks there should be execution immediately: *Le Gervas* v. *Burtchley*, 1 Moo. & R. 150; but affidavits may be received in support of the application: *Ruddick* v. *Simmons*, *Ib.* 184. Lords Lyndhurst and Tenterden in England are said to have laid it down as a rule that where there was a reasonable ground of defence the case should take the ordinary course: *Barford* v. *Nelson*, 5 C. & P. 8. The general object of the English statute was thought by Parke, J. to be to accelerate execution for all debts where there was really no doubt of the claim upon the record: *Anon.* 1 Moo. & R. 168; and he certified for immediate execution in an action of *assumpsit*, though the verdict was taken by consent and though the consent did not contain any stipulation as to the issuing of execution: *Ib.* 167.

(*y*) "Forthwith" means as soon as execution can be obtained in the ordinary course of the court or of the office: *Snooks* v. *Smith*, 7 M. & G. 528; *Gill* v. *Rushworth*, 2 D. & L. 416; *Alexander* v. *Williams*, 4 D. & L. 132.

(*z*) *Semble.* The costs are incident to the recovery: *Smith* v. *Dickenson*, 1 D. & L. 155. Where a certificate is granted for immediate execution, notice of taxation of costs may be given on the day of the trial for the following day, and on that day judgment may be entered and execution issued: *Alexander* v. *Williams*, 4 D. & L. 132; and plaintiff should issue one writ of execution for the amount of the verdict and costs: *Smith* v. *Dickinson et al*, 5 Q. B. 602. There is nothing to restrain the judge from preventing the immediate execution for costs, since he may make his certificate subject to any condition or qualification: *Ib.* 605, *per* Patteson, J. And, *semble*, if he does so the first writ of execution must be a special writ under the statute reciting the judge's certificate and the direction to the sheriff in the body of the writ should not be to levy for the whole sum

of the day on which the judgment is signed; (*a*) but the party entitled to such judgment may postpone the signing thereof. (*b*) 19 Vic. c. 43, s. 182; 8 Vic. c. 13, s. 42.

Sum of money recovered to be awarded generally.

240. (*c*) In all actions where the Plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages. (*d*) 19 Vic. c. 43, s. 144.

Entry and record of judgment.

241. (*e*) Every judgment signed by virtue of the two hundred and thirty-ninth section may be entered and recorded as the judgment of the Court wherein the action is pending, though the Court may not be sitting on the day of the sign-

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for which judgment was signed, but for a special sum ordered by the certificate: *Smith* v. *Dickenson*, 1 D. & L. 158, *per* Wightman, J. And if a second writ of execution become necessary for the costs, the previous writ ought to be recited, and it should appear that the second writ, particularly if the first was a *ca. sa.* is not for the same cause as in the first writ being founded upon the judge's certificate and the second upon the final judgment: *Ib.* If both should be writs of *ca. sa.* and it appear upon looking at them that defendant has been twice taken in execution to satisfy the same judgment, he will be discharged: *Ib.* Since, however, the damages and costs should be embodied in the original judgment and the execution should follow the judgment, these *dicta* may be open to doubt, unless the judgment itself be entered for the damages and costs separately, so as to warrant and support an execution in the special forms above suggested.

(*a*) When once final judgment has been signed, the power of the judge who presided at the trial is at an end, and the execution follows as of right, according to the terms of the certificate, which the judge has no power to alter: *Lander* v. *Gordon*, 7 M. & W. 218. As to the form of *postea* and judgment when a certificate has been granted for immediate execution, see *Engleheart* v. *Eyre et al*, 5 B. & Ad. 70, note *a*.

(*b*) *Qu.* Has the judge power after the certificate to alter or amend it before the signing of judgment where the party entitled to do so postpone the entry of judgment?

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 95. Founded upon the first report of the Common Law Commissioners, section 68.

(*d*) This section is an extension of the principle contained in section 9 of this act, which declares that it shall not be necessary to mention any form or cause of action in any writ of summons or any notice thereof. The reason for the alteration arises from the form of judgment in use before the act, varying according to the nature of the action. In the action of debt the judgment was that plaintiff "do recover the debt" with damages, (which were generally nominal) for the detention of the debt and for costs superadded. In other actions on contract the judgment was for damages only. The distinction was more technical than useful, and was open to objection upon many grounds, several of which have been mentioned in the report of the Commissioners.

(*e*) Taken from Prov. Stat. 16 Vic. cap. 175, s. 28; the origin of which is Eng. Stat. 1 Wm. IV. cap. 7, s. 3.

ing thereof, (*f*) and shall be as effectual as if the same had been signed and recorded according to the course of the common law. (*g*) 19 Vic. c. 43, s. 183.

Judgment may be set aside, &c.

242. (*h*) Notwithstanding any Judgment signed or recorded or execution issued by virtue of the two hundred and thirty-ninth and two hundred and forty-first sections, the Court in which the action is brought may order such Judgment to be vacated and execution to be stayed or set aside, and may enter an arrest of Judgment or grant a new trial or a new assessment of damages, (*k*) as justice may appear to require, and thereupon the party affected by such Writ of Execution shall be restored to all that he may have lost thereby, in like manner as upon the reversal of a Judgment by Writ of Error, (*l*) or otherwise as the Court may think fit to direct; (*m*) but any application to vacate such Judgment must be made within the first four days of the Term in the Superior Courts, and within the first two days in the County Courts next after the rendering of the verdict. (*n*) 19 Vic. c. 43, s. 184.

Consequence of its being so.

(*f*) In declaring on a judgment signed in vacation, the day of signing judgment should be stated according to the fact, and not laid as of the preceding term: *Engleheart* v. *Eyre et al*, 5 B. & Ad. 68.

(*g*) *i. e.* So as to entitle the successful party forthwith to issue his execution, the fruit of his judgment. Where judgment is to be entered up according to the ordinary practice, time is allowed for moving against the verdict before judgment can be entered. The time allowed in the superior courts is the first four days of the term next after the trial. Under the operation of this section, the execution may be issued without waiting the usual period. And under the following section the judgment may be moved against, notwithstanding the issue of execution.

(*h*) Taken from Prov. Stat. 16 Vic. cap. 175, s. 29, the origin of which is Eng. Stat. 1 Wm. IV. cap. 7, s. 4.

(*k*) The court has no power to order money levied on the execution to be paid over while the rule is under discussion: *Morton* v. *Burn et al*, 5 Dowl. P. C. 421.

(*l*) See Chit. Arch. 12 Edn. 576, *et seq.*

(*m*) Where a judge at the trial orders that plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying to the court above to enter a suggestion to deprive the plaintiff of his costs, where the sum recovered is within the jurisdiction of an inferior court: see *Baddley* v. *Oliver*, 1 C. & M. 219.

(*n*) The spirit of these sections as to speedy execution appears to be this—the judge at the trial gives a right to speedy execution; he gives that right, however, not *conclusively;* but subject to an application to the court to be made within the

Deputy clerk to keep books for minuting all judgments, &c.

243. (*o*) Every Deputy Clerk of the Crown and Pleas and every County Court Clerk shall keep a regular book, in which shall be minuted and docketed all Judgments entered by such Deputy Clerk or County Court Clerk, (*p*) and such minute shall contain :

1. The name of every Plaintiff and Defendant ;
2. The date of the issue of the first process ;
3. The date of the entry of Judgment ;
4. The form of action, (*q*) and the amount recovered, exclusive of costs ;
5. The amount of costs taxed ; (*r*) and
6. Whether such Judgment has been entered on verdict, default, confession, *non pros*, non suit, discontinuance, or how otherwise. 19 Vic. c. 43, s. 15 ; 19 Vic. c. 90, s. 7.

Judgments to be also docketed at Toronto.

244. (*s*) Within three months after the entry of each Judgment, by a Deputy Clerk of the Crown, he shall trans-

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first four days of the next ensuing term, upon any ground upon which an application can be made whether in arrest of judgment or for a new trial or otherwise. In other words, the judgment signed with a view to speedy execution is subject to be questioned within the first four days of the term next after the rendering of the verdict: *Smith* v. *Temperley*, 4 D. & L. 510. The court will not entertain objections to the regularity of the proceedings, where the party has neglected to avail himself of opportunities to urge them at an earlier period, even though they amount to error on the face of the record: see *Graves* v. *Walter et ux*, 1 Scott, 310.

(*o*) Taken from C. L. P. Act 1856, s. 15.

(*p*) The duty is declared in positive terms and the fulfilment of it is made imperative.

(*q*) As the form of action need not be mentioned in the writ of summons (section 9) and as the writ is the commencement of the action, the clerk in some cases will have difficulty in entering the "form of action." He will at all events be compelled to delay that part of his entry until declaration is filed. If judgment be signed before declaration, he may be unable to make the necessary entry. Even after declaration, since the forms of pleading in the several actions are now so general, the form of action may be uncertain.

(*r*) The clerk is also required to make an entry containing, besides the form of action, "the amount recovered exclusive of costs" and "the amount of costs taxed." By section 240 of this act, the sum recovered may be awarded generally by the judgment, "without any distinction being therein made as to whether such sum is recovered by way of debt or damages." This language is not consistent with that of the section under consideration, and may occasion some difficulty. It will probably be sufficient for the entry to be made generally without distinction as to debt or damages, where no such distinction is made in the judgment roll.

(*s*) Taken from C. L. P. Act, 1856, section 15.

mit to the principal Clerk of the proper Court in Toronto, every such Judgment-roll and all papers of or belonging thereto, and such Judgment shall be also docketed in the principal office, (*t*) and in case in any of the Courts the original Judgment-roll happens to be lost or destroyed, so that no exemplification or examined copy thereof can be procured, a copy of the entry in any of such docket books, certified by the Clerk or Deputy Clerk of the Crown, or by the Clerk of the County Court having such book in his custody, shall be evidence of all matters therein set forth and expressed. (*u*) 19 Vic. c. 43, s. 15; 19 Vic. c. 90, s. 7.

If the original roll be lost, copies may be used.

245. Repealed by Stat. 24 Vic. cap. 41, s. 3.

246. (*b*) All Writs of Execution may issue from the offices wherein the Judgment has been entered, and in the Superior Courts, after the transmission of the roll to the principal office, such Writs may, at the option of the party entitled thereto, be issued out of such principal office. (*c*) 13 & 14 Vic. c. 52, s. 3; 19 Vic. c. 43, s. 11.

Writs of Execution.

(*t*) It will be noted that upon transmission of the judgment-roll and papers to the principal office, the judgment is only to be docketed. The 8 Vic. cap. 36, s. 4 (now repealed), required the judgment, upon transmission of the papers, to be entered of record *and* docketed. There is a distinction: see *Laverty* v. *Patterson*, 5 U. C. Q.B. 641, *per* Draper, J. The former act prescribed an entry both by the deputy clerk and at the principal office. The present act, in case of entry by the deputy, renders necessary simply a docketing at Toronto. The object of the act is to secure duplicate entries, that one may be forthcoming if the other be lost, or that one or the other may be forthcoming "in case the original judgment-roll be lost or destroyed, so that no exemplification or examined copy thereof can be procured."

(*u*) It is not declared that the clerk's certificate shall be evidence on its bare production, and in the absence of a declaration of the kind it is a question whether or not it is necessary to prove his handwriting before being allowed to use the certificate.

(*b*) Taken from C. L. P. Act 1856, s. 11, as consolidated with Stat. 13 & 14 Vic. cap. 52, s. 3.

(*c*) A seal is necessary to the validity of an execution: *Galloghy* v. *Ormsby*, 1 Ir. C. L. R. 545; see also note *l* to section 5. It is no part of an attorney's duty under the ordinary retainer to issue execution, his authority ceases with the judgment: *Searson* v. *Small*, 5 U. C. Q.B. 259. The court has no power to compel a plaintiff to issue execution for the benefit of a sheriff who claims indemnity, but is a stranger to the judgment: *Gamble et al* v. *Bussell*, 5 O. S. 339. An execution issued by plaintiff's attorney in a cause where plaintiff had fled from the province, and been absent for seven years, was stayed until such time as the

attorney could show that plaintiff was home and had given him authority to issue execution: *Hobson* v. *Shand*, 3 U. C. Q. B 74. An assignment of a judgment by plaintiff for a valuable consideration cannot be considered a satisfaction of his debt, so as to prevent his assignee issuing execution in the name of the original plaintiff: *Commercial Bank* v. *Boulton*, 6 U. C. Q. B. 627. Plaintiffs, when paid their debt under execution, cannot consent to the issue of a second execution, though for the purpose of making good the title to land sold by the sheriff under the first writ: *Bank of Upper Canada* v. *Murphy*, 7 U. C. Q.B. 328. Nothing can be done under a spent execution, unless to perfect what had been commenced while the writ was current: *Doe d. Greenshields* v. *Garrow*, 5 U. C. Q. B. 237. Where goods are already in the custody of the law, an execution at once attaches upon them without an actual seizure: *Beekman* v. *Jarvis*, 3 U.C. Q.B. 280. Where a defendant had been discharged from arrest, as having been irregularly charged in execution, the court upheld a *fieri facias* afterwards issued against his goods: *Dorman* v. *Rawson*, Tay. Rep. 278. It was formerly held irregular to issue an execution against lands until after the return of the writ against goods: *Doe d. Spafford* v. *Brown*, 3 O.S. 92. So it was held that it was irregular to issue an execution against goods after a levy had been made on a writ against lands that has not been returned: *Stevens* v. *Sheldon et al*, T. T. 3 & 4 Vic. P. C. *MS.* R. & H. Dig. "Irregularity," 14, *per* Macaulay, J. But it was held that a return of a writ against goods where the venue was laid was sufficient to warrant a writ against lands to any other county without a warrant against goods there also: *Oswald* v. *Rykert et al*, 22 U. C. Q. B. 306. But now any person entitled to issue an execution against goods may at or after the time of issuing the same issue an execution against lands, and deliver the same to the sheriff to whom the writ against goods is directed, at or after the time of the delivery to him of the writ against goods, and either before or after the return thereof: Stat. Ont. 31 Vic. c. 25, s. 1. But the sheriff is not to expose the lands for sale or sell within less than twelve months from the day on which the writ against lands is delivered to him: *Ib.* No sale can be legally had under an execution against lands until a return of *nulla bona* in whole or in part with respect to an execution against goods in the same suit or matter, by the same sheriff: *Ib.* s. 2. No sheriff is allowed to make a return of *nulla bona* either in whole or in part to any writ against goods until the whole of the goods of the execution debtor in his county have been exhausted: *Ib.* s. 3. If the amount authorized to be made and levied under the writ against goods be made and levied thereunder, the person issuing the writ against lands is not entitled to the expenses thereof or any advertisement or seizure thereunder: *Ib.* s. 4. The return in such case required to be made by the sheriff to the writ against lands is to the effect that the amount has been so made and levied as aforesaid: *Ib.* Writs against lands and goods are however to have the same operation and binding effect as heretofore: *Ib.* s. 5. This statute authorizes the issue of writs against goods and lands at the same time, with a stay of proceedings against lands till the goods are exhausted: see *Gleason* v. *Gleason et al*, 4 Prac. R. 117. An execution against lands so binds them that the owner can only convey subject to the lien: see *Burnham* v. *Daley*, 11 U.C. Q.B. 211; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495: *Wickham et al* v. *The New Brunswick and Canada Railway Co. et al*, L. R. 1 P. C. A. 64. Where writs are issued oppressively the court or judge has power to grant relief: *Anon.* 4 Prac. R. 242. If the sheriff make a return erroneously as to the writ under which he made the money, he may be allowed to amend it: *Lee et al* v. *Neilson et al*, 14 U. C. Q. B. 606. So if there be any other mistake in the return: *Bull* v. *King*, 8 U. C. C. P. 474. He will not in general be allowed to make a special return: *Ford* v. *Story*, 1 Prac. R. 18. A writ will not be set aside because the sheriff did not take any proceedings under it during its currency: *Morrison* v. *Rees*, *Ib.* 25. Before the issue of a *fi. fa.* residue, a *ven. ex.* or *alias* writ, the original should be returned: *McMurrich* v. *Thompson*, *Ib.* 258. Where part of a debt has been levied under a *fi. fa.* and the writ returned, either a *fi. fa.*

residue or an *alias* may issue: *Lee et al* v. *Neilson et al*, 3 U. C. L. J. 72. The former is the more correct: *Ib.* It is an irregularity only and not a nullity to issue an *alias fi. fa.* after a return of goods on hand: *The Commercial Bank of Canada* v. *McDonell et al*, 1 U. C. Q. B. 406. In determining the priority of writs the court will look to the fraction of a day: *Beekman* v. *Jarvis*, 3 U. C. Q. B. 280. An irregular writ will not be set aside on the application of a subsequent execution creditor: *Farr* v. *Aderly*, 1 U. C. Q. B. 337; *Perrin* v. *Bowes*, 5 U. C. L. J. 138. A writ against the goods of a deputy sheriff may be directed to the sheriff and not to a coroner: *Gordon* v. *Bonter*, 6 U. C. L. J. 112. An irregularity in the issue of a writ may be waived by the laches of the defendant: *Hayden et ux* v. *Shearman*, 4 Ir. C. L. R. 169. A writ against lands bearing teste after the death of the defendant is void: *McCarthy* v. *Low*, 2 O. S. 353. But if tested in the lifetime of the debtor it may be executed after his death: *Doe d. Hagerman* v. *Strong et al*, 4 U. C. Q. B. 510. A judgment against an executor to recover *de bonis testatoris* will warrant the issue of an execution against testator's lands, on the return of *nulla bona* as against his goods: *Doe d. Jessup* v. *Bartlet*, 3 O.S. 206. In taking out a writ against executors for costs the costs directed to be levied must follow the judgment: *The Gore Bank* v. *Gunn et al*, 1 Cham. R. 170. An original writ of execution having been lost, plaintiff was allowed to issue a duplicate in order to obtain a return upon which to found an *alias*: *McEwen* v. *Stoneburne*, T. T. 7 Wm. IV. *MS.* R. & H. Dig. "Fieri Facias," 10. The court will not restrain a plaintiff from levying the whole of his debt on one of several defendants: *Zavitz* v. *Hoover et al*, M. T. 2 Vic. *MS.* R. & H. Dig. "Execution," 2. *Quære.* Can an *elegit* be regularly issued in this Province to the prejudice of the remedy of other creditors whose satisfaction from the sale of the lands would be indefinitely postponed: *Doe d. Henderson* v. *Burtch*, 2 O.S. 516, *per* Robinson, C. J.

A *fi. fa.* directed to no one is void, and cannot be amended after the return day or after a levy under it: *Wood et al* v. *Campbell*, 3 U. C. Q. B. 269. A *fi. fa.* lands tested after the death of defendant is void: *McCarthy* v. *Low*, 2 O. S. 353. An amendment was allowed in *fi. fa.* after a sale under it by the sheriff: *Fleming* v. *Executors of Wilkinson*, T. T. 1 & 2 Vic. *MS.* R. & H. Dig. "Amendment," i. 1. The court allowed an original *fi. fa.* to an outer district to be amended by making it a *testatum* and an original writ, to warrant the *testatum* to be sued out after the first writ had been placed in the sheriff's hands: *Fisher* v. *Brooks*, 3 O. S. 143. *Testatum* writs are abolished: section 247; and ground writs are unnecessary: section 247. A *fi. fa.* was amended so as to have relation to the day of entry of judgment: *Andruss* v. *Page*, Tay. Rep. 478. *Fi. fa.* to one county upon which £10 levied. After return day, *fi. fa.* to a second county for original debt, and without noticing £10 levy. Second writ set aside: *McMurrich* v. *Thompson*, 1 Prac. R. 258. After the expiration of *fi. fa.* against lands, upon which proceedings had been stayed by agreement between the parties, the court allowed an *alias* to issue, returnable at such a distance of time as to allow the sheriff to advertise, &c.: *Nickall* v. *Crawford*, Tay. Rep. 376.

Issue of a writ of *ca. sa.* allowed upon an affidavit, sworn before a judge of Lower Canada: *Coit* v. *Wing*, 3 O.S. 439. On a return of *devastavit*, a *ca. sa.* does not issue as a matter of course without enquiry: *Willard* v. *Woolcott*, Dra. Rep. 211. Court refused to set aside a *ca. sa.* issued several terms after the return of a *fi. fa.* goods: *Glynn* v. *Dunlop*, 4 O.S. 111. New *ca. sa.* refused although debtor discharged from first writ by plaintiff's attorney, acting upon the erroneous impression that the debt had been compromised: *Bradbury et al* v. *Loney*, H. T. 5 Vic. *MS.* R. & H. Dig. "Capias ad Satisfaciendum," 9. A *ca. sa.* commanding sheriff to detain defendant in custody until he should satisfy plaintiff, without stating amount of debt to be recovered, held void: *Henderson* v. *Perry et al*, 3 U. C. Q. B. 252; *Billings et al* v. *Rapelje et al*, E. T. 4 Vic. *MS.* R. & H. Dig. "Amendment," i. 2. Where the Christian name of a defendant was errone-

Writ to Sheriff of the County where the *venue* is laid may be dispensed with.

247. (*d*) It shall not be necessary to issue any Writ directed to the Sheriff of the County in which the *venue* is laid, (*e*) but Writs of Execution may issue at once into any County and be directed to and executed by the Sheriff of any County without reference to the County in which the *venue* is laid, and without any suggestion of the issuing of a prior Writ into such County. (*f*) 19 Vic. c. 43, s. 186.

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ously given in a *ca. sa.* the court refused to allow amendment: *Allison* v. *Wagstaff*, M. T. 7 Vic. *MS.* R. & H. Dig. "Amendment," i. 3. Not necessary for plaintiff who had two Christian names to state the second in an affidavit of debt, where his identity sufficiently appeared by the affidavit: *Perkins* v. *Connolly*, 4 O.S. 2.

There is a choice of offices held out to plaintiff—either the office in which judgment is entered, if the office of a deputy clerk, or the office of the chief clerk at Toronto, the latter only apparently "after the transmission of the roll." Chief Justice Draper, under the old practice, in a case before him, in general terms expressed himself as follows: "In order to justify the issuing of any writ of execution, *alias* and *pluries*, and *a fortiori* original from the office of a deputy clerk of the crown, it is necessary that the judgment should have been entered there:" *Dalrymple* v. *Mullen*,, 1 Prac. R. 327, note *a*. The facts of the case were that on the 6th February, 1844, a *fi. fa.* issued from the principal office at Toronto, to the sheriff of Gore, which was returned to and filed in the same office on 18th March, 1852. A *fi. fa.* against lands, issued from the office at Toronto on 15th March, 1853. On 6th November, 1852, an original writ against goods issued from the office of the deputy clerk of the crown at Hamilton (a *præcipe* for that writ being the only paper in the cause in that office) directed to the sheriff of Wellington, Waterloo and Grey. Writ set aside, upon the ground that it was "irregular to issue a writ of execution out of the office in which there have been no previous proceedings in the cause, and in which there is no judgment entered, or other matter upon which the officer of the court is presumed to found the execution, the award of which is technically presumed to be upon the roll." Subsequently it was decided by Chief Justice Richards, in a case before him, in Practice Court, where the papers had been filed in the office of a deputy clerk of the crown, though judgment was entered in Toronto, that a *pluries* writ of *fieri facias* issued from the office of the deputy clerk was regular: *The President, Directors and Company of the Gore Bank* v. *Gunn*, 1 Prac. R. 323.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 121. Substantially the same as Stat. U. C. 7 Wm. IV. cap. 3, s. 33. Founded upon the first report of the Common Law Commissioners, section 76.

(*e*) The contrary was the rule that prevailed in England before the passing of the English C. L. P. Act, 1852, though in practice often neglected. But in this Province the practice enacted by this section has prevailed since 1837: Stat. U. C. 7 Wm. IV. cap. 3, s. 33. The execution, however, should in all cases strictly conform to the judgment upon which it is issued: see *King* v. *Birch*, 3 Q. B. 425; *Phillips* v. *Birch*, 2 Dowl. N.S. 97.

(*f*) The writ formerly issued into the county in which the *venue* was laid was called the ground writ. That to any other county was grounded upon it and was known as a *testatum*. The former was by Stat. 7 Wm. IV. cap. 3. s. 33, abolished, and the latter, instead of being a *testatum*, becomes in consequence an original writ.

248. (*g*) Where, at the time this Act takes effect, it is necessary to sue out process of execution against the person into any particular County in order to charge bail, (*h*) the same shall continue to be necessary, notwithstanding anything contained in this Act. (*i*) 7 Wm. IV. c. 3, s. 33.

It shall still be necessary to sue out execution in the proper County to charge bail.

249. (*j*) Except Writs of *Capias ad Satisfaciendum*, (*k*) every Writ of Execution shall bear date and be tested on the day on which it is issued, (*l*) and shall remain in force for one year from the teste, (*m*) and no longer if unexecuted, (*mm*)

Duration of Writs of Execution.

(*g*) Taken from 7 Wm. IV. cap. 3, s. 33, which was an original provision in this Province, and at the time it was passed in advance of any similar provision in England: see note *e* to section 247.

(*h*) The prisoner must be charged in execution within the term next after trial or judgment: N. R. 99.

(*i*) A *ca. sa.* lodged in the sheriff's office to charge the bail (see section 278) is not a charging in execution: *Dorman* v. *Rawson*, Tay. Rep. 265; *Hesketh* v. *Ward*, 4 Prac. R. 158. It is not necessary that fifteen days should elapse between the teste and the return of the *ca. sa.*: *Beatty* v. *Taylor*, 2 Prac. R. 44; *Beattie* v. *McKay et al*, 2 Cham. R. 56. The fact that a plaintiff has not charged the debtor in execution in two months after judgment is no ground for ordering an exonerctur of the bail-piece: *Torrance et al* v. *Holden et al*, 10 U. C. L. J. 298. The vacation succeeding a term is not to be considered for the purpose of charging a defendant in execution as part of the preceding term: *Reid et al* v. *Drake*, 4 Prac. R. 141.

(*j*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 124, from which it differs in some particulars hereafter noted. Founded upon the first report of the Common Law Commissioners, section 78.

(*k*) As to which see section 272 of this act.

(*l*) A writ of assignment of dower is within the meaning of this section, and may be tested on the day when issued: *Fisher* v. *Grace*, 28 U. C. Q. B. 312. The court will not interfere with the discretion of a judge at Chambers, where upon a summons to set aside an execution for irregularity with costs he makes the order as asked, adding as a condition that the defendant bring no action: *Bartlett* v. *Sinton*, L. R. 1 C. P. 483.

(*m*) The day of the teste of a writ of *fi. fa.* is inclusive, so that a writ of *fi. fa.* issued on 16th May, 1861, will expire on 15th May, 1862: *The Bank of Montreal* v. *Taylor*, 15 U. C. C. P. 107; and therefore a writ issued on 27th July, 1861, renewed 22nd July, 1862, was held entitled to prevail over a writ issued on 16th May, 1861, but not renewed till 16th May, 1862: *Ib.*

(*mm*) The object of this section is to secure execution creditors entitled to priority of execution, and at the same time prevent them from committing frauds upon other creditors coming after them. There is no doubt if a sheriff be in receipt of several executions at the suit of different creditors against the same debtor, and all the writs be current, that he is bound to give precedence to the writ which was first delivered to him for execution: *Hutchinson* v. *Johnston*, 1 T. R. 729; *Bradley* v. *Wyndham*, 1 Wils. 44; *Kempland* v. *Macauley*, 4 T. R. 436; *Pringle* v. *Isaac*, 11 Price, 445; *Smallcomb* v. *Crose*, 1 Ld. Rayd. 251; *Drewe* v.

Renewal. unless renewed, but such Writ may, at any time before its expiration, and so from time to time during the continuance of the renewed Writ, be renewed by the party issuing it, for one year from the date of such renewal, by being marked in

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Lainson et al, 11 A. & E. 529. But if the first writ be delivered with instructions not to levy or be otherwise countermanded, it is not a writ upon which the sheriff can act, and therefore loses its priority: *Payne* v. *Drewe*, 4 East. 523; *Jones* v. *Atherton*, 7 Taunt. 56; *Samuel* v. *Duke et al*, 6 Dowl. P. C. 536; *Hunt* v. *Hooper et al*, 1 D. & L. 626; *Howard* v. *Cauty*, 2 D. & L. 115; *Foster et al* v. *Smith*, 13 U. C. Q. B. 243; *Castle* v. *Ruttan*, 4 U. C. C. P. 252; *Kirwan* v. *Jennings et al*, 3 Ir. C. L. R. 48; *Ross et al* v. *Hamilton*, E. T. 3 Vic. *MS.* R. & H. Dig. "False Return," 8; *Strange* v. *Jarvis*, 6 O. S. 160; *Re Fair and Buist*, 2 U. C. L. J. N. S. 216. And where goods seized under a *fi. fa.* founded on a judgment fraudulent against creditors remain in the sheriff's hands or are capable of being seized by him, he is compellable to sell and seize such goods under a subsequent execution founded on a *bona fide* debt: *Imray* v. *Magnay et al*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Ex. 160. If the first writ though *bona fide* remain one year unexecuted, it lapses so as to let in subsequent executions: *Doe d. Greenshields* v. *Garrow*, 5 U. C. Q. B. 237. When a writ can be said to be executed so as to satisfy this section, is a question. Nothing, at all events, short of an actual seizure can, it is apprehended, be considered an execution of a writ of *fi. fa.* against goods. Whether a partial levy will be sufficient, remains to be decided. Writs of execution in England, under Stat. 3 & 4 Wm. IV. cap. 67, s. 2, are made returnable "immediately after the execution thereof." And under that statute it has been held that partial execution is not the execution intended: *Jordan* v. *Binckes*, 13 Q. B. 757. Denman, C. J., "I do not see where the line is to be drawn, short of complete execution, to limit the force and duration of the writ. The defendant's construction, namely, that the writ is executed as soon as the sheriff may return *nulla bona* either in whole or in part, requires authority to support it; and such authority as there is, seems to be quite against it." Patteson, J., "I cannot see at what point the sheriff can stop before complete execution. Formerly, if other goods came into his bailiwick after a partial levy and before the return of the writ, the sheriff was bound to seize them, and he is equally bound to do so now, until the writ has been completely executed." The reasoning of this decision is obvious. A writ of execution not being made returnable at a fixed day or within a limited period from the teste, but only when executed, it may be well said that a writ only *partially* executed continues current *quoad* the residue because not yet fully executed and consequently not yet returnable. Where shortly before the return of a *fi. fa.* against lands the plaintiff therein obtained it from the sheriff for the purpose of renewing the writ, and did not return it for fifteen days thereafter, when the year from the teste had expired, it was held that under these circumstances there was no abandonment of the plaintiff's rights under the execution: *Meneilly* v. *McKenzie*, 3 Er. & Ap. 209. It only remains to be observed that since the C. L. P. Act all executions against goods and chattels issued from our superior courts of common law are, as in England, made returnable "*immediately after the execution thereof.*" A sheriff failing to return such writ within a "reasonable time" after receipt thereof is liable to be ruled in the ordinary manner. To constitute a reasonable time the sheriff must be allowed the sheriff time to travel to the residence of defendant, make an inventory of his goods, return to his office, advertise and sell. It is the duty of the sheriff in every case where goods seized by him under execution remain unsold on his hands for want of buyers, to state and specify in his return of "goods on hand" the time and place when and where such goods were offered for sale by him, and the names of at least three persons who

the margin, with a memorandum, to the effect following: "Renewed for one year from the ——— day of ———," signed by the Clerk or Deputy Clerk of the Crown or Clerk of the County Court who issued such Writ, or by his successor in office; (*n*) and a Writ of Execution so renewed shall have the effect and be entitled to priority according to the time of the original delivery thereof to the Sheriff. (*o*) 19 Vic. c. 43, s. 189.

Effect of renewal.

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were present at the time of such attempted sale; but if so many were not present, then the names of those who were present, if any, and that there were no others, and if no persons were present then to state the fact: 27 & 28 Vic. cap 28, s. 27. Where an execution was levied by seizure, but the sale was suspended by an interpleader order, and before sale a petition for adjudication of bankruptcy was filed against the execution debtor, on which he was afterwards adjudged bankrupt, the case was held to be within the Bankruptcy Consolidated Act (12 & 13 Vic. cap. 106, s. 184) and the execution creditor deprived of the benefit of his execution: *O'Brien* v. *Brodie*, L. R. 1 Ex. 302; see also *Converse et al* v. *Michie*, 16 U. C. C. P. 167. The law was held otherwise when at the time of the issue of attachment in insolvency the debtor's goods had been converted into money: *Whyte* v. *Treadwell*, 17 U. C. C. P. 488. It is now declared that no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ the estate of the debtor shall have been assigned to an interim assignee, or shall have been placed in compulsory liquidation: Stat. Dom. 32 & 33 Vic. cap. 16, s. 59. But this provision is not to affect any lien or privilege acquired before the passing of the act, or any privilege for costs which the plaintiff possesses under the law of the province in which the writ shall have issued, by reason of such issue, delivery or seizure: *In re Heyden*, 29 U. C. Q. B. 262.

(*n*) It was held under this section as it originally stood, that a writ of execution could only be once renewed, and if then unexecuted it expired: *Neilson* v. *Jarvis*, 13 U. C. C. P. 176. But the legislature afterwards amended the section by inserting after the word "expiration" the words "and so from time to time during the continuance of the renewed writ:" 27 Vic. cap. 13, s. 2; and the amending act has since been held not to be retrospective in its operation: *Miller* v. *The Beaver Mutual Fire Insurance Association*, 14 U. C. C. P. 399. No renewal can take place when the writ has been acted upon or levy has been made: *Neilson* v. *Jarvis*, 13 U. C. C. P. 176.

(*o*) In order that the clerk may mark the writ with the memorandum in the margin it will be necessary to procure the execution from the sheriff, though for all ordinary purposes he is entitled to keep it in his possession: see *Meneilly* v. *McKenzie*, 3 Er. & Ap. 209. Before this act there was no method of renewing an execution unless by having the original returned and an *alias* or *pluries* issued. This let in all intermediate executions; for the original execution lost priority from the time when it became returnable. To avoid this the original is supposed to continue in the possession of and under the control of the sheriff, though for a short time for the purposes of renewal he must in fact part with it or else himself take it to the proper officer to be renewed, if willing so to do, upon the request of the party whose execution it is: see *Muir et al* v. *Munro*, 23 U. C. Q. B. 139.

Evidence of renewal.

250. (*a*) The production of a Writ of Execution, marked as renewed in manner aforesaid, (*b*) shall be sufficient evidence of its having been so renewed. (*c*) 19 Vic. c. 43, s. 190.

When lands not liable unless the judgment exceeds forty dollars.

251. (*d*) In case any suit of the proper competence of a Division Court be brought in a Superior Court, or in a County Court, no execution against lands shall issue, unless the amount of the judgment exceeds forty dollars. (*e*) 13 & 14 Vic. c. 53, s. 78.

Writs against lands may issue at same time as writs against goods.

252. (*f*) Any person who now is or hereafter may become entitled to issue a writ of execution against goods and chattels may, at or or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the Sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against (*g*) goods, and either

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(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 125.

(*b*) See section 249.

(*c*) *i. e.* Without proof of signature or seal.

(*d*) Taken from the Consolidated Division Court Act 13 & 14 Vic. c. 53, s. 78.

(*e*) In case an execution in a division court be returned *nulla bona*, and the sum remaining unsatisfied in the judgment under which the execution issued amounts to the sum of forty dollars, the plaintiff or defendant may obtain a transcript of the judgement from the clerk, under his hand and sealed with the seal of the court, which transcript shall set forth—

1. The proceedings in the cause.
2. The date of issuing execution against goods and chattels.
3. The bailiff's return of *nulla bona* thereon as to whole or part.

And upon filing such transcript in the office of the clerk of the county court in the county where such judgment has been obtained or in the county where the defendant's or plaintiff's lands are situate, the same shall become a judgment of such county court: Con. Stat. U. C. c. 19, ss. 142, 143.

If the transcript omit any of the above required particulars it will be a nullity, so that no *fi. fa.* lands can be issued thereon: *Farr* v. *Robins*, 12 U. C. C. P. 35; *Jacomb* v. *Henry*, 13 U. C. C. P. 377; *Hope* v. *Graves*, 14 U. C. C. P. 393. But if it be correct so as to become a judgment of the county court for any purpose, it becomes so for all purposes, including examination and commitment of the judgment debtor: *Kehoe* v. *Brown et al*, 13 U. C. C. P. 549.

(*f*) Taken from Stat. Ont. 31 Vic. cap. 25, s. 1, which repealed section 252 of the C. L. P. Act, and sustituted this section therefor.

(*g*) It is often made a question as to what estates or interests in lands can or may be sold under an execution against lands. Mere possession constitutes *prima facie* a seisin in fee, which can only be sold on an execution against lands: *Doe d. Keogh* v. *Calhoun*, 1 U. C. Q. B. 157. But it has been held that a mere right

before or after any return thereof: Provided, always, that the Sheriff shall not expose the lands for sale, or sell within less than twelve months from the day on which the writ against the lands is delivered to him. (*h*)

Proviso, lands not to be sold within a year.

INVENTORY AND SALE OF GOODS.

253. (*j*) In case any goods or chattels be seized in execution under a writ issued out of either of the Superior Courts of Common Law or of any County Court, the Sheriff, his deputy or officer, who seized the same, shall, on request,

Sheriff to deliver inventory to the owner, &c.

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of action or entry on lands is not saleable under execution: *Doe d. Ausman et al* v. *Minthorne*, 3 U. C. Q. B. 423. Nor can be a mere trust estate: *Doe d. Simpson* v. *Privat*, 5 U. C. Q. B. 215. A rent-charge issuing out of and chargeable upon a freehold estate is not subject to be seized and sold as a chattel: *Smith* v. *Turnbull*, *Ib.* 586; but may be seized on an execution against lands: *Dougall* v. *Turnbull*, 10 U. C. Q. B. 121. The interest of a reversioner in lands may be seized during the lifetime of the tenant for life: *Doe d. Cameron* v. *Robinson et al*, 7 U. C. Q. B. 335. When real property is conveyed to trustees for the satisfaction of debts, so as the sale be made within a certain period, and the sale be not made within that period, no use results to the grantor that can be seized in an execution against lands: *Doe d. Laurason* v. *The Canada Company*, 6 O. S. 428. Lands held in fee simple by a debtor at the time of his death may be seized on a judgment against his executor or administrator in respect of the debt of the deceased: *Gardener* v. *Gardener*, 2 O.S. 520; Stat. 27 Vic. cap. 15. But no such sale can be had on a judgment against the administrator of the administratrix of the deceased: *Ingalls et al* v. *Reid*, 15 U. C. C. P. 490. And now a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent into or upon any land, may be disposed of by deed: Con. Stat. U. C. cap. 90, s. 5. And any estate, right, title, or interest in lands which may be so conveyed or assigned by any party, is liable to seizure and sale under execution against such party: *Ib.* s. 11. But a right to dower without entry is not "a contingent or executory or a future interest or a possibility coupled with an interest," within the meaning of the statute, and so is not subject to execution: *McAnnany* v. *Turnbull*, 10 Grant. 298.

(*h*) Does this mean that lands liable to be sold upon a writ must be lands in the hands of an execution debtor at the time the writ is placed in the hands of the sheriff? or does it mean that lands acquired subsequently may be sold immediately after the expiration of twelve months, provided the sheriff has advertised the lands for the required time? or does it mean that although the lands would be liable to seizure during the currency of the writ, the sheriff must hold the writ over it for twelve months before he can sell? Lands acquired while the writ is in the sheriff's hands may be sold under it if properly advertised, though they have not been twelve months owned by the debtor: *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495, *per* Burns, J. An *alias fi. fa.* need not be twelve months in the hands of the sheriff before sale: *Nickall* v. *Crawford*, Tay. Rep. 277; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 500; *Campbell* v. *Delihanty et al*, 24 U.C. Q.B. 236; see further as to irregularities in writs of execution note *c* to section 246.

(*j*) Taken from our old Statute 49 Geo. III. cap. 4, s. 5.

deliver to the owner, his agent or servant, an inventory thereof before they are removed from the premises on which they have been so seized; (*k*) and no Sheriff or other officer shall sell any effects under a Writ of Execution until he has, previously thereto, given at least eight days' public notice in writing of the time and place of sale, at the most public place in the Municipality, where such effects have been taken in execution. (*l*) 51 Geo. III. c. 6, ss. 2, 3; 49 Geo. III. c. 4, s. 5.

Goods, &c., exempted from execution.

254. (*m*) The goods and chattels exempt by law from seizure, (*n*) shall not be taken in execution under any Writ

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(*k*) The object of this section is the protection of the execution debtor from the abuse of the process of the court by the sheriff or any of his officers. The request need not be in writing, and when made should be complied with before the goods or chattels are removed from the premises on which they have been seized.

(*l*) Where the writ is in itself regular, the omission of the sheriff to advertise will not, it is apprehended, affect the purchaser at the sale: *Paterson* v. *Todd*, 24 U. C. Q. B. 296; and certainly is no ground for setting aside the writ, though the advertisement be not made till the writ is spent: *Morrison* v. *Rees*, 1 Prac. R. 25.

(*m*) This is substituted by Stat. 23 Vic. cap. 25, s. 3, for the original clause of this act corresponding in number with the one here annotated.

(*n*) The following are the exemptions:

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family;

2. The necessary and ordinary wearing apparel of the debtor and his family;

3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives; six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one tea pot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use;

4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of forty dollars;

5. One cow, four sheep, two hogs, and food therefor, for thirty days;

6. Tools and implements of or chattels ordinarily used in the debtor's occupation to the value of sixty dollars.

There can be no exemption against the crown: *Regina* v. *Davidson*, 21 U.C.Q.B. 41. Nor is any chattel mentioned in sub-sections 3, 4, 5 or 6, exempt from seizure in satisfaction of a debt contracted for such identical chattel: 23 Vic. cap. 25, s. 5. So goods and chattels as respects debts contracted before 19th May, 1860, remain liable to seizure and sale under execution, provided the writ of execution under which they are seized has indorsed upon it a certificate, signed by the judge of the court out of which the writ issues, certifying that it is for the recovery of a debt

from either of the said Superior Courts, or from any County Court. (*o*)

STOCK MAY BE SOLD.

Bank stock and other stocks may be sold in execution.

255. (*p*) The stock held by any person in any bank or in any corporation or company in Upper Canada, having a joint transferable stock, (*q*) may be taken and sold in execution in the same manner as other personal property of a debtor. (*r*) 2 Wm. IV. c. 6, s. 1; see 12 Vic. c. 73, s. 1.

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before 19th May, 1860: Stat. 24 Vic. cap. 27, s. 2. A debtor may select out of any larger number the several chattels mentioned as exempt from seizure: Stat. 23 Vic. cap. 25, s. 6. Jewellery, it would seem, is not necessary wearing apparel, so as to be exempt: *Montague* v. *Richardson et al*, 24 Conn. Rep. 338; *Towns* v. *Pratt*, 33 N. H. 345.

(*o*) In an action against a sheriff and his sureties, for not paying over moneys levied under a *fi. fa.* it appeared that certain goods of one H. had been seized by the sheriff at plaintiff's suit, and claimed by the debtor's brother under a sale which the plaintiffs alleged to be fraudulent. The debtor also claimed exemption for $60 worth of goods under 23 Vic. cap. 25, and these latter goods the sheriff sold under a subsequent execution, the debt for which had been recovered before 19th May, 1860, as appeared by an exemplification of the judgment. *Held* that plaintiffs could have no claim in respect of such goods, for they were exempt from their writ under 23 Vic. cap. 25, and, even if not subject to the other execution, the sheriff was responsible to the execution debtor, not to the plaintiff, for the proceeds: *Michie et al* v. *Reynolds*, 24 U. C. Q. B. 303.

(*p*) Taken from repealed statute of Upper Canada 2 Wm. IV. cap. 6, ss. 1, 2. The legislature of Canada afterwards passed an act "to make better provision for the seizure and sale of shares and dividends of the stockholders of all incorporated companies: 12 Vic. cap. 23. The latter is still in force as Consol. Stat. Can. cap. 70. The two acts must be read together as if one act: *Goodwin* v. *Ottawa and Prescott Railway Co.* 22 U. C. Q. B. 186.

(*q*) All shares and dividends of stockholders in incorporated companies are to be held, considered and adjudged to be personal property, and liable as such to *bona fide* creditors for debts: Con. Stat. Can. cap. 70, s. 1. All corporations established for purposes of trade or profit, or for the construction of any work, or for any purpose from which revenue is intended to be derived, are to be deemed incorporated companies for the above mentioned purposes, though not called companies in the act or charter incorporating them: *Ib.* s. 7. The shares are to be held personal property found by the sheriff in the place where the notice of seizure may be made: *Ib.* s. 5. The shares of individual proprietors in a railway company are not to be deemed either an interest in land or goods and merchandize, within the Statute of Frauds: *Humble* v. *Mitchell*, 11 A. & E. 205; *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Dancuft* v. *Albrecht*, 12 Sim. 189; *Tempest et al* v. *Kilner*, 3 C. B. 249; see further *Pierpoint* v. *Brewer*, 15 M. & W. 201; *Freeman* v. *Appleyard*, 7 L. T. N.S. 282. However, shares in a canal company have been held to pass to the assignees of a bankrupt as personal estate: *Ex parte Lancaster Canal Navigation Co.* 1 Deac. & Clut. 411.

(*r*) The sheriff to whom the writ of execution is addressed, on being informed on behalf of the plaintiff that the defendant has stock in an incorporated company, and on being required to seize such stock, must forthwith serve a copy of

To be transferred on the certificate of the Sheriff.

256. (*s*) Upon the production of a certificate under the hand and seal of office of the Sheriff, declaring to whom any stock taken upon an execution has been sold by him, (*t*) the cashier of the bank, or the proper officer of any other such company or corporation, the stock of which has been sold, shall transfer such stock from the name of the original stockholder to the person named in the certificate as the purchaser under the execution; (*u*) and such purchaser shall thenceforth be entitled to receive all dividends and profits arising from such stock, and in all other respects be considered in the place of the former stockholder. (*v*) 2 Wm. IV. c. 6, s. 2.

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the writ on the company, with a notice that all the shares which the defendant may have in the stock of such company are seized: Con. Stat. Can. c. 70, s. 3. From the time of such service no transfer of stock by the defendant is valid unless or until the seizure is discharged: *Ib.* Every such seizure and sale under the same includes all dividends, premiums, bonuses, or other pecuniary profits upon the shares seized: *Ib.* The same, after notice from the sheriff, are not to be paid by the company to any party except the party to whom the shares may be sold by the sheriff unless and until the seizure be discharged, on pain of paying the same twice: *Ib.* If the company have more than one place where service of process may be legally made upon them, and there be some place where transfers of stock may be notified to and entered by the company so as to be valid as regards the company, or where any dividends or profits on stock may be paid, other than the place where service of such notice has been made, such notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place so as to subject the company to pay twice, or to affect the rights of any *bona fide* purchaser until after the expiration of a period from the time of service sufficient for the transmission of notice of such service by post from the place where it has been made to such other place: *Ib.* s. 4. It is the business of the company to transmit the notice: *Ib.*

(*s*) Taken from our repealed Statute of Upper Canada, 2 Wm. IV. cap. 6, s. 2, and to be read in connection with Con. Stat. Can. c. 70, formerly Stat. of Canada, 12 Vic. cap. 23: *Goodwin* v. *The Ottawa and Prescott Railway Co.* 22 U. C. Q. B. 186.

(*t*) Whenever any share has been sold under a writ of execution, the sheriff by whom the writ has been executed must, within ten days after the sale, serve upon the incorporated company, at some place where service of process upon such company may be made, an attested copy of the writ of execution, with his certificate endorsed thereon, certifying to whom the sale of such share has been by him made: Con. Stat. Can. c. 70, s. 2.

(*u*) The officer will not be compelled by *mandamus* to perform this duty unless all the requirements, as well of the section annotated as of Con. Stat. Can. c. 70, have been complied with: *Goodwin* v. *The Ottawa and Prescott Railway Co.* 22 U. C. Q. B. 186. Therefore where it was not shown that a copy of the writ had been served, together with the certificate, the plaintiff, who sued under the C. L. P. Act, claiming a *mandamus*, failed in his action: *Ib.*

(*v*) The person purchasing shall thereafter be a stockholder of the shares and have the same rights and be under the same obligations as if he had purchased

The interest of mortgagors may be sold in execution.

257. (*a*) The Sheriff or other officer to whom any Writ of *Fieri Facias* against the lands and tenements of any Mortgagor of Real Estate is directed, (*b*) may seize or take in execution, sell and convey, (in like manner as any other Real Estate might be seized or taken in execution, sold and conveyed,) (*c*) all the legal and equitable interest of such Mortgagor in the Mortgaged lands and tenements. (*d*). 12 Vic. c. 73, s. 1.

Effect of such sale.

258. (*e*) The effect of such seizure or taking in execution, sale and conveyance, of any such Mortgaged lands and tenements, (*f*) shall be to vest in the purchaser, his heirs and assigns, all the legal and equitable interest, of the Mort-

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the shares from the proprietor thereof, in such form as may be by law provided for the transfer of stock in the company: Con. Stat. Can. c. 70, s. 2.

(*a*) Taken from our repealed Statutes of Canada, 12 Vic. c. 73, s. 1, which for the first time in this Province subjected an equity of redemption to sale under a common law execution against the lands of the mortgagor.

(*b*) This act as first passed only authorized the sale of the legal and equitable interest of the mortgagor on a judgment recovered against *him* and on an execution issued against *his* lands and tenements: *The Bank of Upper Canada* v. *Brough*, 8 U. C. L. J. 264; but see new Stat. 27 Vic. cap. 13, s. 1.

(*c*) See section 252 of this act and notes thereto.

(*d*) It is now declared by statute that the word "mortgagor," whenever it occurs in this section or in the 258 and 259 sections of this act, shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after such word "mortgagor:" 27 Vic. cap. 13, s. 1. It is by the same statute expressly provided that the equity of redemption in any freehold mortgage of real estate shall be saleable under an execution at law against the lands and tenements of the owner of such equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to such mortgage in the same manner as any lands and tenements can now be sold under an execution at law: *Ib.* Before the passing of the statute the interest of a mortgagor in a freehold mortgaged estate was not saleable under execution at law: *Doe d. Campbell* v. *Thompson*, *MS.* H. T. 6 Vic. R. & H. Dig. "Execution," 12. So it has been held that an equity of redemption in a term of years cannot be sold on an execution at law against goods: *Doe d. Webster* v. *Fitzgerald*, *MS.* E. T. 2 Vic. R. & H. Dig. "Execution," 11; or lands: *Doe d. Court* v. *Tupper*, 5 O.S. 640; *Chisholm* v. *Sheldon*, 1 Grant, 108; s. c. 2 Grant, 178. But still the sale of such an interest was held to be effectual in equity as to the interest of the executrix of the deceased owner, who pointed out the land and desired to have it sold: *Walton* v. *Bernard*, 2 Grant, 344; and it was afterwards held that the purchaser at sheriff's sale of the reversion in land mortgaged for a term of years was entitled to redeem the mortgage for his own benefit: *Waters* v. *Shade*, 2 Grant, 457; see further section 260 of this act.

(*e*) Taken from the repealed Statute of Canada, 12 Vic. c. 73, s. 2.

(*f*) See note *b* to section 257.

gagor therein at the time the Writ was placed in the hands of the Sheriff or other Officer to whom the same is directed as well as at the time of such sale, and to vest in such purchaser, his heirs and assigns, the same rights as such Mortgagor would have had, if such sale had not taken place; (*g*) and the purchaser, his heirs or assigns, may pay, remove or satisfy, any Mortgage, charge, or lien, which at the time of such sale existed upon the lands or tenements so sold, in like manner as the Mortgagor might have done, and thereupon the purchaser, his heirs and assigns shall acquire the same estate, right and title, as the Mortgagor would have acquired, in case the payment, removal or satisfaction had been effected by the Mortgagor, and on payment of the Mortgage money to the Mortgagee by the purchaser, his heirs or assigns, the Mortgagee, his heirs, or assigns shall, if required, give to such purchaser, his heirs or assigns, at his or their charge, a certificate of payment or satisfaction of such mortgage, (*h*) which certificate may be in the following form, that is to say:

To the Registrar of the County of ——— :

I, A. B. of ———, do certify that C. D. of ———, who hath become the purchaser of the interest of E. F. of ———, hath satisfied all money due upon a certain Mortgage made by the said E. F. to me, bearing date the ——— day of ———, one thousand eight hundred and ———, and regis-

(*g*) The purchaser acquires only the title of the mortgagor at the time the writ is delivered to the sheriff, not at the time of the recovery of judgment: see *Pegg* v. *Metcalfe*, 3 U. C. L. J. 148. The interest of the mortgagor in a *portion* only of the mortgaged premises cannot be sold under execution: *Heward* v. *Wolfenden*, 14 Grant, 188; *Van Norman* v. *McCarty*, C. P. M. T. 1869.

(*h*) When any person entitled to any freehold or leasehold land by way of mortgage has departed this life, and his executor or administrator is entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the said mortgage, may convey, release and discharge the mortgage debt and the legal estate in the land: Con. Stat. U. C. c. 87, s. 5. The executor or administrator has the same power as to any portion of the lands on payment of some part of the mortgage debt or on any arrangement for exonerating the whole or any part of the mortgaged lands, without payment of money: *Ib.* But it has been held that neither the executor nor administrator has any power to sell or convey the legal estate held by his testator or intestate to a person purchasing the mortgage: *Robinson* v. *Byers*, 9 Grant, 572; *Hunter* v. *Farr et al*, 23 U. C. Q. B. 324; see Stat. Ont. 32 Vic. cap. 10, and 33 Vic. cap. 18.

tered at ——— of the clock in the forenoon (*as the case may be*) of the ——— day of ———, in the same year, (*or as the case may be*), and that such mortgage is therefore discharged. As witness my hand this ——— day of ———, one thousand eight hundred and ———.

(Signed) A. B.

E. H. of ———
G. H. of ——— } Witnesses.

And such certificate shall be of the like effect, and shall be acted upon by registrars and others to the same extent as if the same had been given to the Mortgagor, his heirs, executors, administrators or assigns. 12 Vic. c. 73, s. 2.

Mortgagee may become purchaser at Sheriff's sales.

259. (*j*) Any Mortgagee of lands and tenements so sold, or the heirs or assigns of such Mortgagee, (being or not being Plaintiff or Defendant in the judgment whereon the writ of *Fieri Facias* under which such sale takes place has issued) may be the purchaser at such sale, and shall acquire the same estate, interest and rights thereby as any other purchaser; (*k*) but in the event of the Mortgagee becoming such purchaser, he shall give to the Mortgagor a release of the mortgage debt, (*l*) and if any other person becomes such purchaser, and if the Mortgagee enforces payment of the mortgage debt against the Mortgagor, then such purchaser shall repay the amount of such debt and interest to the Mortgagor, (*m*) and

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(*j*) Taken from repealed statute of Canada, 12 Vic. cap. 73, s. 3.

(*k*) Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any power of sale in his mortgage or any decree, without thereby merging the mortgage debt as against any subsequent mortgagee having a charge on the same property: Con. Stat. U. C. cap. 87, s. 1. In case any such prior mortgagee or his assignee takes a release of the equity of redemption of the mortgagor or his assignee in such mortgaged property, or purchases the same under any power of sale in his mortgage or under any decree, no subsequent mortgagee or his assignee shall be entitled to foreclose or sell such property without redeeming or selling subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption: *Ib.* s. 2.

(*l*) *Quære* as to the effect of intermediate mortgages or charges on the land: see *Pegge* v. *Metcalfe*, 3 U. C. L. J. 148.

(*m*) Irrespective of the form of the contract between the parties, the rule is clear, independently of this statute, that the purchaser of an equity of redemption

in default of payment thereof within one month after demand, the Mortgagor may recover from such purchaser the amount of such debt and interest, in an action for money had and received, (*n*) and until such debt and interest have been repaid to the Mortgagor, he shall have a charge therefor upon the mortgage lands. (*o*) 12 Vic. c. 73, s. 3.

The interest of a mortgagor in goods mortgaged may be sold in execution.

260. (*p*) On any writ, precept or warrant of execution against goods and chattels, (*q*) the sheriff or other officer to whom the same is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, (*r*) and such sale shall convey whatever interest the Mortgagor had in such goods and chattels at the time of the seizure. (*s*) 20 Vic. c. 3, s. 11; *and see* 12 Vic. c. 73, s. 1.

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is bound as between himself and his assignees to pay off incumbrances: *Thompson* v. *Wilkes*, 5 Grant. 594. The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract express or implied to discharge, cannot keep such incumbrance alive against a mesne incumbrance which by the terms of the contract of purchase express or implied the purchaser was bound to discharge: *Blake* v. *Beaty*, 5 Grant. 359.

(*n*) Money had and received is the most comprehensive of all the common counts. It is applicable wherever the defendant has received money which in justice and equity belonged to the plaintiff under circumstances which render the receipt by the defendant a receipt to the use of the plaintiff. The purchaser here at the time of purchase as it were takes credit for the amount of the mortgage money, as if he had received the amount thereof to the use of the mortgagor, and therefore is either bound to apply it in liquidation of the mortgage, or pay the same to the mortgagor as money received to his use.

(*o*) Not only is the right to sue for the money given to the mortgagor as against the purchaser, but, in order that the mortgagor shall be as nearly as possible perfectly secure, it is declared that until such debt and interest have been repaid to the mortgagor the latter shall have a charge therefor upon the mortgaged lands.

(*p*) Taken from repealed Statute 20 Vic. cap. 3, s. 11, as consolidated with repealed Statute 12 Vic. cap. 73, s. 1.

(*q*) See note *d* to section 257.

(*r*) The sheriff has no power to take or remove the *corpus* of the goods or chattels. All that he is empowered to control or sell is "the interest or equity of redemption."

(*s*) "*At the time of the seizure.*" Considering that an execution from the superior courts or a county court binds goods and chattels from the time of the delivery of the writ to the sheriff, it is difficult to see why the legislature postponed the operation of the writ under this section till seizure. But so it is; and it is apparently in the power of the execution debtor, between the delivery of the writ to the sheriff and seizure, to assign his interest, and if done *bona fide* defeat the execution: see *Pegge* v. *Metcalfe*, 3 U. C. L. J. 148.

MONEY AND SECURITIES.

261. (*t*) The Sheriff or other officer, having the execution of any Writ of *Fieri Facias* against goods sued out of either of the Superior Courts of Common Law, or out of any County Court, or of any precept made in pursuance thereof, shall seize any money or bank-notes (including any surplus of a former execution against the debtor), and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money, belonging to the person against whose effects the Writ of *Fieri Facias* has issued, and shall pay or deliver to the party who sued out the execution, any money or bank-notes so seized, or a sufficient part thereof, (*u*) and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by the writ and endorsement thereon directed to be levied, or so much thereof as has not been otherwise levied or raised, and such Sheriff or other officer may sue in his own name for the

Sheriff may seize money and securities for money.

Money seized to be paid over to party taking out the execution.

(*t*) Taken from repealed Statute 20 Vic. cap. 57, s. 22, the origin of which apparently is Eng. Stat. 1 & 2 Vic. cap. 110, s. 12.

(*u*) The sheriff at common law can only seize under a *fi. fa.* such things as he can sell: *Legge* v. *Evans et al*, 6 M. & W. 36, *per* Parke, B.; with the exception of wearing apparel actually in use, and perhaps goods in his actual immediate possession: *Sunbolf* v. *Alford*, 3 M. & W. 254, *per* Parke, B.; but deeds, cheques, bills, notes, bonds, mortgages, specialties, or other securities for money, could not at common law be seized or sold under execution because the law did not consider them the subject of sale: *Wood* v. *Wood*, 4 Q. B. 401; and the object of this enactment is to subject the securities mentioned to execution as of goods and chattels: *Ib.* When money is seized it becomes as it were money the proceeds of goods and chattels seized and sold: *Collingridge* v. *Paxton*, 2 L. M. & P. 654. But it does not become ear-marked, nor does the property in it become vested in the execution creditor: *Ib.* 658, *per* Jervis, C. J. Power is by the section expressly given to the sheriff to seize money the proceeds of a former execution against the debtor: see *Harrison* v. *Paynter*, 6 M. & W. 387; *Masters* v. *Stanley*, 8 Dowl. P. C. 169; *Brun* v. *Hutchinson*, 2 D. & L. 43; *Wood* v. *Wood*, 4 Q. B. 397; *King* v. *Knott*, 3 Ir. Jur. O.S. 69. But it has been held that the sheriff cannot seize money in the hands of a third party for the use of the defendant: *Robinson* v. *Peace*, 7 Dowl. P. C. 93; *Brown* v. *Perrott*, 4 Beav. 585. So it has been held that money deposited in an action in lieu of bail cannot be paid out to an execution creditor in another action: *France* v. *Campbell*, 9 Dowl. P. C. 914. As to cheques, &c. see *Squire et al* v. *Huetson et al*, 1 Q. B. 308; *Watts* v. *Jefferyes*, 3 Mac. & Gor. 422; *Ex parte Chaplin*, 3 Y. & C. 397. *Semble*, that books of account and open accounts cannot be seized by the sheriff—at least they cannot be sold or transferred; but if seizable at all must be held by the sheriff in security for the judgment debt, and collected as such in his own name: *McNaughton* v. *Webster*, 6 U. C. L. J. 17. A sale of books of account by the sheriff does not pass the property in the debts or accounts therein charged: *Ib.*

recovery of the sums secured thereby, when the time of payment thereof has arrived. (*v*) 20 Vic. c. 57, s. 22.

Payment thereon to the Sheriff to be valid.

262. (*a*) The payment to such Sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution (*as the case may be*), from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security. (*b*) 20 Vic. c. 57, s. 22.

Sheriff to pay over moneys so paid to him.

263. (*c*) The Sheriff or other officer shall pay over to the party who sued out the writ, the money so recovered, or a sufficient sum to discharge the amount by the writ directed to be levied. (*d*)

Surplus to be paid to the party against whom the execution issues.

264. (*e*) If, after satisfaction of the amount, together with Sheriff's poundage and expenses, (*f*) any surplus remains in the hands of the Sheriff or other officer, the same shall be paid to the party against whom the writ issued. (*g*)

(*v*) The same in regard to the effects of an absconding debtor: see Con. Stat. U. C. cap. 25, s. 25.

(*a*) Taken from 20 Vic. cap. 57, s. 22, the origin of which apparently is Eng. Stat. 1 & 2 Vic. cap. 110, s. 12.

(*b*) The law will never compel a person to pay a sum of money a second time which he has paid once under the sanction of the court: *per* Channel, B., in *Wood et al* v. *Dunn*, L. R. 2 Q. B. 80.

(*c*) Taken from Eng. Stat. 1 & 2 Vic. cap. 110, s. 12.

(*d*) This is simply acting in obedience to the command of the writ. The party entitled to the money makes a written demand on the sheriff for a return of the writ, in which case it is the duty of the sheriff within eight days, inclusive of the service of the demand, to return the writ: 27 & 28 Vic. cap. 28, s. 34. If the sheriff wilfully neglect or refuse to do so, he is liable to be ruled to return the writ, and to be further proceeded against by attachment as in other cases of contumacy to orders or rules of court: *Ib.* The sheriff in such case to pay the costs of any rule or order taken out to compel the return and all other costs consequent thereon, and also the costs of the requisition to make the return: *Ib.* s. 36.

(*e*) Taken from Eng. Stat. 1 & 2 Vic. cap. 110, s. 12.

(*f*) In case a part only be levied on any execution against goods and chattels, the sheriff is entitled to poundage only on the amount so levied, whatever may be the sum indorsed on the writ: Section 271.

(*g*) After satisfaction of the execution, the surplus of course is held to the use of the debtor. No doubt he could maintain money had and received for it against

Sheriff not bound to sue until secured.

265. (*h*) No Sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party who sued out the execution enters into a bond with two sufficient sureties to indemnify such Sheriff or officer from all costs and expenses to be incurred in the prosecution of the action, or to which he may become liable in consequence thereof; (*i*) and the expense of such bond may be deducted out of any money recovered in such action. (*j*) 20 Vic. c. 57, s. 22.

PRIORITY OF EXECUTIONS.

Cases of execution from County Courts and Division Courts at the same time against the same debtor provided for.

266. (*k*) Where a writ against the goods of a party has issued from any of such Courts, and a warrant of execution against the goods of the same party has issued from a Division Court, the right to the goods seized shall be determined by the priority of the time of the delivery to be executed of the writ to the Sheriff, or of the warrant to the Bailiff of the Division Court; (*l*) and the Sheriff, on demand, shall, by writing

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the sheriff after demand: see *King* v. *Macdonald*, 15 U. C. C. P. 397. The proceeds of an execution may be attached in the sheriff's hands for a debt due by the execution creditor: *Murray* v. *Simpson*, 8 Ir. C. L. R. Ap. xlv.

(*h*) Taken from Eng. Stat. 1 & 2 Vic. cap. 110, s. 12.

(*i*) This is only a reasonable protection to the sheriff See a similar provision in the case of absconding debtors: Con. Stat. U. C. cap. 25, s. 25. The condition of the bond should be as nearly as possible in the very words of the statute.

(*j*) And so, it is apprehended, be ultimately paid by the execution debtor.

(*k*) Taken from Stat. 20 Vic. cap. 57, s. 24.

(*l*) Apparently a warrant of execution from a division court, unlike an execution from a court of record, does not bind the goods from the time of its receipt by the officer, but from the time of levy: *Culloden* v. *McDowell*, 17 U. C. Q. B. 357. This being so, an execution from a court of record, though subsequent in point of time, if there were no levy under it, would prevail against it. The object of the section here annotated is to prevent such an injustice being committed by providing that in the case of rival executions, some from courts of record and some from division courts, priority shall be determined "by the time of the priority of the delivery to be executed of the writ to the sheriff or warrant to the division court bailiff." Now that a seizure of goods under a division court execution (commonly called a warrant) is entitled under the operation of this section to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being already under the division court execution in the custody of the law: *King* v. *Macdonald*, 15 U. C. C. P. 397. *Held*, also, that in the absence of a count for money had and

signed by him or his deputy or a clerk in his office, inform the Bailiff of the precise time of such delivery of the writ, and the Bailiff, on demand, shall shew his warrant to any Sheriff's officer; (*m*) and such writing purporting to be so signed, and the endorsement on the warrant shewing the precise time of the delivery of the same to such Bailiff, shall respectively be sufficient justification to any Bailiff or Sheriff acting thereon. (*n*) 20 Vic. c. 57, s. 24.

NOTICE OF SALE OF LANDS.

Notice of sale of lands in execution.

267. (*o*) Before the sale of real estate upon execution against lands and tenements, the Sheriff shall publish (*p*) an advertisement of sale in the *Canada Gazette*, at least six times, specifying:

First—The particular property to be sold;

Second—The names of the Plaintiff and Defendant;

Third—The time and place of the intended sale;

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received, plaintiff could not recover the surplus money which the sheriff could have seized, in the hands of the division court bailiff, under section 226 of this act, after satisfaction of the prior execution: *Ib.*

(*m*) So that each officer shall know the precise portion of the other in regard to the executions in their several hands.

(*n*) *i. e.* As against execution creditors claiming priority as between the rival executions.

(*o*) Taken from the old King's Bench Act, 2 Geo. IV. cap. 1, s. 20.

(*p*) The omission to do as here directed is only an irregularity, with which a purchaser at sheriff's sale is not to be affected: *Paterson* v. *Todd*, 24 U.C. Q.B. 296. The purchasers title to land sold by the sheriff is *prima facie* good when the sale is made upon a legal writ and the debtor is in possession at the time of sale: *Doe d. Boulton* v. *Fergusson*, 5 U. C. Q. B. 515. A defendant seeking to defeat the title on the ground of a defect in the proceedings anterior to the writ, must show clearly and conclusively that there was such a defect: *Ib.* The title is not liable to be defeated by irregularity in the proceedings anterior to the judgment: *Ib.* Unless the circumstances are such that the purchasers taking the deed can be said to amount to fraud: *McDonald* v. *Cameron*, 13 Grant, 84. So long as the judgment subsists in full force, it supports the execution, *and the execution supports the sale.* See further R. & H. Dig. "Sheriff's deed," *passim*—"Sheriff's sale"—under which heading 19 cases have been collected: *Ib.* "Title," cases 1, 2, 3, 11, 12, 13, 14, 15 and 16; also to *McDonell* v. *McDonell*, 9 U. C. Q. B. 259; *Doe d. Burnham* v. *Simmonds*, *Ib.* 436; *Doe d. Meyers* v. *Meyers*, *Ib.* 465; *Doe d. Elmsley et ux.* v. *McKenzie*, *Ib.* 559; *In re Campbell and Ruttan*, 10 U. C. Q. B. 641; *Burnham* v. *Daly*, 11 U. C. Q. B. 211; *Shenston* v. *Baker*, 12 U. C. Q. B. 175; *Reaume et al* v. *Guichard*, 13 U. C. Q. B. 275; *Stroud* v. *Kane*, *Ib.* 459; *Doe d. Mills* v. *Kelly*, 2 U. C. C. P. 1; *Douglass* v. *Bradford*, 3 U. C. C. P. 459.

and he shall, for three months next preceding the sale, also publish such advertisement in a public newspaper of the County in which the lands lie, or shall for three months put up and continue a notice of such sale in the office of the Clerk of the Peace, or on the door of the Court House or place in which the Court of General Quarter Sessions for such County is usually holden; (*q*) but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day. (*r*) 2 Geo. IV. c. 1, s. 20.

Notice in *Gazette* shall constitute incipient execution.

268. (*s*) The advertisement in the Official Gazette of any lands for sale under a Writ of Execution, during the currency of the Writ, (*t*) (giving some reasonably definite description of

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(*q*) The advertisement must be two-fold:

1. In the *Canada Gazette* "at least six times."

2. In a public newspaper of the county in which the lands lie, "for three months next preceding the sale; or shall for three months put up and continue a notice of such sale in the office of the clerk of the peace, or on the door of the court house or place in which the court of general quarter sessions for such county is usually holden."

Where an advertisement to the correctness of which no objection was pointed out was inserted in a local newspaper for three months before the day appointed for sale (27th August, 1864), and a notice incorrect in some particulars inserted in the *Canada Gazette* on 11th June, 1864, and in the four next ensuing weekly numbers of the Gazette; but in the sixth insertion the errors were corrected, all six announcing the sale for 27th August, 1864, and then on 1st October following another advertisement was inserted in the Gazette for the sale of the lands on 12th November, 1864 (not purporting to be a postponed sale) and this was published on the five succeeding weekly numbers, but there was no advertisement for 12th November, 1864, in the local newspaper, the statute was held not to have been sufficiently complied with: *Paterson* v. *Todd*, 24 U. C. Q. B. 299. The statute requires the sheriff to specify in the advertisement "the particular property to be sold." It is no compliance with this enactment to name, not the property to be sold, but a whole block, lot, or half lot, when the defendant is only entitled to an easily distinguished portion of such block, lot, or half lot: *McDonald* v. *Cameron*, 13 Grant, 92, *per* Mowat, V. C.

(*r*) *Quære.* Is it necessary that there should be any advertisement of "an adjourned sale:" see *Paterson* v. *Todd*, 24 U. C. Q. B. 296.

(*s*) This section is in its terms restricted to executions against lands.

(*t*) Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what has been commenced while it was in force: *Doe d. Greenshields* v. *Garrow*, 5 U. C. Q. B. 237. There must be some act done amounting in law and fact to an incipient step in the execution of the writ: *Doe d. Miller* v. *Tiffany*, *Ib.* 90, *per* Macaulay, J. The mere receipt of the writ by the sheriff while in office will not be a sufficient inception of execution: *Ib.* There must be something to connect the process with the land: *Ib.* It was made a question before this act whether an advertisement in the official *Gazette* was a sufficient step: *Ib.* It is now enacted that such an advertisement giving some reasonable description of the land shall be sufficient.

the land in such advertisement,) (*u*) shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the Writ has become returnable. (*v*) 19 Vic. c. 43, s. 188.

(*u*) See preceding section and notes thereto.

(*v*) Where there has been an inception of execution before the expiration of the writ, the sheriff may do all things necessary to its completion, notwithstanding its expiration. But if the sheriff go out of office during the currency of the writ and before sale, his successor must execute the conveyance: Section 269. If the sale take place before he go out of office, he and not his successor is the proper person to execute the conveyance: *Ib.* In case of the death, resignation, or removal of any sheriff, or of any deputy sheriff while there is no sheriff, after he has made a sale of lands, but before he has made the deed of conveyance of the same to the purchaser, and whether such sale was under an execution or for arrears of taxes, the deed or conveyance shall be made to the purchaser by the sheriff, or by the deputy sheriff, who may be in office acting as sheriff as aforesaid, at the time when the deed or conveyance is made: 27 & 28 Vic. cap. 28, s. 43. Upon the separation of any junior county from any senior county, or upon the dissolution of any union of counties, the powers, functions and jurisdiction of the sheriff of the senior county over and within the junior county shall remain unimpaired in respect of any writ of mesne or final process in any civil suit or cause in his hands for service or execution at the time of such separation or dissolution, and in respect of any renewal of any such writ, and of any subsequent or supplementary writ of the same nature in the same suit or cause: *Ib.* s. 44. In case a sheriff dies, resigns his office and his resignation is accepted, or is removed therefrom, the deputy sheriff by him appointed shall nevertheless continue the office of sheriff, and execute the same and all things belonging thereto in the name of the sheriff so dying, resigning or being removed, until another sheriff has been appointed and sworn into office; and the said deputy sheriff shall be answerable for the execution of the said office in all respects and to all intents and purposes whatsoever, during such interval as the sheriff so dying, resigning or having been removed, would by law have been, if he had been living or continuing in office, and the security given to the sheriff so deceased, resigning or being removed, by his said deputy sheriff, and his pledges, as well as the security given by the said sheriff under this act, shall remain and be a security to the Queen, her heirs and successors, and to all persons whatsoever for the due and faithful performance of the duties of his office during such interval by the said deputy sheriff: *Ib.* s. 47. Upon the removal of any sheriff from his office, or upon his resignation of the same, and upon the appointment of his successors, the out-going sheriff shall, and in the event of the death of any sheriff the deputy sheriff shall forthwith make out and deliver to the new or incoming sheriff a true and correct list and account, under his hand, of all prisoners in his custody, and of all writs and process in his hands not wholly executed by him, with all such particulars as shall be necessary to explain to the said incoming sheriff the several matters intended to be transferred to him, and shall thereupon hand over and transfer to the care and custody of the said incoming sheriff, all such prisoners, writs and process, and all records, books, and matters appertaining to the said office of sheriff; and the said incoming sheriff shall thereupon sign and deliver a duplicate of such list and account to the sheriff going out of office, or to the deputy sheriff where the previous sheriff has deceased, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned, and transferred to the incoming sheriff, and from the further charge of the execution of the writs, process and other matter therein contained,

If Sheriff leaves office, his successor to execute Writs against lands.

269. (*a*) If the Sheriff goes out of office (*b*) during the currency of any Writ of Execution against lands, and before the sale, (*c*) such Writ shall be executed and the sale and conveyance of the lands be made by his successor in office, and not by the old Sheriff; (*d*) but any Sheriff may, after he has gone out of office, execute any Deed or Conveyance necessary to effectuate and complete a sale of lands made by him while in office. (*e*) 19 Vic. c. 43, s. 187.

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without any writ of discharge or other writ whatsoever, and the said incoming sheriff shall thereupon stand and be charged with the said prisoners, and also with the execution and care of the said writs, process, and other matters contained in the said list and account, as fully and effectually as if the same writs and process had been handed over by indenture and schedule; and in case any such outgoing sheriff, or in the case of the death of the former sheriff, any such deputy sheriff shall refuse or neglect to make out, sign and deliver such list and account as aforesaid, and to hand over the process aforesaid in manner aforesaid, every such sheriff or deputy sheriff so neglecting and refusing shall be liable to make such satisfaction by damages and costs to the party aggrieved, as he, she, or they shall sustain by such neglect or refusal: *Ib.* s. 49.

(*a*) This and the following section appear to have been enacted in order to remove doubts upon points concerning which when first enacted there was no very decided opinion in the courts: see *Doe d. Campbell* v. *Hamilton*, 6 O. S. 88; *Doe d. Young* v. *Smith*, 1 U. C. Q. B. 195; *Doe d. Miller* v. *Tiffany*, 5 U. C. Q. B. 79.

(*b*) *Qu.* Is a sheriff to be deemed in office until the appointment of his successor or until he has been in a formal and legal manner discharged from the office? see *Ross et al* v. *McMartin*, 7 U. C. Q. B. 179. A writ of *fi. fa.* was delivered to the sheriff on 21st November, 1847, returnable in Hiliary Term, 1848. On 9th December, 1847, the sheriff tendered to the government his resignation of office. On 14th of same month it was notified to him that his resignation had been accepted, but his successor was not appointed till after the return of the writ, which had been made in the interval. The deputy sheriff, who remained in the office to wind up the old business, made his return to the writ. In an action against the ex-sheriff for a false return it was held under the particular circumstances of the case, that the ex-sheriff must be considered as in office at the return of the writ and liable upon the return made: *Ib.*; see also *Kent* v. *Mercer*, 12 U. C. C. P. 30.

(*c*) It is well to notice that this section is restricted to executions against lands: see *Miller* v. *Stitt*, 17 U. C. C. P. 559. It is said that where a sheriff has made a seizure under a *fi. fa.* against goods, he may complete the execution although he has in the meantime gone out of office: *Clerk* v. *Withers*, 6 Mod. 290.

(*d*) It matters not whether there has or has not been an inception of execution so long as no sale has taken place, in which case the successor in office is the proper person to sell and convey the land seized.

(*e*) The latter part of this section is implied in the former, though to avoid question it is well that it should be substantively expressed. If a *sale* has taken place the conveyance shall be made by the sheriff who effected the sale, whether he continue to be sheriff or has resigned that office. This is supposing him to be still living. If after sale and before conveyance he die, his deputy may continue in office and execute all things pertaining to it in the name of the deceased: Con.

POUNDAGE.

Sheriff's poundage.

270. (*f*) Upon any execution against the person, lands or goods, the Sheriff may, in addition to the sum recovered by the judgment, levy the poundage fees, expenses of the execution, (*g*) and interest upon the amount so recovered

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Stat. U. C. cap. 38, s. 14. But the power of the deputy ceases upon the appointment of a new sheriff: *Doe d. Campbell* v. *Hamilton*, 6 O. S. 88; see further note *v* to section 268.

(*f*) Taken from our old King's Bench Act, 2 Geo. IV. cap. 1, s. 19, as amended by Statute of Canada 9 Vic. cap. 56, s. 3.

(*g*) The right to poundage does not exist at common law: *Yates* v. *Meehan*, 11 Ir. C. L. R. App. 1. The sheriff's sole claim to fees is based on positive enactment: *Buchanan et al* v. *Frank*, 15 U. C. C. P. 196. The English statute 29 Eliz. cap. 4, as to poundage, is not in force here: *Marris* v. *Boulton*, 2 Cham. R. 60. The first statute we had on the subject was the 49 Geo. III. cap. 4, which enacted "That from and after the passing of this act, in every action in which the plaintiff or plaintiffs shall be entitled to levy under an execution against *the goods* of any defendant or defendants, *such plaintiff or plaintiffs* may also levy the poundage fees and expenses of the execution over and above the sum recovered by the judgment: sec. 3. Next we had 2 Geo. IV. cap. 1, which enacted "That it shall and may be lawful in any execution against *the person, lands or goods* of any debtor or debtors for the sheriff to levy the poundage fees and the expense of the said execution over and above the sum recovered by the judgment, together with legal interest, &c.:" sec. 19. Then 7 Wm. IV. cap. 3, reciting that where writs of execution issued in several districts, upon which writs property real or personal may have been seized or advertised, which property has afterwards not been sold on account of satisfaction having been otherwise obtained or from some other cause, it has been doubted whether a claim to poundage might not be advanced by the sheriff of each of such districts respectively, although no money was actually levied by them under the writ enacted "That where upon *any* writ of execution sued out against the estate, real or personal, of the defendant or defendants, no money shall be actually levied, no poundage shall be allowed to the sheriff; but he shall be allowed his fees for the services which may be actually rendered by him; and it shall be in the power of the court from whence such execution shall have issued, or for any judge thereof in vacation, to allow a reasonable charge to the sheriff for any service rendered in respect to such execution for which no specific fee or allowance may be assigned in the table of costs:" sec. 32. The 9 Vic. cap. 56, s. 2, re-enacted the 7 Wm. IV. cap. 3, s. 32, with the introduction of the word "such" after the word "*any*" above italicised, and further enacted "That the sheriff shall not be entitled to poundage on any execution against goods and chattels (except in cases where the full amount shall be collected by him) on a greater sum than the value of the property actually seized by him under any writ of execution whatever be the sum mentioned or endorsed upon such writ:" sec. 3. The courts passed a rule in H. T. 10 Vic. fixing the amount of poundage which a sheriff was entitled to receive on the "amount *levied and made*," and afterwards fixed the poundage on the amount "made." These are the statutes which the legislature is supposed to have consolidated in this and the section which follows it. How the same has been accomplished may be seen in note *k* to the next section. The first act (49 Geo. III. cap. 4) gave poundage only on executions against goods and chattels, but did not enable the sheriff to levy it, leaving the settlement of it between him and the execution creditor, who in his turn was enabled to recover it from the execution debtor. The second act (2 Geo. IV. cap. 1) extended the

from the time of entering the judgment. (*h*) 2 Geo. IV. c. 1, s. 19; 9 Vic. c. 56, s. 3. *See* 19 Vic. c. 90, s. 24, *and Tariff of Fees, 18th July*, 1857.

In what cases Sheriffs entitled to poundage.

271. (*i*) 1. In case a part only be made by the Sheriff on, or by force of any execution against goods and chattels, the Sheriff shall be entitled, besides his fees and expenses of execution, to poundage only upon the amount so made by him whatever be the sum endorsed upon the Writ, (*j*) and in case the personal estate, except chattels real, of the defendant or defendants be seized or advertised on, or under an execution, but not by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually made by the Sheriff on, or by force of such execution, the Sheriff shall be entiled to the fees and expenses of execution and poundage only on the value of the property seized not exceeding the amount indorsed on the Writ or such less sum as a Judge of the Court out of which the Writ issued may deem reasona-

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right to poundage to executions against lands and the person, and gave to the sheriff the right, without reference to the plaintiff, to levy his poundage in addition to his other fees. The third act (7 Wm. IV. cap. 3) provided simply for the case of concurrent writs, and in no manner altered the law in regard to an execution in the hands of one sheriff only, but as its enacting part was supposed to go beyond its preamble in regard to the writs intended, all doubt was removed by the fourth act: 9 Vic. cap. 56. It was at a very early period made a question whether the sheriff was entitled to poundage on a *fi. fa.* where after advertisement for sale the parties compromised, and the court declined to determine so important a question on a summary application without appeal: *Gates et al* v. *Crooks*, 3 O.S. 286; and in a subsequent case, an action having been brought, Macaulay, J. intimated that the sheriff having seized had so far levied as to entitle himself to poundage whether the parties compromised or not: *Leeming et al* v. *Hagerman*, 5 O.S. 43; and this view of the law was afterwards sustained by Burns, J.: *Morris et al* v. *Boulton*, 2 Cham. R. 66, 67, 70. The full court next so ruled on an execution against the person: *Corbet* v. *McKenzie*, 6 U. C. Q. B. 605; and in order that no distinction should exist in this respect between writs of *ca. sa.* and *fi. fa.* the same rule was applied to the latter writs: *Thomas* v. *Cotton*, 12 U. C. Q. B. 148; see also *Brown* v. *Johnson*, 5 U. C. L. J. 17. Where the writ was set aside for irregularity so that no money was made, the sheriff was held not entitled to *any* poundage: *Walker* v. *Fairfield*, 8 U. C. C. P. 95.

(*h*) This is a re-enactment of the latter part of section 19 of 2 Geo. IV. cap. 1, mentioned in previous note.

(*i*) This section is sec. 4 of Stat. Ont. 31 Vic. cap. 24, which repealed sec. 271 of this Act as it formerly read, and gave the section above in substitution thereof.

(*j*) A re-enactment of 9 Vic. cap. 56, s. 3: see note *g* to section 270. "A needless enactment, as this has always been the law:" *Buchanan et al* v. *Frank*, 15 U. C. C. P. 199, *per* Adam Wilson, J.

When Sheriffs entitled to mileage and fees only.

ble under the circumstances of the case; (*k*) Provided, also, in case of Writs of Execution upon the same Judgment to several Counties wherein the personal estate of the Judgment debtor or debtors, has been seized or advertised, but not sold by reason of satisfaction having been obtained under or by virtue of a Writ in some other County, and no money has been actually made on such execution, the Sheriff shall not be entitled to poundage, but to mileage and fees only for the services actually rendered and performed by him, and the Court out of which the Writ issued or any Judge thereof, may allow him a reasonable charge for such services, in case no special fee therefor be assigned on any table of costs. (*l*)

(*k*) It was held on the construction of the old section, for which this is a substitution, that the sheriff was not entitled to poundage unless he actually levied and made the money: *Buchanan et al* v. *Frank*, 15 U. C. C. P. 196; *Grant* v. *The Corporation of the City of Hamilton*, 2 U. C. L. J. N. S. 262. In *Buchanan* v. *Frank*, 15 U. C. C. P. 199, Adam Wilson, J., speaking of the section as it formerly read, said: "It is of no practical value to follow this further, and to say that the present reading of the law has probably arisen from an unintentional oversight in the work of consolidating, for we must accept the law as it stands. If it were not an intentional alteration, the legisiature will no doubt, if it be thought expedient, amend the law." The section as it now reads is amended as suggested it should be by the learned judge. Poundage is now given though the money be not actually made by the sheriff where personal estate is seized but not sold, by reason of satisfaction having been otherwise obtained. A sheriff's officer went with a warrant to the defendant's premises for the purpose of levying under a *fi. fa.*, and, without saying or doing any thing more, produced the warrant and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest. *Held* that this did not amount to such a levy as to entitle the sheriff to poundage: *Nash* v. *Dickenson*, L. R. 2 C. P. 252. Where on a sale of goods producing in gross $846, the expenses amounted to $106, the court expressed great surprise, believing that such a charge would not be found justified by the tariff and the proper practice under it: *Michie et al* v. *Reynolds et al*, 24 U. C. Q. B. 303. The sheriff is not entitled to any compensation for seizing and remaining in possession of the goods of a stranger to the writ: *Cole* v. *Terry*, 5 L. T. N. S. 347. The sheriff cannot maintain an action against the execution debtor for his poundage: *Thomas* v. *The Great Western Railway Co.* 24 U. C. Q. B. 326. Under the statute 29 Eliz. cap. 4, the sheriff might maintain debt against the plaintiff in an execution for his poundage. The statute 43 Geo. III. cap. 46, gave the right to the plaintiff, who was entitled to levy under an execution against the goods of any defendant, the right to levy the poundage, fees and expenses of the execution, over and above the sum recovered by the judgment. This statute has not taken away the sheriff's right of action for poundage against the plaintiff in the execution. Before the last mentioned statute the sheriff used to levy the debt recovered by the judgment, and satisfy himself out of it for the poundage, and pay over the residue. The statute gives a boon to the plaintiff in the action, who is entitled to levy under an execution against the goods of the defendant the poundage, fees and expenses of the execution, over and above the sum recovered by the judgment: *Ib.*

(*l*) This is in effect a re-enactment of our old Stat. 7 Wm. IV. cap. 3, s. 32, which was repealed and re-enacted by the Stat. 9 Vic. cap. 56, s. 1: see note *g* to

2. In case any person liable on any execution shall be dissatisfied as to the amount of poundage fees and expenses of execution that any Sheriff may claim under the Tariff of Fees and allowances now in force, or under this Act, he may before or after payment thereof, apply to the Court out of which such Writ issued, or to any Judge thereof, and if, upon a statement of the whole facts, the said Court or Judge, after notice to the Sheriff, is of opinion that such amount is unreasonable, notwithstanding it may be according to the Tariff, or this Act, the same shall be reduced or ordered to be refunded upon such terms as to costs or otherwise, as the Court or Judge may think fit to impose. (*m*)

If party dissatisfied he may apply to the Court, who may reduce the amount.

WRITS OF CAPIAS AD SATISFACIENDUM.

272. (*mm*) Every Writ of *Capias ad Satisfaciendum* shall be tested and bear the date the day on which it issues, (*n*) and

Teste and date of writs of *Ca. Sa.*

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sec. 270. The costs of concurrent writs ought not to be disallowed unless issued oppressively or for the mere purpose of making additional costs: see *McKellar* v. *Grant*, 3 U. C. L. J. 14.

(*m*) Upon the settlement of an execution, either in whole or in part, by payment, levy or otherwise, the sheriff or officer claiming any fees, poundage, incidental expenses or remuneration, which shall not have been taxed, shall, upon being required by either plaintiff or defendant, or the attorney of either party, and on payment or tender of the expenses of such taxation, and the further sum of twenty-five cents for the copy of his bill in detail, which he shall be bound to render, have his fees, poundage, incidental expenses or remuneration, as the case may be, taxed by the clerk or the deputy clerk of the crown of the county wherein such sheriff shall keep his office: 27 & 28 Vic. cap. 28, s. 39. No sheriff shall collect any fees, costs, poundage or incidental expenses, after having been required to have the same taxed, without taxation, and upon tender of the amount taxed, no fees, costs, poundage or incidental expenses in respect of proceedings subsequently taken, shall be allowed to any sheriff: *Ib.* s. 40. It shall be the duty of every taxing officer referred to in the act, to tax the bills of costs presented to him for taxation, as therein required, upon payment or tender of his fees, and to give, when requested, a certificate of such taxation and the amount thereof: *Ib.* s. 41. It shall be the duty of every taxing officer authorized to tax costs, upon proof of notice of the time and place of such taxation having been served upon the sheriff, deputy sheriff, or other officer charged with the execution of the writ, to examine the bills presented to him for taxation, as herein required, whether such taxation be opposed or not, and to be satisfied that the items charged in such bill are correct and legal, and to strike out all charges for services which, in his opinion, were not necessary to be performed; Provided always, that either party dissatisfied with the taxation may appeal to the court, or to a judge of the court, in which the proceedings may be taken, for a revision of such taxation, as in ordinary cases: *Ib.* s. 42.

(*mm*) Apparently original.

(*n*) See notes to section 11.

shall continue in force two months from the day of the date thereof inclusive and no longer, (*o*) and no such writ shall be renewed, (*p*) but on the expiration thereof a new Judge's order may be obtained in the manner directed by the twelfth section of the Act respecting arrest and imprisonment for debt. (*q*)

If to fix bail.

273. (*r*) Writs of Execution to fix bail may be tested and returnable in vacation. (*s*) 19 Vic. c. 43, s. 192.

(*o*) The day of the teste is inclusive: *The Bank of Montreal* v. *Taylor*, 15 U. C. C. P. 107.

(*p*) Writs of *ca. sa.* are especially excepted from the operation of section 249 as to the renewal of writs of execution.

(*q*) See s. 12 of Con. Stat. U. C. cap. 24.

(*r*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 90.

(*s*) The writ of execution to fix bail is usually a *ca. sa.* It is little more than a mere form, and is chiefly designed to intimate to the bail by what species of execution plaintiff intends to proceed: *Hunt* v. *Coxe*, 3 Burr. 1360. Leaving it in the sheriff's office is notice to the bail that the plaintiff will proceed against the *person* of their principal. The *ca. sa.* should lie four days in the sheriff's office: *Anon.* 2 Salk. 599; *Cock* v. *Brockhurst et al*, 13 East. 588; *Furnell* v. *Smith et al*, 7 B. & C. 693; *Wilson* v. *Farr*, 4 B. & Al. 537; *Scott* v. *Larkin*, 7 Bing. 109. If any of the four days be a *dies non* it will not be reckoned: *Howard* v. *Smith*, 1 B. & Al. 528; *Goodwin* v. *Sugar*, 2 Chit. 192; *Armitage* v. *Rigby et al*, 5 A. & E. 76. Within the four days the bail may surrender their principal: *Beattie* v. *McKay et al*, 2 Cham. R. 56. The writ of *ca. sa.* must be sued out, and, it seems, returned before process can be had against the bail: *Thackray* v. *Harris*, 1 B. & Al. 212. It is incumbent on the bail to search in the sheriff's office as to whether any *ca. sa.* was left there or not: *Hunt* v. *Coxe*, 3 Burr. 1360. Though in strict practice the writ should be sued out, returned and filed before the commencement of proceedings against bail, it seems that if the writ be filed before replication to a plea by the bail of no *ca. sa.* it will be sufficient: *Ib.*; see also *Rawlinson et al* v. *Gunston*, 6 T. R. 284. The *want* of a *ca. sa.* is not a mere irregularity, but a matter of substance of which the bail can only take advantage by plea: *Philpot* v. *Manuel*, 5 D. & R. 615. It is useless to sue out the writ after render of the principal: *Saunderson et al* v. *Parker*, 9 Dowl. P. C. 495. The writ when sued out should be tested on the day of issue: section 272. It was held that proceedings to outlawry could not be founded on a *ca. sa.* "returnable immediately after the execution thereof:" see *Levy* v. *Hamer*, 5 Ex. 518. It has been held if defendant consent that plaintiff shall have judgment as of a term previous to the trial, the *ca. sa.* may be tested as of the previous term: *Hovenden* v. *Crawther*, 1 Dowl. P. C. 170. Notwithstanding the provisions of section 247, it is apprehended that the *ca. sa.* must be directed to the sheriff of the county in which the venue is laid: see *Laporte's Bail*, 4 Dowl. P. C. 639. Between the teste and return it was at one time held that a period of fifteen days was requisite: *Ferrie* v. *Mingay*, M. T. 5 Vic. *MS.* R. & H. Dig. "Bail," iii. 11. But since 12 Vic. c. 63, and under that statute, it has been held that eight days were sufficient: *Beattie* v. *McKay et al*, 2 Cham. R. 65. If the teste be irregular the writ may be set aside on motion: *Gawler* v. *Jolley*, 1 H. Bl. 74; *Laporte's Bail*, 4 Dowl. P. C. 639.

On what authority Sheriffs may discharge debtors from custody.

274. (*t*) A written order under the hand of the Attorney in the cause by whom any Writ of *Capias ad Satisfaciendum* has been issued, shall justify the Sheriff, Gaoler or person in whose custody the party may be under such writ, in discharging such party, (*u*) unless the party for whom such Attorney professes to act has given written notice to the contrary to such Sheriff, Gaoler or person in whose custody the opposite party may be, (*v*) but such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor, (*w*) and nothing herein contained shall justify any

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(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 126. Founded upon the first report of the Common Law Commissioners, section 79.

(*u*) The authority of an attorney in general determines with the judgment: *Tipping* v. *Johnson*, 3 B. & P. 357; *Searson* v. *Small*, 5 U. C. Q. B. 259; but he may issue execution and receive the money, in which case his receipt will be the same as that of his client: *Savory* v. *Chapman*, 11 A. & E. 836, *per* Littledale, J.; *Brock* v. *McLean*, Tay. Rep. 398; *Stocking* v. *Cameron*, M. T. 6 Vic. *MS.* R. & H. Dig. "Escape," 26. The intent of the writ of *ca. sa.* is that the defendant shall continue in custody until the plaintiff is satisfied his debt: *Crozer* v. *Pilling et al*, 4 B. & C. 32. But after judgment an attorney has no right as against the plantiff to settle the action on any other terms than payment of debt and costs: see *Butler* v. *Knight*, L. R. 2 Ex. 109; see also *Hemming* v. *Hale et al*, 7 C. B. N.S. 487; *Hamilton et al* v. *Holcomb*, 13 U. C. C. P. 9. The sheriff should not discharge a debtor from custody on a *ca. sa.* without payment of debt and costs: *Savory* v. *Chapman*, 11 A. & E. 829; *Woods* v. *Finnis et al*, 7 Ex. 363. Without receipt of the money or an express authority from the client, an attorney before this act had no power to discharge from custody a defendant arrested under a *ca. sa.* The authority of the attorney was only to receive the money in satisfaction of the debt: *Connop* v. *Challis*, 2 Ex. 484. He had no authority, upon receipt of part and security for the balance, to discharge the debtor: *Ib.* Though as to executions against goods he had under such circumstances full authority to order the sheriff to withdraw from possession: *Levi* v. *Abbott*, 4 Ex. 588. His authority as between him and the sheriff, both as regards executions against goods and the person, are by this act placed much upon the same footing.

(*v*) The sheriff is allowed to presume that an attorney professing to act for his client has authority to do so. This is a presumption which may be disproved by written notice to the contrary from the client. By such, notice when given, the sheriff must be governed at his peril.

(*w*) The mere *taking* of the person in execution does not operate as an extinguishment of the debt: *Ward* v. *Bromhead et al*, 21 L. J. Ex. 216; *The National Assurance and Investment Association* v. *Best*, 2 H. & N. 605; *Thompson et al* v. *Parish*, 5 C. B. N.S. 685 The discharge of the debtor before this act, whether rightfully or wrongfully, if by order of the attorney, was considered a satisfaction of the debt: see *Hamilton et al* v. *Holcomb*, 12 U. C. C. P. 38; s. c. in appeal, 9 U. C. L. J. 235. The client thereby lost all claim as against the debtor, and was compelled to fall back upon the sheriff or look to his attorney for damages. Now it is enacted that the discharge shall not be a satisfaction of the debt "unless made by authority of the creditor." This means that if the attorney without authority discharge the debtor, the creditor may still hold the debtor responsible.

Attorney in giving such order for discharge without the consent of his client. (*x*) 19 Vic. c. 43, s. 191.

RULES TO RETURN WRITS, AND DUTY OF SHERIFFS AND CORONERS THEREON.

Deputy Clerks of the Crown and County Court Clerks may issue rules to return writs, &c.

275. (*a*) Every Deputy Clerk of the Crown and Pleas, and in County Courts the Clerk, may sign and issue rules on any Sheriff or Coroner to return writs and process issued out of the office of such Deputy or County Court Clerk and directed to such Sheriff or Coroner; (*b*) and each Sheriff or

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The matter of fact whether the discharge was effected by authority of the creditor or not is a proper question for a jury: *Ward* v. *Broomhead et al*, 7 Ex. 726. Defendant, if sued upon the judgment after being discharged, may plead the fact of discharge as a defence: *Vigers* v. *Aldrich*, 4 Burr. 2482.

(*x*) A consent in writing is advisable though not indispensable. The act is for the protection of the sheriff, who is not in general bound to go behind his authority, valid on its face, to make inquiries as to its sufficiency in point of law or fact: see *Lloyd* v. *Harrison*, L. R. 1 Q. B. 502; *Hargreaves et al* v. *Armitage*, L. R. 4 Q. B. 143. The authority of the attorney, as between him and his client, is not altered by this act. If the attorney give orders to the sheriff when unauthorized, he will be liable to his client for the consequences. The measure of damages in such case, where the action is not in debt, would be "the value of the custody of the debtor at the moment of the escape, without deduction for anything that plaintiff might have obtained by diligence after the escape:" see *Arden* v. *Goodacre*, 11 C. B. 371; *Hemming* v. *Hale et al*, 29 L. J. C. P. 137; *Kinjan et al* v. *Hall*, 24 U. C. Q. B. 248; *Kinlock* v. *Hall*, 25 U. C. Q. B. 141; *Macrae* v. *Clarke*, L. R. 1 C. P. 403.

(*a*) This section resembles the repealed enactment 8 Vic. cap. 36, s. 9. It was as follows: "That it shall and may be lawful for each and every deputy clerk of the crown to issue rules upon the sheriff, coroners, or elisors of his district, for the return of any writs of mesne or final process to him directed, in the same manner as may now be done in the principal office." The new practice authorizes the deputy clerk not only to issue, but to *sign* the rules; yet restricts his authority to writs and process "issued out of the office of such deputy."

(*b*) The party entitled to a return of a writ may make a demand in writing, in which case it is made the duty of the sheriff to return the writ within eight days: Stat. 27 & 28 Vic. cap. 28, s. 34. If the sheriff wilfully neglect or refuse so to do, he is liable to be ruled to return the writ: *Ib.* The rule for the return of process may issue in vacation: *McGowan* v. *Gilchrist*, H. T. 7 Vic. P. C. *MS.* R. & H. Dig. "Sheriff," ii. 1 *a*, *per* McLean, J. It should be a six days' rule: *Hilton et al* v. *Macdonell et al*, 1 Cham. R. 207. *Sed qu.* see *Clark* v. *Galbraith*, 10 U. C. L. J. 296. As to computation of time: *Regina* v. *Jarvis*, 3 U. C. Q. B. 125. At the time of service the original rule should be shown to sheriff: *Hilton et al* v. *Macdonell*, 1 Cham. R. 207. Personal service is in some cases dispensed with: see note *e* to section 276. If he do not return the writ within the time limited by the rule, the court will impose the costs of the rule upon him: *McGowan* v. *Gilchrist*, H. T. 8 Vic. P. C. *MS.* R. & H. Dig. "Sheriff," ii. 1 *a*; *The Bank of Upper Canada* v. *Macfarlane et al*, 4 U. C. Q. B. 396. In every case in which the sheriff neglects or refuses to return any writ after demand in writing under the statute 27 & 28 Vic. cap. 28, he is made subject to pay the costs of any order or rule taken out to compel such return, and all other costs consequent thereon, as well as the costs

Coroner shall, in case of his being served with any such rule, return such writs to the office from which the same issued. (*c*) 19 Vic. c. 43, s. 14.

Sheriff not entitled to fees on Writs unless returned in 4 days after being ruled if delivered 15 days before such ruling.

276. (*d*) In case a Writ delivered to a Sheriff for service or execution has remained in his hands fifteen days, and in case he has not been delayed from returning the same by an order in writing from the party from whom he received the Writ, his attorney or agent, and in case he be afterwards ruled to return such Writ, (*e*) he shall not be entitled to any

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of the demand: section 36. It is no sufficient ground for opposing a rule for an attachment for not returning a writ against goods that there is a question pending before the court as to the title to the goods: *Stull* v. *McLeod*, 1 U. C. Q. B. 402. Where the rule served was for an attachment, because the sheriff had not brought up the body under his return of *cepi corpus*, *held* that it was a good answer to such rule that the defendant was arrested under the *ca. sa.* and placed in close custody, and was afterwards admitted to the limits, and that he had not since been confined to close custody by any process whatever: *White* v. *Petch et al*, 7 U. C. Q. B. 1.

(*c*) The sheriff or coroner, upon being served with the rule, is to return the writ to the office "from which the same issued." It was, under the old practice, held that a rule to return a *fieri facias* could not be issued out of the office of a deputy clerk—as the writ itself did not issue out of that office: *Anon.* Dra. Rep. 246. A sheriff having been ruled to return a writ without stating to what office, and it appearing that the writ had been issued from the office of a deputy clerk, to which office the sheriff might have returned it, the court refused an attachment against him, on an affidavit that the writ had not been returned to the crown office at Toronto: *Scott* v. *Benson*, 1 Prac. R. 32.

(*d*) Taken from 3 Wm. IV. cap. 8, s. 18.

(*e*) This enactment in effect provides—

1. That in certain cases the sheriff may be ruled to return writs.

2. That when he is so ruled he shall not be entitled to any fees thereon, *unless* he, within *four* days after being so ruled, returns or encloses the writ by post to the party, his attorney or agent.

Now N. G. pr. 101 provides that "all rules upon sheriffs to return writs or bring in the bodies of defendants shall be four day rules." It is difficult to see how the statute and the rule of court can be made to operate harmoniously or beneficially unless by providing in one rule on the sheriff for the two purposes of loss of fees and contempt—the first by a default after four days, the latter by a default after six days: *Clark* v. *Galbraith*, 10 U. C. L. J. 296.

It is provided by a recent statute that—In all cases when the party who delivered any writ of process to any sheriff to be executed, shall, by himself or by his attorney, or by the agent of such attorney, require, by a demand in writing, the sheriff to return such writ, either to the party or to his attorney or attorney's agent, or to the court from which the process issued, and whether such requisition be made before or after the return day of such writ or process, or before or after the service or other execution thereof the sheriff shall within eight days, inclusive of the day of the service of the requisition, return such writ or process according to the terms of the requisition to the party, or to the attorney, or to the agent of the attorney, or to the court; and

fees thereon, unless, within four days after being so ruled, he returns or encloses the Writ by post to such party, his attorney or agent. 3 Wm. IV. c. 8, s. 18.

When mileage not allowed on service of *mesne* process unless served by Sheriff.

277. (*f*) In the taxation of costs no fees shall be allowed for the mileage or service of Writs of Summons or other *mesne* process (*g*) unless served and sworn in the affidavit of service to have been served by the Sheriff, his Deputy or Bailiff, being a literate person (or by a Coroner when the Sheriff is a party to the suit,) nor unless a return of the Sheriff or Coroner (*as the case may be*) be endorsed thereon except in cases as provided in the eighteenth section of this Act. (*h*) 19 Vic. c. 43, s. 32; 20 Vic. c. 57, s. 28.

When Sheriffs liable to costs for not returning Writs.

278. (*i*) In case at any time after the proper day for the return of any Writ, or for the performance of any other duty or matter relating to the office of Sheriff or Coroner, application be made for a rule, or a rule be granted on him by any Court, for the return of the Writ or performance of the duty or matter, (*j*) he shall, unless the Court or a Judge other-

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in case the sheriff wilfully refuses or neglects to do so, he shall be liable to be ruled to return such writ or process, and to be further proceeded against as in other cases of contumacy to orders or rules of court: 27 & 28 Vic. cap. 28, s. 34. In all cases when the party to the writ or process, who did not deliver the same to the sheriff to be executed, is entitled, according to the practice of the court, to call for a return of the writ or process; he may proceed in like manner to procure such return, as is above provided in the case of parties who have delivered the writ or process to the sheriff for execution: *Ib.* s. 35. In no case in which a personal service on the sheriff of any rule or other proceeding has heretofore been required, shall such personal service be necessary, if it appears by affidavit that enquiry was made for the sheriff, and that he could not conveniently be found, to make such personal service upon, but full and sufficient service shall be deemed to have been made upon such sheriff by serving the deputy sheriff of such sheriff, if such deputy sheriff can be conveniently found to make such service upon; and if such deputy sheriff cannot conveniently be found, then such service may be made upon the sheriff's clerk, or upon any bailiff of the sheriff who may for the time be present in, or have charge of, the sheriff's office: *Ib.* s. 37.

(*f*) Taken from C. L. P. Act, 1856, s. 32, as consolidated with C. L. P. Act, 1857, s. 28.

(*g*) Only applicable to service of process. Therefore does not affect service of notices, &c.

(*h*) *i. e.* After sheriff has had the process for fifteen days and neglected to serve it: see section 18.

(*i*) Taken from repealed statute 3 Wm. IV. cap. 8, s. 17.

(*j*) In every case in which the sheriff neglects or refuses to return any writ or process, when called upon in accordance with 27 & 28 Vic. cap. 28, he is bound to

wise orders, (*k*) pay to the party making the application or obtaining the rule, all taxable costs thereon. (*l*) 3 Wm. IV. c. 8, s. 17.

If application frivolous, may be allowed costs.

279. (*m*) In case it appears to the Court or a Judge that the application for a rule is frivolous or vexatious, the Court or Judge may, on discharging the application, order that the Sheriff or Coroner shall be paid all taxable costs and expenses of opposing the same. (*n*) 3 Wm. IV. c. 8, s. 17.

Attachments for non-return of Writs may be issued unless further time for return granted.

280. (*o*) In case a writ be issued out of any Court of Record directed to a Sheriff or Coroner and be delivered to him for execution, and in case such Sheriff or Coroner be ordered to return the same by any rule or order of the Court out of which the writ issued, and does not make such return within the time specified in the order, any Judge having jurisdiction in the matter may grant to the Plaintiff or Defendant in the writ (*as the case may be*) a summons upon the Sheriff or Coroner to shew cause why a Writ of Attachment should not issue against him; (*p*) and the same or any other

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pay the costs of any order or rule taken out to compel such return, and of all the other costs consequent thereon, and also the costs of the previous requisition to make the return: see further note *b* to section 275.

(*k*) See section 285.

(*l*) Not so extensive in its terms or in its operation as the enactment to which reference is made in the previous note.

(*m*) Taken from repealed statute 3 Wm. IV. cap. 8, s. 17.

(*n*) It is enacted by 27 & 28 Vic. cap. 38, that in case the court, or any judge of the court from which the writ, process or rule issued, is of opinion that the proceedings against the sheriff are frivolous or vexatious, such court or judge may specially order that no costs shall be paid by such sheriff, or may specially order that costs shall be paid to the sheriff by the party taking such proceedings as therein mentioned: section 38.

(*o*) Taken from repealed Stat. 7 Vic. cap. 33, s. 1.

(*p*) It has been said that personal service of a summons for an attachment, without showing the original, is sufficient: *Lilton et al* v. *Macdonell et al*, 1 Cham. R. 207. The summons should name the sheriff, instead of calling upon him by designation of his office: *Ib.* In no case in which a personal service on the sheriff was heretofore required is such personal service now necessary, if it appear by affidavit that enquiry was made for the sheriff and that he could not conveniently be found for the purpose of personal service: 27 & 28 Vic. cap. 28, s. 37. In such case service may be made on the deputy sheriff: *Ib.* If the deputy cannot be conveniently found, then service may be effected upon the sheriff's clerk, or upon any bailiff of the sheriff who may for the time be present in or have charge of the sheriff's office: *Ib.* An attachment was granted against a sheriff

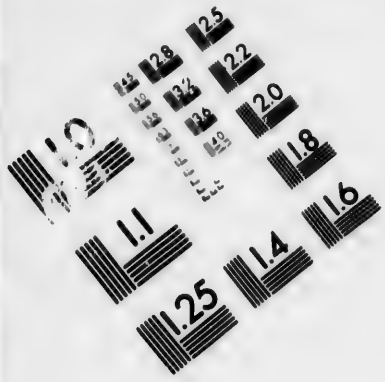
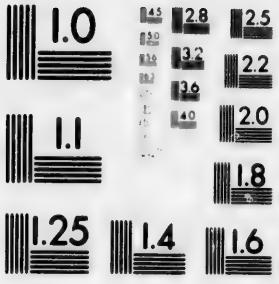
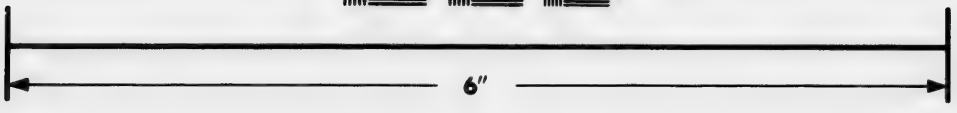


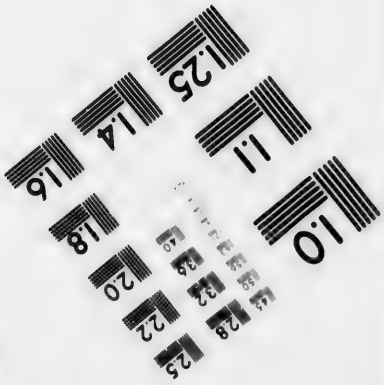


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Judge having such jurisdiction may, at the return of the summons, discharge the same, or order a Writ of Attachment to issue against the Sheriff or Coroner, or limit a further

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who was a member of parliament, for not returning a writ, pursuant to order, served upon him: *Bell* v. *Buchanan*, M. T. 1 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 7. Before the passing of Stat. 7 Vic. cap. 33, it was held that a judge in chambers had no power to grant an attachment: *Rex* v. *Sheriff of Niagara*, Dra. Rep. 343. It is undecided whether, since that statute, a judge in chambers has power to pass judgment upon a sheriff for contempt, when the object of the statute has been attained by the return of the writ: *Regina* v. *Jarvis*, 6 U.C. Q.B. 558; but see section 282. Where the sheriff returned the writ to the crown office, but it was not filed, because the postage was unpaid, and the plaintiff, with notice of these facts, obtained an attachment upon the usual affidavit that the writ "was not on the files," the court set the attachment aside: *Regina* v. *Moodie*, 1 U. C. Q. B. 410. Though the proceedings were characterized by the court "as sharp and harsh," the sheriff was made to pay the costs, because, in order to make his return effectual, he was bound to pay the postage: *Ib.* Where the writ was enclosed to the clerk of the crown, three or four days after the expiration of the rule, so that it was not on the files when the [illegible] was made, but was produced in open court by the clerk, an attachment was refused, though asked, for the purpose of making the sheriff pay the costs: *Regina* v. *Robertson et al*, 3 O. S. 304. A sheriff having been ruled to return a writ of *fi. fa.* without stating to what office it was to be returned, and it appeared that the writ had been issued from the office of a deputy clerk of the crown, an attachment was refused, the only affidavit being that he had not returned the writ to the crown office in Toronto: *Scott* v. *Benson*, 1 Prac. R. 32. A sheriff cannot be attached for non-payment of the costs of a rule to return a writ under this statute, unless there has been a rule specially calling upon him to do so: *Marcy* v. *Butler*, H. T. 2 Vic. *MS. Doe d. McGregor* v. *Grant*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 11. A party who ruled a sheriff, and afterwards gave an order to stay proceedings for a certain time, held not entitled after that time (the writ not having been returned), to proceed by attachment under his rule: *Bergin* v. *Hamilton*, M. T. 2 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 2. Where after the delivery of a writ against lands to the sheriff, the plaintiff and defendant agreed to compromise, and after a delay of more than two years, the compromise was not effected, and the plaintiff obtained a rule for an attachment against the sheriff, the rule was set aside: *Crooks* v. *O'Grady*, 1 U. C. Q. B. 400. Attachment refused when applied for more than a year after the issue of the rule: *Loucks* v. *Farrard*, 4 O. S. 5. An attachment will not be granted for not returning a writ, pursuant to rule issued on the same day that the writ was returnable: *Regina* v. *Hamilton*, E. T. 2 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 13. The sheriff cannot be regularly served with a rule to return a writ until the return day is past: *Regina* v. *Jarvis*, 3 U. C. Q. B. 125. If an attachment issue on such a rule, the proper course is to set aside the attachment and not the rule: *Ib.* A rule to return a writ was issued in Trinity Term (June). In July following the writ was in the hands of plaintiff's agent. In August attachment issued. The court set it aside upon payment of costs up to the time the writ was returned: *Rex* v. *Sherwood*, 3 O. S. 305. Where a sheriff had three writs of execution against goods, and, having seized and sold and partly satisfied the first and third writs, a stranger claimed the property; the plaintiff on the second writ refused the sheriff indemnity, and he did not return his writ; an attachment was issued: *Land* v. *Burn*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 18. An attachment may be granted for an insufficient return: *Smith* v. *Bellows*, H. T. 4 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 19. Where the writ was returned before the attachment issued, though the return was disputed

period after which such Writ of Attachment shall issue unless a return be made in the meantime, or otherwise order, as to such Judge seems proper under the circumstances. (*q*) 7 Vic. c. 33, s. 1.

281. (*r*) In case such writ be not returned at the expiration of any further time limited by the order of the Judge, as mentioned in the last preceding section, and in case the service of such order and the failure of the Sheriff or Coroner to return the writ be proved, the Court in term time, or any Judge having jurisdiction as aforesaid in vacation, may order a Writ of Attachment (*s*) to issue forthwith against the Sheriff or Coroner. 7 Vic. c. 33, s. 2.

If Writ not returned within extended time given by Judge, attachment may issue in term or vacation.

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as false, the sheriff was relieved from the attachment on payment of costs: *The Bank of Upper Canada* v. *Macfarlane et al*, 4 U. C. Q. B. 396. If the return were in fact false, the sheriff would be liable to an action for it: *Ib.* An attachment may issue against a sheriff for returning "goods on hand" to a *venditioni exponas*: *Harper* v. *Powell*, E. T. 2 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 9. Impertinent matter in a return is considered as a contempt in the sheriff: *Jones* v. *Scofield*, Tay. Rep. 441. Attachment refused where the sheriff had been more than six months out of office, before rule issued against him: *Ladd* v. *Burwell et al*, E. T. 3 Vic. *MS.* R. & H. Dig. "Sheriff," ii. 17; *Mott* v. *Gray et al*, 1 U. C. Q. B. 392. Where a return of *cepi corpus* was made, the sheriff ruled to bring in the body, and attached for default, and the attachment set aside for irregularity; but while in existence, defendant having given bail, was discharged by *supersedeas*, the court held a second attachment on a second rule to bring in the body, issued eight months after the setting aside of the first attachment, to be irregular: *Rex* v. *Sheriff of Niagara*, 2 O. S. 126. Second attachment refused until costs of setting aside a former one for irregularity were paid: *Rex* v. *Ruttan*, 5 O. S. 155. The court will sometimes, under special circumstances, relieve a sheriff, by allowing the return of a writ even after a motion has been made to bring in his body on the coroner's return of *cepi corpus*: *Regina* v. *Jarvis*, 1 U. C. Q. B. 415. But relief will only be given on payment of costs: *Rex* v. *The Sheriffs of London*, 2 B. & Al. 192; *Regina* v. *Sheriff of Middlesex*, 3 D. & L. 472.

(*q*) The concluding part of this section vests a wide discretion in the judge to do what is right in view of all the circumstances before him.

(*r*) Taken from repealed Stat. 7 Vic. cap. 33, s. 2.

(*s*) The writ of attachment should be directed to the coroner. If there be several coroners for the same county, great care must be used in directing the attachment. Where coroners are empowered only to act ministerially, as in the execution of process directed to them upon the default or incapacity of the sheriff, all their costs will be void wherein they do not all join: 2 Hawk, P. C. c. 9, s. 45. And although one only executes the writ, it seems the return must be in the name of all: *Ib.* Where there are several coroners, some of whom only are interested, the process must be directed to and executed by the others: Jervis Off. Coroners, 3 ed. 54. If the writ be directed *Coronatoribus*, where there are more than two coroners in the county, and after the writ issue one coroner die, the writ may be executed by the survivors. But if one only survive he can neither execute nor return the writ until the appointment of another coroner: *Ib.* 56. The writ of

Judge in Chambers may order issue of Writs of *Habeas Corpus.*

282. (*t*) Upon the return of "*Cepi Corpus*" to any attachment in vacation, any Judge having jurisdiction as aforesaid may direct the issue of a Writ of "*Habeas Corpus,*" and thereupon may exercise the same powers and discretion in committing the Sheriff or Coroner to close custody, or in admitting him to bail, and in all other respects, as are possessed by the said Courts respectively in Term time. (*u*) 7 Vic. c. 33, s. 3.

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attachment should be personally delivered to the coroner. In order to bring him into contempt, it is not sufficient to deliver it to a clerk in his office: *Fever* v. *Aubin*, 1 H. & W. 332. So where the coroner upon being ruled to bring in the body neglected to do so, an attachment was issued against the coroner: *Andrews* v. *Sharp*, 2 W. Bl. 911; *Rex* v. *Peckham et al*, *Ib.* 1218.

(*t*) Taken from old Stat. 7 Vic. cap. 33, s. 3.

(*u*) If coroner return *cepi corpus* an order may be obtained for a *habeas corpus*, and the same be issued. When the body is brought in, a motion is made that the party be sworn to answer certain interrogatories. He is sworn accordingly, and may then be discharged on bail, being bound to appear and answer the interrogatories when called on. Interrogatories are then drawn up, which contain the charge against the sheriff, after which an appointment is made under which the master examines the sheriff on the interrogatories. A motion, in England, is next made that the examination be referred to the Queen's coroner or master on the crown side, and an appointment obtained and served. Afterwards a motion is made that the master make his report. If the sheriff has cleared himself of his contempt, which he can only do by *bona fide* obeying the rule, he is discharged: *Regina* v. *Weston*, 8 Jur. 1122. But if reported in contempt, the court or judge, after hearing affidavits in mitigation of sentence, and next the affidavits in aggravation, and the counsel of parties respectively, the prosecutor having the reply, sentence is pronounced. The party in contempt may be sentenced to imprisonment, which, however, is no exoneration: *Regina* v. *Hemsworth*, 3 C. B. 745. If he return the writ he will in general be allowed to set aside the attachment on payment of costs, *i. e.* all costs fairly incidental to the suing out of the attachment: *Tyler* v. *Campbell*, 5 Bing. N. C. 192. If he do not return the writ within three months after attachment he will forfeit his office: section 284. On setting aside an attachment against the sheriff for an escape under a *ca. sa.* the court will if necessary direct an issue to ascertain the amount of damages: *Regina* v. *The Sheriff of Leicestershire*, 11 C. B. 367. All affidavits after attachment has issued must be entitled "The Queen v. A. B.:" *Brown* v. *Edwards*, 2 D. & L. 520. The writ may be set aside for irregularity: *Regina* v. *Burgess*, 8 A. & E. 275. Bankruptcy has been held to discharge the party: *Rex* v. *Edwards*, 9 B. & C. 652; *Re Slater*, 28 L. T. Rep. 286. The application must be made in a reasonable time: *Regina* v. *Burgess*, 8 A. & E. 275. A party in contempt being permitted to be at large may be retaken on an alias attachment: *Good* v. *Wilks*, 6 M. & S. 413. Every deputy sheriff, bailiff, or other sheriff's officer or clerk, who may be entrusted with the custody of any writ or process or of any book, paper or document belonging to the sheriff or his office, is required upon demand upon him by such sheriff to restore and return such writ, process, book, paper, or document to the custody of the sheriff, and in case of neglect or refusal may be required, by any order of any court of record in Ontario or of any judge of such court, to return and restore such writ, process, book, paper or document to the sheriff, and be further proceeded against by attachment, as in other cases of contumacy to orders or rules of court: 27 & 28 Vic. cap. 28, s. 32.

Such Writs may be returnable in term or vacation.

283 (*a*) All Writs of Attachment and "*Habeas Corpus*" issued against any Sheriff or Coroner (*b*) may be returnable on a day certain in vacation to be fixed by order of the Judge or Court ordering the same; and such return day shall not be more than thirty days from issuing the writ, (*c*) and when the writ is returnable in vacation, it shall, when issued out of the Superior Courts, be made returnable before the presiding Judge in Chambers, (*d*) and when issued out of any County Court, before the Judge thereof. (*e*) 7 Vic. c. 33, s. 4.

Sheriff or Coroner not returning Writs within three months after attachment executed, to forfeit office.

284. (*f*) Any Sheriff or Coroner who does not return any writ issued out of any of the said Courts within three months after a Writ of Attachment for not returning the same has been executed against him, shall forfeit his office; (*g*) and if he continues after the expiration of such period to exercise the duties of his office without having been duly re-appointed to the same, he shall forfeit and pay the sum of four hundred dollars to any person who sues therefor in any of Her Majesty's Courts of Record having competent jurisdiction; (*h*) but no such suit shall be brought after the expira-

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(*a*) Taken from repealed Stat. 7 Vic. cap. 33, s. 4.

(*b*) See note *s* to section 281, and note *u* to section 282.

(*c*) Apparently excluding the day of issue: see as to computation of time, *Young* v. *Higgin*, 6 M. & W. 49; s. c. 8 Dowl. P. C. 212.

(*d*) Had better be made returnable in the very words of the act, "before the presiding judge in chambers."

(*e*) This means, it is presumed, the senior judge in chambers; where there is a senior and junior judge: see Con. Stat. U. C. cap. 15, s. 4. See Stat. Ont. 33 Vic. cap. 7, s. 14, as to county of York.

(*f*) Taken from repealed Stat. 7 Vic. cap. 33, s. 5.

(*g*) Defendant, Mercer, was appointed sheriff of the county of Norfolk on 9th March, 1858, and gave a bond, with the two other defendants as sureties, covenanting that Mercer as sheriff should pay over all moneys received, by virtue of his office as sheriff. On 19th February, 1859, judgment was given for the crown against him on an information involving a forfeiture of office whereby his office became vacant, but no writ of discharge issued. On 15th March, 1859, a writ of *fi. fa.* was placed in his hands at the suit of the now plaintiff, and on 29th June, 1859, Mercer received the amount indorsed on the writ, but never paid the same to the plaintiff. *Held* that his sureties were liable for moneys received by him *colore officii*: *Kent* v. *Mercer*, 12 U. C. C. P. 30; see further note *i* to this section.

(*h*) *Quære*, could the action be brought in a county court? see *O'Reily qui tam* v. *Allan*, 11 U. C. Q. B. 526; *In re Judge of Elgin*, in a cause of *Medcalfe* v. *Widdifield*, 12 U. C. C. P. 411; *Stinson qui tam* v. *Guess*, 1 L. J. U. C. N.S. 19.

tion of twelve months from the time such forfeiture was incurred. (*i*) 7 Vic. c. 33, s. 5.

Costs of proceedings to enforce return of Writs to be in discretion of Judge.

285. (*j*) The cost of any proceedings to enforce the return of process shall be in the discretion of the court or of the presiding judge, (*k*) who may order them to be paid by the sheriff or coroner, or by either of the parties in the cause. (*l*) 7 Vic. c. 33, s. 6.

Act not to interfere with existing remedies.

286. (*m*) The two hundred and eightieth and following Sections of this Act shall not be construed to interfere with or take away any remedy which existed before the passing thereof (*n*) 7 Vic. c. 33, s. 7.

(*i*) The forfeiture is incurred after the expiration of three months from the writ of attachment for not returning the writ. The action for the penalty must under this section be brought within twelve months from the expiration of that period. Calendar months are intended: Con. Stat. U. C. cap. 2, s. 13. A sheriff who wilfully makes a false return upon a writ or warrant of execution directed to him and placed in his hands for execution, unless by consent of both the parties to the same, is liable to forfeit his office: 27 & 28 Vic. cap. 28, s. 26. If any bailiff or constable entrusted with the execution of any writ, warrant or process, mesne or final, wilfully misconducts himself in the execution of the same, or wilfully makes any false return to such writ, warrant or process, unless by the consent of the party in whose favor the process may have issued, such bailiff or constable is guilty of a misdemeanor: *Ib.* s. 31. Besides he is liable to answer in damages to any party aggrieved by the misconduct or false return: *Ib.* Although a sheriff may have forfeited his office, and become liable to be removed therefrom by reason of his not having complied with the provisions of the 27 & 28 Vic. cap. , he nevertheless continues in office to all intents and purposes, and the liability of himself and his sureties remains until a new sheriff has been appointed and sworn into office: *Ib.* s. 28; see also note *g* to this section.

(*j*) Taken from repealed Stat. 7 Vic. cap. 33, s. 6.

(*k*) In every case in which the sheriff neglects or refuses to return any writ or process when so called upon under 27 & 28 Vic. cap. 28, he is bound to pay the costs of any order or rule taken out to compel such return, and of all other costs consequent thereon, and also the costs of the previous requisition to make the return: 27 & 28 Vic. cap. 28, s. 36; see also sections 278 and 279 of this act.

(*l*) The enactments referred to in the previous note and this section apparently conflict. But it is presumed that the judge, in the exercise of the discretion conferred by this section, will so act as to prevent a conflict in fact: see *Clark* v. *Galbraith*, 10 U. C. L. J. 296.

(*m*) Taken from the repealed Stat. 7 Vic. cap. 33, s. 7.

(*n*) Attachment is not the only remedy for non-return of a writ by a sheriff whose duty it is to do so. Loss of fees may also follow: section 276. Besides the sheriff may be held liable to an action for misconduct, whether wilful or inadvertent, and whether of himself, his deputy, or one of his bailiffs: see *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Peshall* v. *Layton*, *Ib.* 712; *Sturmy qui tam* v. *Smith*, 11 East. 25; *Crowder et al* v. *Long*, 8 B. & C. 598; *Raphael et al* v. *Goodman*, 8 A. & E. 565; *Searfe* v. *Halifax*, 7 M. & W. 288; *Wood* v. *Finnis et al*, 21 L. J. Ex. 138.

EXAMINATION OF DEBTORS—ATTACHMENT OF DEBTS.

Examination of a judgment debtor as to what debts are due to him.

287. (*o*) Any creditor who has obtained a judgment (*p*) is either of the Superior Courts (*q*) may apply to the Court or a Judge thereof (*r*) for a rule or order that the judgment debtor shall be orally examined by the Judge of any County Court or before any Clerk or Deputy Clerk of the Crown, or before any other person to be specially named, as to any and what debts are owing to him, (*s*) and the Court or Judge may make such rule or order for the examination of the Judgment debtor, (*t*) and for the production of any books or

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(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 60. Founded upon the second report of the Common Law Commissioners, section 43. Inapplicable in the case of proceedings carried on against an absconding debtor: see section 289.

(*p*) An executor who has neither revived the judgment obtained by his testator nor entered a suggestion upon the roll in pursuance of section 302 of this act, is not a judgment creditor within the meaning of the act: *Baynard* v. *Simmons*, 1 Jur. N.S. 657; s. c. 5 El. & B. 59. Nor is a plaintiff in ejectment: *Challen* v. *Baker*, 26 L. T. Rep. 206. Nor is the Queen: *Regina* v. *Benson*, 2 Prac. R. 350. A party to an interpleader who has obtained an order for costs is a creditor within the act: *Hartley* v. *Shemwell*, 1 B. & S. 1. But an order of the court of chancery for the payment of money is not a judgment within the meaning of this section: *The Financial Corporation, Limited*, v. *Price*, L. R. 4 C. P. 155.

(*q*) If a creditor having obtained a judgment in one of the superior courts of common law afterwards sue upon it in an inferior court, and obtain judgment upon it in the inferior court, he will not be in a position to avail himself of this section: *Jones* v. *Jenner*, 2 Jur. N. S. 574.

(*r*) "Judge *thereof*." The introduction of the word "thereof" here may have the effect of restricting the application to a judge of the court in which the judgment was recovered. There was no such word in the C. L. P. Act 1856. Nor is there in the English act from which it is taken. As to the relative powers of the court and judge see note *w* to section 48.

(*s*) The subject matter of the examination will be "debts owing," as to which see note *j* to next section. A judgment debtor who is an executor is within the clause: *Burton* v. *Roberts*, 6 H. & N. 93. Payment may be enforced notwithstanding decree for administration made subsequent to the order for attachment: *Fowler* v. *Roberts*, 2 Giff. 226. There is no way of orally examining a corporation but through its directors or officers; and as this section contains no provision for such an examination, no such examination can be had: *Dickson* v. *The Neath and Brecon R. Co.* 19 L. T. N.S. 702; see also *Cameron* v. *Brantford Gas Co.* 2 U. C. L. J. 209.

(*t*) The first case in this Province under this section proceeded by summons and order: *Brown* v. *Benniger*, 2 U. C. L. J. 212; but see *Connor* v. *McBride*, *Ib* 232. It does not seem necessary, if the application be merely to obtain an oral examination of defendant under this section, that the affidavit should show debts due: *Nimmo* v. *Welland*, 2 U. C. L. J. 213. Plaintiff is enabled under this section to discover debts, and having discovered them, is entitled under section 288 to take proceedings to have them attached. Care ought

documents, (*u*) and the examination shall be conducted in the same manner, as in case of an oral examination of an opposite party, (*v*) and in the case of a judgment in any County Court, such County Court or the Judge or acting Judge thereof may exercise similar jurisdiction in relation to such judgment, and in like manner as might be exercised by one of the Superior Courts sitting in Banc. (*w*) 19 Vic. c. 90, s. 17; 19 Vic. c. 43, s. 193.

Judge may on application and

288. (*a*) Upon the *ex parte* application of such Judgment creditor, (*b*) either before or after such oral examina-

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to be taken to distinguish between this and the following section, the one being merely auxiliary to the other. As a matter of prudence a party applying under either section should, whenever able to do so, state not only that judgment has been recovered and is unsatisfied, but that efforts have been made to collect the money by execution without success. Where an application was made for an *ex parte* order upon affidavit that "plaintiff had recovered a judgment against defendant, and that such judgment was wholly unsatisfied," *per* Richards, J.: "Your affidavit should show that some attempt has been made to make the money by execution. I will not grant an order in the first instance, but if you think your grounds sufficient you may take a summons:" *Irvine* v. *Mercer et al*, Chambers, December 8, 1856; upheld in *Smith* v. *McGill*, 3 U. C. L. J. 134. And in a later case an order in the first instance was refused, though it was shown that execution had been issued and returned *nulla bona*, the judge being of opinion that "the parties should have an opportunity of showing why they should not be examined:" *Carter* v. *Cary et al*, Chambers, December 9, 1856, *per* Richards, J.; and this now is the settled practice. The order under section 288, it is expressly declared, may be obtained upon the *ex parte* application of the judgment creditor. Service of the order upon the wife of the party without showing that it came to his knowledge is not sufficient to entitle his opponent to move for an attachment: *Mason* v. *Muggeridge*, 18 C. B. 642; but service at the defendant's usual place of business, plaintiff being unable to discover his place of abode, was held sufficient: *Bird* v. *Wretton*, 30 L. T. Rep. 258: s. c. 6 W. R. 211. An attachment for disobedience of the order cannot be granted by a judge in vacation: *Greene et al* v. *Wood*, 3 U. C. L. J. 115. An order for the oral examination of a judgment debtor may be granted, though that debtor has been arrested on final process at the suit of the judgment creditor: *Brown* v. *Benniger*, 2 U. C. L. J. 213.

(*u*) As to which see section 189 and notes thereto.

(*v*) As to which see section 192 and notes thereto. Questions as well as answers had better both appear on the face of the examination: *McInnes* v. *Hardy*, 7 U. C. L. J. 295.

(*w*) The jurisdiction of county court as to examination of judgment debtors and attachment of debts is the same as the jurisdiction of the superior courts.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 61. Inapplicable in the case of proceedings carried on against an absconding debtor: see section 289.

(*b*) See note *p* to section 287. The order is *ex parte* and absolute in the first instance: see *McCann* v. *Bowers*, 2 Ir. Jur. N. S. 379; *Bergin* v. *Bennett*, *Ib.* 380.

tion, (*c*) and upon his affidavit or that of his attorney, (*d*) stating that Judgment has been recovered and that it is still unsatisfied, (*dd*) and to what amount, and that some third person (*e*) is indebted to the Judgment debtor (*f*) and is

affidavit, order attachment of such debts.

(*c*) It is presumed that a party applying under this section is in possession of information as to debts owing to his judgment debtor. That information may have been obtained either from the debtor himself upon his examination under the preceding section, or in some manner independently of that section. The more satisfactory mode is to proceed under it with a view to an application under this section. A debt due to a judgment debtor who is dead cannot be attached without reviving the judgment against his personal representatives: *The Commercial Bank* v. *Williams*, 5 U. C. L. J. 66. Where plaintiff applied under this section for an *ex parte* order to attach debts after having proceeded under the preceding section (287), his application was granted upon an affidavit of the facts: *Macpherson et al* v. *Kerr*, Chambers, December 10, 1856, *per* Richards, J. The affidavit, which was that of plaintiff's attorney, was as follows: 1. That on, &c. defendant was orally examined before the judge of the county court of the county of Simcoe, in pursuance of an order bearing date, &c. 2. That defendant upon such examination swore that one A. B. was indebted to him in the sum of, &c. and that said A. B. resides within the jurisdiction of this court, &c.: *Ib.*

(*d*) "*Or* that of his attorney." The words used are in the disjunctive, and in this particular differ from the words "*and* of his attorney or agent," used in section 191. An affidavit of the agent of the attorney is not sufficient under this section: *Tiffany* v. *Boulton*, 18 U. C. C. P. 91; *Boyd et al* v. *Haynes*, 5 Prac. R. 15.

(*dd*) A judgment creditor who has taken his debtor in execution under a *ca. sa.* will not be allowed to attach debts: *Jauralde* v. *Parker*, 6 H. & N. 431. The arrest of the garnishee under a *ca. sa.* does not extinguish his debt so as to prevent it being attached under this section: *Hartley* v. *Shemwell*, 1 B. & S. 1: and although the debtor after arrest was discharged under a bankrupt act: *In re Halahan* v. *Worman*, 11 W. R. 10.

(*e*) A judgment creditor cannot attach a debt due by himself or by a firm of which he is a partner: *Nonell* v. *Hullett et al*, 4 B. & Al. 646. An order upon executors to pay a simple contract debt pursuant to an attaching order was refused on the ground that the executors might be liable on specialty debts of their testator, after satisfaction of which they might have no assets, and before satisfaction of which they ought not to be ordered to pay a simple contract debt: *Ward* v. *Vance*, 10 U. C. L. J. 269. If the garnishee die after the attaching order, the court has no power to permit a suggestion of the death of the garnishee so as to legalize execution against his executors or administrators: s. c. *Ib.* 189. A debt due to an administrator in his representative capacity cannot be attached to answer a debt due by him in his private capacity: *Bowman* v. *Bowman*, *Ib.* 301.

(*f*) "*Is indebted to.*" The affidavit, which must be that of the plaintiff or his attorney, should in general be positive as to the indebtedness of the third party or garnishee, more particularly as under the operation of the preceding section materials for a positive affidavit may be discovered: *The Cataraqui Road Co* v. *Dunn*, 3 U. C. L. J. 27; *Hazlewood* v. *De Bergue et al*, *Ib.* 28, *per* McLean, J.; *Boyd et al* v. *Haynes*, 5 Prac. R. 15; though there may be circumstances under which an affidavit of belief would be sufficient: *Jones* v. *De Bergue et al*, *Ib.* 31; *McLaren et al* v. *Sudworth et al*, 4 U. C. L. J. 233. The affidavit should disclose the nature and character of the debt: *Wilson et al* v. *The Corporation of the United Counties of Huron and Bruce*, 8 U. C. L. J. 136, *per* Draper, C. J. It would be well also that the amount should, if possible, be stated in the affidavit: *Meldrum* v. *Tulloch*,

within the jurisdiction, (*g*) a Judge of any of the said Courts (*as the case may be*) (*h*) may order (*i*) that all debts owing (*j*) by or accruing from such third person to the Judgment debtor

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3 U. C. L. J. 184. But this is a matter in the discretion of the judge, and if he grant it the order will not be set aside: *Tiffany* v. *Bullen*, 18 U. C. C. P. 91.

(*g*) If the garnishee, though residing out of the jurisdiction, have money in the hands of an agent within the jurisdiction, such money may be attached under this section, provided plaintiff plainly show that there is such an agent in addition to the ordinary contents of the affidavit: *Brown* v. *Merrills*, 3 U. C. L. J. 31. The law is different in the case of a foreign corporation: *Lundy* v. *Dickson*, 6 U. C. L. J. 92.

(*h*) The court will not in the first instance in term time entertain the application: *Dunbar* v. *Russell*, 2 Ir. Jur. N. S. 234; see further *Delahunt* v. *Bennett*, *Ib.* 459; *Murphy* v. *Bennett*, 7 Ir. C. L. R. 9.

(*i*) The application is not one of right, but in the discretion of the judge. Where the judgment creditor sued the judgment debtor in an inferior court on the judgment in the superior court, and obtained an order for payment by instalments, some of which had been paid, the court refused an attaching order under this section although the judgment was "unsatisfied:" *Jones* v. *Jenner*, 25 L. J. Ex. 319.

(*j*) The preceding section empowers the court or a judge to make an order for the oral examination of a judgment debtor as to "debts owing to him." And this section empowers a judge to make an order attaching "all debts owing or accruing from" the garnishee. The subject matter to be attached is a *debt*. It may be stated as a general rule that if the execution debtor could sue the garnishee in an action to recover the debt an order to attach may be made: *Jones* v. *Jenner*, 25 L. J. Ex. 319; see also *Miller* v. *Mynn et al*, 1 E. & E. 1075; *McDowall* v. *Hollister*, 25 L. T. Rep. 185; *Geraghty* v. *Sharkey*, 30 L. T. Rep. 201; *Smith* v. *The Trust and Loan Co.* 22 U. C. Q. B. 525; *Webster* v. *Webster et al*, 6 L. T. N.S. 13. The recovery of a judgment on a debt attachable prior to such judgment being recovered does not render the debt less attachable: *McKay* v. *Tait et al*, 11 U. C. C. P. 72. A debt means something due: *Geraghty* v. *Sharkey*, 30 L. T. Rep. 204. The order should when made be strictly regular: *Cooper* v. *Brayne*, 27 L. J. Ex. 446. The penalty of a bond is not such a debt as can be attached: *Griswold* v. *The Buffalo, Brantford and Goderich R. Co.* 3 U. C. L. J. 115; *Johnson* v. *Diamond*, 11 Ex. 73. It would seem that a liability which cannot be set off as a debt cannot be attached as a debt: *McNaughton* v. *Webster*, 6 U. C. L. J. 17. An unliquidated demand is not a debt: *Gwynne* v. *Rees*, 2 Prac. R. 282; *Johnson* v. *Diamond*, 11 Ex. 73; *Bank of Toronto* v. *Burton*, 4 Prac. R. 56. But there may be a debt of unascertained amount: *Daniel* v. *McCarthy*, 7 Ir. C. L. R. 261. The superannuated allowance granted by the East India Company to a retired servant by mere resolution is rather a gratuity than a debt: *Innes* v. *The East India Co.* 17 C. B. 351. But contra as to the pension, distinguished from half pay, of a retired Indian officer: *Dent* v. *Dent*, L. R. 1 P. & D. 366. A legacy, though the executor promise to pay it, is not attachable: *Macdowall* v. *Hollister*, 3 C. L. Rep. 933. An unsettled balance of account due by one partner to another cannot be attached: *Campbell* v. *Peden et al*, 3 U. C. L. J. 68; *McCormick* v. *Park et al*, 9 U. C. C. P. 330. But where the debt is not a partnership one it may be attached: *Bescoby et al* v. *Hamilton Water Commissioners*, *Ib.* 81. Money due in respect of savings bank annuities to the wife of the judgment debtor cannot be attached: *Dingley* v. *Robinson*, 26 L. J. Ex. 55. Nor a sum of money paid into court: *Jones et al* v. *Brown*, 29 L. T. Rep. 79; *French* v. *Lewis*

shall be attached to answer the Judgment. 19 Vic. c. 90, s. 17; 19 Vic. c. 43, s. 194.

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et al, 16 U. C. Q. B. 547. Nor money in the hands of a receiver of the court of Chancery: *Ames* v. *The Trustees of the Birkenhead Docks*, 20 Beav. 332; *Nixon* v. *Loghlin*, 7 Ir. Jur. N.S. 367. Nor a dividend payable in bankruptcy: *Boyse* v. *Simpson*, 8 Ir. C. L. R. 523; *Gilmour* v. *Simpson*, *Ib.* Ap. xxxviii; *Dawson* v. *Malley*, Ir. L. R. 1 Ex. 207; *The Commercial Bank* v. *Williams*, 5 U. C. L. J. 66. But the proceeds of an execution in the hands of a sheriff may be attached: *Murray* v. *Simpson*, 8 Ir. C. L. R. Ap. xlv.; *In re Smart* v. *Miller*, 3 Prac. R. 385. Money in a sheriff's hands levied under an attachment for costs awarded by a decree in equity, held not liable to be attached: *Williams* v. *Reeves*, 12 Ir. Ch. R. 173. Money in the hands of the assignee of an insolvent estate cannot be attached by the assignee for his own debt after the dismissal of the petition of insolvency: *Johnstone* v. *Fenix*, 3 Ir. Jur. N. S. 67. A verdict in an action for unliquidated damages cannot be attached before judgment: *Jones* v. *Thompson*, 1 E. B. & E. 63; *Dresser* v. *Jones*, 6 C. B. N.S. 429; *Boyd et al* v. *Haynes*, 5 Prac. R. 15; *Gwynne* v. *Rees*, 2 Prac. R. 282. Where the sum attempted to be garnished was money awarded to the judgment debtor, of which, according to the affidavit of one of the arbitrators, a certain sum was for work done under a contract and the remainder for damages he had sustained by having had the work taken out of his hands, *held* that as this latter portion did not become a debt until award made, only attaching orders coming in after the award would bind it: *Tate and the Corporation of the City of Toronto*, 10 U. C. L. J. 66.

The section is applicable to funds in the hands of a corporation or company: *Salaman* v. *Donovan*, 10 Ir. C. L. R. Ap. xiii. So to funds in the hands of the special manager of a company in course of liquidation: *Ex parte Turner*, 3 L. T. N.S. 389; s. c. 2 DeG. F. & J. 354; but see *De Winton* v. *Mayor, &c., of Brecon*, 28 Beav. 200. The proceeds of the sale of the commission of an officer in the army liable while in the hands of the army agents may be attached: *Power* v. *Kenny*, 2 L. T. N. S. 93. Rent due may be attached: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259; *Leake* v. *Noble*, 6 Ir. C. L. R. 510; *Costello* v. *Nesbitt*, 2 Ir. Jur. N.S. 378. Contra if rent not due: *McLaren et al* v. *Sudworth et al*, 4 U. C. L. J. 253; *The Commercial Bank* v. *Jarvis et al*, 5 U. C. L. J. 66. Nor can the salary of a municipal officer who holds his office at will at an annual salary payable quarterly be attached before some part of it is due: *Shanley* v. *Moore*, 9 U. C. L. J. 264. A debt due by the garnishee to a person who is a trustee of it for the judgment debtor cannot be attached: *Boyd et al* v. *Haynes*, 5 Prac. R. 15. There must be a legal debt due by a legal debtor to a legal creditor: *Ib.* The remedy by attachment of debts is only given in cases where the whole proceeding is in the common law courts: *The Financial Corporation Limited* v. *Price*, L. R. 4 C. P. 155. Equity will not give the judgment creditor the remedy which he has at law: *Horsley* v. *Cox*, L. R. 4 Ch. 92. Nor extend the legal remedy: *Gilbert* v. *Jarvis*, 16 Grant, 265; *Blake* v. *Jarvis*, *Ib.* 295. The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent for land is not in equity liable to be seized or attached, at all events before the amount is determined by decree or otherwise: *Roberts* v. *The Corporation of the City of Toronto*, *Ib.* 236. The surplus money in favor of the mortgagor arising out of a sale of the mortgaged premises may be attached at law: *McKay* v. *Mitchell*, 6 U. C. L. J. 61. Debts due or to fall due on negotiable paper not attachable: see *Mellish* v. *The Buffalo, Brantford and Goderich R. Co.* 3 U. C. L. J. 108. Moneys paid by the owners of land sold for taxes within one year from the day of sale as redemption money to the county treasurer, for the use and benefit of the purchasers and banked in the name of the county treasurer, cannot be attached at the instance of the creditor of the corporation of the county as a debt due by the bank to the corporation: *Wilson et al* v. *The Corporation of the United Counties of*

Huron and Bruce, 8 U. C. L. J. 135. But it is not *every* debt due to a judgment debtor that can be attached. The debt may be attended with circumstances that would prevent the judgment creditor from enforcing its immediate payment, and where such is the case it is not a debt of the nature contemplated by this act: *Kennett* v. *Westminster Improvement Commissioners*, 11 Ex. 349. A public body (incorporated by act of parliament) borrowed money from time to time on their bonds, some of which had a preference over others, and eventually a general mortgage of their lands was given on the occasion of fresh advances by one class of bondholders, whose security was inferior to that of another class, whereby and by an act confirming the same, all the bondholders were to be paid *pari passu: held* that one of such bondholders having recovered judgment by default against the corporation could not attach a debt due to it from a builder for money advanced under the power of their acts, as the garnishee clauses only apply to personal debts, over which the judgment debtor has complete control: *Ib.* The act, though it gives a power of execution against property not before subject to it, does not in any way affect the priority of charges so as to alter the rights of third parties: *Ames* v. *The Trustees of the Birkenhead Docks*, 1 Jur. N. S. 529. An act incorporating a dock company authorised the trustees, for the purpose of constructing and maintaining the docks, to raise money by mortgage of the rates and tolls. The mortgagees were to have no share in the management nor any priority among themselves. The trustees were empowered to enter into contracts, but they were not to be personally liable, and execution was to issue only against the goods and chattels belonging to them, *virtute officii*. A judgment creditor obtained an order *nisi* to attach, in the hands of the garnishees, rates and tolls due by them to the company. Before this order was made absolute an order for the appointment of the chairman of the trustees receiver of the rates and tolls was obtained by consent, in a suit instituted by the mortgagees in equity. *Held*, first, that the mortgagees of the rates and tolls had priority over a judgment creditor; secondly, that the garnishee clauses of the C. L. P. Act did not affect the priority of the charges; thirdly, that if the mortgagees were not in possession, by their receiver, a judgment creditor might take the tolls in execution under the C. L. P. Act, but that the mortgagees, by entering into possession, might stop further execution: *Ib.* Equitable debts are apparently not within the section: *Clark* v. *Perry*, 26 L. T. Rep. 46; *Boyd et al* v. *Haynes*, 5 Prac. R. 15; but see *Alden* v. *Boomer et al*, 2 Prac. R. 339. A judgment creditor obtained an order under the C. L. P. Act attaching all debts owing from the garnishee to the judgment debtor, and a second order directing the garnishee to pay to the judgment creditor the debt due from him (the garnishee) to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt. At the time of these orders the garnishee was indebted to the judgment debtor in respect of, amongst other matters, certain costs in equity to an amount not then ascertained. *Held* that this debt was not affected by the orders obtained under the garnishee enactments: *Clark* v. *Perry*, 26 L. T. Rep. 46. But debts *in præsenti* with a *solvendum in futuro* may be attached: *Harding* v. *Barratt*, 3 U. C. L. J. 31. The order in such a case will be for the payment of the debts by the garnishee to the judgment creditor so soon as the period of credit has expired: *Ib.* The mere possibility that when the day of payment arrives there may be a defence is no ground for refusing the order: *Sparks* v. *Younge*, 8 Ir. C. L. R. 251. The order to *attach* may be allowed to stand though the court discharge the order for *payment: Ib.* On an application for an order upon a garnishee to pay over to the judgment creditor the amount of an acceptance due by him to the judgment debtor, it was held necessary for the applicant to show that the acceptance was at the time of the application under the control of the judgment debtor: *Mellish et al* v. *The Buffalo, Brantford and Goderich R. Co.* 2 L. J. U. C. 230, *per* Hagarty, J. It is doubtful whether the liability of an endorser on a current note of which the judgment debtor is holder, is, while

the note is current, such a debt as can be attached under this act: see *Lewin* v. *Edwards*, 9 M. & W. 720; also *Powell* v. *Ansell*, 3 Scott, N. R. 444. Debts equitably belonging to another cannot be attached, thus debts already assigned by the judgment debtor are not attachable: *Hirsch et al* v. *Coates*, 18 C. B. 757; *Arthur* v. *Clough et al*, 17 U. C. Q. B. 302; *Clark* v. *Clark*, 8 U. C. L. J. 107; *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240; *Webster* v. *Webster*, 31 Beav. 393. It was at one time supposed, on the authority of *Watts et ux.* v. *Porter*, 3 El. & B. 743, that the debt could be attached notwithstanding the assignment or equitable charge, provided there was no notice of the assignment or charge given to the garnishee at the time of the attaching order. But the authority of that case was much shaken in *Beavan* v. *Lord Oxford*, 6 DeG. M. & G. 507; *Kinderley* v. *Jervis*, 22 Beav. 1; and *Pickering et al* v. *The Ilfracombe Railway Co.* L. R. 3 C. P. 235. And it is now held that no notice to the garnishee is necessary to constitute a good assignment as against the attaching order: *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264. But if the garnishee in good faith, and without notice of the assignment, pay the debt to the judgment debtor, he is to be protected: *Cooper* v. *Brayne*, 3 H. & N. 972; *Wood et al* v. *Dunn*, L. R. 2 Q. B. 73. If the garnishee having notice of the assignment of the debt before the time for showing cause has elapsed, he is bound to show the assignment as cause, and in default of doing so may be compelled to pay the debt a second time: *Ib.*; see further note *p* to section 289. Where the assignee not only neglected to give the garnishee notice of the assignment, but his attorney stood by while an attaching order was being made, and the garnishee paid the debt to the judgment creditor, the court relieved the garnishee from proceedings taken by the assignee in the name of the judgment debtor: *In re Jones ex parte Kelly*, 7 U. C. C. P. 149. Where the debt is claimed by a third party as assignee, there is no power in this Province to direct an interpleader issue between such third person and the judgment creditor to try the validity of the alleged assignment: *Kerr et al* v. *Fullarton et al*, 8 U. C. L. J. 222; *McNaughton* v. *Webster*, 6 U. C. L. J. 17: *Chapman et al* v. *Shepherd et al*, 8 U. C. L. J. 275. An assignment after service of the attaching order is no answer: *Worthington* v. *Peden et al*, 8 U. C. L. J. 48. An assignee of the debt has no *status* before the court: *Rittinger* v. *McDougall*, 10 U. C. C. P. 395. Where the debt is attachable it is in general superior to the lien of an attorney in respect of costs due to him from the judgment debtor: *Hough* v. *Edwards*, 1 H. & N. 171; *The Queen* v. *Benson*, 2 Prac. R. 350; *Bank of Upper Canada* v. *Wallace*, 2 Prac. R. 352. But it is only right that where a fund has been recovered by the exertions of the party claiming a lien, that he should have his reward out of the fruit of his exertions: *Sympson* v. *Prothero*, 26 L. J. Ch. 673, *per* Wood, V. C. Attorneys who had given notice of their lien were held entitled to priority over attaching creditors in the distribution of a fund recovered by their exertions: *Ib.* 671. The plaintiff having obtained a decree for payment by the defendant of a sum of money and costs, the defendant paid part of the sum to certain judgment creditors of the plaintiff under the authority of two garnishee orders. The plaintiff's attorney had a lien for his costs at the time the garnishee orders were made, but no notice had been given to them previous to the application for the garnishee orders, nor was the existence of the lien mentioned to the judge who made the order. *Held* that the payment under the garnishee orders was not, under the circumstances, a satisfaction of the judgment of the court: *The Leader*, L. R. 2 A. & E. 314. But where a judgment creditor received from the garnishee the amount of his claim, with notice of the lien or rather equitable right of the attorney of the judgment debtor for his costs in the action, he was compelled to refund the money: *Eisdell* v. *Coningham*, 28 L. J. Ex. 213; s. c. 4 H. & N. 871; see Eng. Stat. 23 & 24 Vic. cap. 127, s. 28, passed for the better protection of the attorney's lien. It is doubtful whether notice of a prior attachment out of the mayor's court of London interferes with the operation of an attaching order under the corresponding section of the Eng. C. L. P.

PROCEEDINGS AGAINST GARNISHEES.

And may order the garnishee to appear, &c.

289. (*k*) Such third person is hereinafter called the garnishee, (*l*) and service upon him of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Judge directs, (*m*) shall bind such debts in his

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Act: *Newman* v. *Rook*, 4 C. B. N.S. 434; see further *Redhead* v. *Welton*, 29 Beav. 521; *The Mayor and Aldermen of the City of London* v. *Cox et al.* L. R. 2 H. L. 239; see also *Manning* v. *Farquharson*, 30 L. J. Q. B. 22; *Frith et al* v. *Guppy et al*, L. R. 2 C. P. 32. Where there are rival claimants for the money the judgment debtor may file a bill of interpleader: *Davidson* v. *Douglas*, 12 Grant, 181; *Nelson* v. *Barter*, 10 L. T. N.S. 743. Where there are cross claims between the garnishee and the judgment debtor the balance only can be attached: *Hesse* v. *The Buffalo, Brantford and Goderich R. Co.* Chambers, March 30, 1857, *per* Robinson, C. J. If a judgment be recovered against three, the debts owing and accruing to one or more of the judgment debtors may be attached: *Miller* v. *Mynn et al*, 1 E. & E. 1075; s. c. 7 W. R. 524. But a debt owing to two cannot be attached to satisfy the claim of a creditor of one only of them: *In re Smart* v. *Miller*, 3 Prac. R. 385. An order to attach the debt will be granted though the amount be not stated: *Meldrum* v. *Tulloch*, 3 U. C. L. J. 184; *Daniel* v. *McCarthy*, 7 Ir. C. L. R. 261. Where on an order to attach debts the court cannot see clearly that the garnishee is not liable, they will not set aside the attaching order without allowing the judgment creditor to proceed against him by writ: *Seymour* v. *The Corporation of Brecon*, 29 L. J. Ex. 243. Where the garnishee (a deputy sheriff), after the lapse of ten months, applied to set aside an order for him to pay to the judgment creditor the debt alleged to be due by him to the garnishee, upon the ground that when the garnishee order was made there was no such debt, and that he, the garnishee, was ignorant of the nature and effect of the proceedings, the application was refused: *Gordon* v. *Bonter*, 6 U. C. L. J. 112. The origin of these clauses appears to be the practice by "foreign attachment," which has for a long time prevailed in the city court of London: see Com. Dig. "Attachment," A. By the custom of London money was attachable, provided it was not ordered to be paid by some judicial act: *Grant* v. *Hawding*, 4 T. R. 313, note *a*; *Coppell* v. *Smith*, *Ib.* 312; *Caila* v. *Elgood*, 2 D. & R. 193; but neither money nor property could be attached in the hands of a garnishee who had a lien upon it without discharging his lien: *Nathan et al* v. *Giles et al*, 5 Taunt. 558. A resemblance to the practice as to extents in chief in the second degree at the suit of the crown also exists: see West on Extents, 242.

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 26.

(*l*) See note *e* to s. 288.

(*m*) Personal service is not indispensable: *Ward* v. *Vance*, 9 U. C. L. J. 214. But it should be shown that the garnishee had knowledge of the service: *Ib.* 244. The appearance of the garnishee before a judge in chambers, by an attorney, to object to the sufficiency of service, is a waiver of any objection in the service: *Ib.* 214. To an action for work and labour the defendant pleaded that B. recovered a judgment against the plaintiff, and being such judgment creditor applied for and obtained an order that the debt due from the now defendant to the plaintiff should be attached to answer the judgment so recovered against the plaintiff by B.; that the debt was still unsatisfied, and that the order still remained in force: *held* a bad plea for not alleging that the order was served upon or notice thereof given to the garnishee: *Lockwood* v. *Nash*, 18 C. B. 536; see further *Watts et ux.* v. *Porter*, 3 El. & B 743.

hands, (*n*) and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or some officer of the Court to be specially named by such Judge, to show cause why he should not pay the Judgment creditor the debt due from him to the Judgment debtor, or so much thereof as may be sufficient to satisfy the Judgment debt; (*o*) but the two last preceding and this section shall not apply in actions commenced or carried on against a Defendant as an absconding debtor. (*p*) 19 Vic. c. 90, s. 17; 19 Vic. c. 43, ss. 194 *and* 195.

(*n*) The word "bind" in this section has received the same construction as the word "bind," used in the Statute of Frauds: 29 Car. II. cap. 3. As under the Statute of Frauds the goods are bound in the hands of the sheriff, so under this section the debt is bound in the hands of the garnishee: *Holmes et al* v. *Tutton*, 5 El. & B. 80; *Turner et al* v. *Jones*, 1 H. & N. 878; *Tilbury* v. *Brown*, 30 L. J. Q. B. 46; see further *Sweetnam* v. *Lemon et al*, 13 U. C. C. P. 534; *Tate and ... Corporation of the City of Toronto*, 10 U. C. L. J. 66.

(*o*) In cases in the superior courts, where the amount claimed as due from any garnishee is within the jurisdiction of a county or division court, the summons or order to appear, as it is called, must be for the garnishee to appear before the judge of the county court of the county in which the garnishee resides: section 292; and in cases in the county courts, where the amount is within the jurisdiction of a division court, the order to appear must be for the garnishee to appear before the clerk of a division court within whose division the garnishee resides: section 296. Though an order to attach may be made, although the amount of the debt do not appear: note *f* to s. 288; yet a summons to pay over should not be granted till the *amount* is stated: *Meldrum* v. *Tulloch*, 3 U. C. L. J. 184. Personal service of the summons to pay over is unnecessary if it can be gathered from the materials before the judge that the garnishee had knowledge of the service: *Ward* v. *Vance*, 9 U. C. L. J. 214; s. c. *Ib.* 244. Where the summons to pay over was argued in one day and judgment deferred till the next day, when the summons was made absolute (the garnishee having died in the interim), on an application to set aside the order on the ground that it was made after the proceedings had abated by reason of the death of the garnishee, leave was given to the judgment creditor to amend the order *nunc pro tunc* without costs, the delay having been the delay of the judge and not of the party: *Ib.* 144. But no suggestion of death of the garnishee can be entered in such a case so as to warrant execution against the personal representatives: *Ib.* 189. Where the order to pay is made for too much it may be rescinded, and money paid thereunder recovered back in an action for money had and received: *Sessions* v. *Strachan*, 23 U. C. Q. B. 492. The judge may, if he consider the cause shown sufficient, at once discharge the summons instead of proceeding under section 291: *Griswold* v. *The Buffalo, Brantford and Goderich R. Co.* 3 U. C. L. J. 115. As to effect of assignment of the debt sought to be attached see note *j* to section 288.

(*p*) Notice of the garnishee proceedings should be given as well to the judgment debtor as to the garnishee: *Ferguson* v. *Carman*, 26 U. C. Q. B. 26. An order on garnishees to pay over having been made on a summons of which the judgment debtor had no notice, it appeared, on application to rescind the order, that the debt had been assigned before the attaching order, and that the garnishees had notice of such assignment before the summons was served on them, to which they

When prompt execution may issue against garnishee.

290. (*q*) If the garnishee does not forthwith (*r*) pay into Court (*s*) the amount due from him to the judgment debtor, (*t*) or an amount equal to the judgment debt, (*u*) and does not dispute the debt due or claimed to be due from him to the judgment debtor, (*v*) or if he does not appear upon summons, (*w*) then the Judge (*x*) may (*y*) order execution to issue, (*z*) and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from

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did not appear, and before payment over of the money under the order. Under these circumstances the order was rescinded with costs, to be paid by the judgment creditor, who, it appeared, was also aware of the assignment: *Ib.*

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 63.

(*r*) Must mean within a reasonable time after notice. The distance of the garnishee from court, and other like circumstances, may well be taken into account when determining the sufficiency of the notice.

(*s*) The garnishee, upon payment of the money into court, is freed from further responsibility: *Clark* v. *Clark*, 8 U. C. L. J. 107. Payment to the judgment creditor has not the same effect: *Ib.* The subsequent execution of a composition deed by the debtor will not prevent the creditor being entitled to the money so paid into court: *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295.

(*t*) As to what constitutes an "amount due" within the meaning of this section, see note *j* to section 288.

(*u*) In cases where the amount due exceeds the amount of the judgment obtained against the garnishee's creditor.

(*v*) The garnishee, if not intending to dispute the debt, might, it is presumed, indorse an admission on the order or notice served upon him.

(*w*) If he neglect to indorse the order, &c. as mentioned in preceding note, and also neglect to appear, then an order for execution may be made by default.

(*x*) Apparently the judge in chambers for the time being, and this at present is the understood practice.

(*y*) *May*, not shall. There is a discretion in the judge even after default: *Clark* v. *Perry*, 26 L. T. Rep. 46. Indeed the judges may use any of the garnishee clauses at their discretion: *Jones* v. *Jenner*, 27 L. T. Rep. 191, *per* Martin, B.; see also *Lee et al* v. *Gorrie*, 1 U. C. L. J. N.S. 76.

(*z*) Execution may be ordered to issue:

1. If the garnishee does not forthwith pay into court, &c.
2. *And* does not dispute the debt, &c.
3. *Or* if he does not appear upon the summons, &c.

A composition deed executed by the garnishee under section 192 of the English Bankruptcy Act of 1861 is a bar to an execution under this section: *Kent* v. *Tomkinson*, L. R. 2 C. P. 502. As to the duty of the attorney to issue execution: see *Sweetnam* v. *Lemon et al*, 13 U. C. C. P. 534. As to effect of assignment of the debt: see note *j* to section 288. If the garnishee dispute the debt and the judgment creditor decline to proceed by writ to contest it, the attaching order may be discharged with costs: *Wintle* v. *Williams*, 3 H. & N. 288. The execution may be either against the goods or against the body of the garnishee, the latter only,

such garnishee towards satisfaction of the judgment debt. (*a*) 19 Vic, c. 43, s. 196.

If garnishee disputes his liability.

291. (*b*) If the garnishee disputes his liability, (*c*) the Judge, (*d*) instead of making an order that execution shall issue, may (*e*) order that the judgment creditor may proceed against the garnishee, by writ (*f*) calling upon him to shew cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor if less than the judgment debt, (*g*) and for costs of suit, (*h*) and the proceedings (*i*) upon such suit shall be the same, or

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it is apprehended, upon affidavit: see section 12 of Con. Stat. U. C. cap. 24. As to the forms of execution: see R. G. pr. Sch. Nos. 45, 46.

(*a*) The direction of the writ will be to levy the amount due from such garnishee "towards satisfaction of the *judgment debt*." As to the costs where no suit: see section 299. In case garnishee dispute the debt, costs of suit are expressly provided for by the next succeeding section; and in cases within the jurisdiction of a county or division court express provision is made for costs: section 294.

(*b*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 64.

(*c*) To entitle the garnishee to a writ under this section he must satisfy the judge that he has real ground for disputing his liability for the debt: *Newman* v. *Rook*, 4 C. B. N.S. 434; and is acting *bona fide* in making the dispute: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240. Where an action is pending against the garnishee at the suit of the judgment debtor, and there be no collusion between them, the court will not grant a writ against the garnishee under this section: *Richardson* v. *Greaves*, 10 W. R. 45. The court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to proceed by writ: *Seymour* v. *The Corporation of Brecon*, 29 L. J. Ex. 243. If the garnishee disputes his liability, and the judgment creditor declines to proceed by writ under this section, the garnishee is entitled to have the attaching order discharged with costs: *Wintle* v. *Williams*, 3 H. & N. 288. Where several creditors proceed against the same garnishee, they are entitled to be paid in the order in which their attachment orders were served: *Tate and the Corporation of the City of Toronto*, 10 U.C. L. J. 66; see also *Salaman* v. *Donovan*, 10 Ir. C. L. R. App. xiii.

(*d*) *The judge.* See note *x* to section 290.

(*e*) *May.* Discretionary not compulsory: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240; Con. Stat. U. C. cap. 2, s. 18, sub-s. 2.

(*f*) Form of writ: R. G. pr. Sch. No. 47.

(*g*) The judgment debtor apparently is an admissible witness for either party to this issue.

(*h*) In *Johnson* v. *Diamond*, 25 L. J. Ex. 41, Pollock, C. B. said: "The question in this case is whether, when the party has received the leave of the court to bring an action under this act, the successful party is not entitled to costs. I am of opinion that he is." *Ib.*

(*i*) *Proceedings*, *i. e.* declaration: as to which see R. G. pr. Sch. No. 48, *et seq.*

as nearly as may be, as upon a Writ of Revivor issued under this Act. (*j*) 19 Vic. c. 43, s. 197.

When garnishee to appear before County Court Judge in cases in Superior Courts.

292. (*k*) In cases in the Superior Courts, when the amount claimed as due from any garnishee is within the jurisdiction of a County or Division Court, the order to appear made under the two hundred and eighty-ninth section shall be for the garnishee to appear before the Judge of the County Court of the County within which the garnishee resides (*l*), at some day and place within his County to be appointed in writing by such Judge—and written notice thereof shall be given to the garnishee at the time of the service of the order. (*m*) 20 Vic. c. 57, s. 16.

Execution from County or Division Court, if the garnishee does not dispute the debt.

293. (*n*) If the garnishee does not forthwith (*o*) pay (*p*) the amount due by him, (*q*) or an amount equal to the Judgment debt, (*r*) and does not dispute the debt due or claimed to be due from him to the Judgment debtor, (*s*) or if he does not appear before the Judge named in the order at the day and

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(*j*) Where, in an action against a garnishee, he pleaded that the body of the judgment debtor had been taken and still was in execution under a *ca. sa.* at the suit of the plaintiff, *held* a good plea: *Jauralde* v. *Parker*, 3 L. T. N.S. 751. The law would be different if the debtor, after his arrest under the *ca. sa.* had obtained his discharge under the Bankruptcy Act: *Halahan* v. *Worman*, 11 W. R. 10. Although the proceedings are directed to be the same as on a writ of revivor, it is only as "nearly as may be," and therefore the court may add to an order made under this section the restriction that under the special circumstances of the case the costs shall abide the event. But if the court *give no such direction*, they virtually order costs to the successful party when they order the writ: *Johnson* v. *Diamond*, 26 L. T. Rep. 137.

(*k*) Taken from C. L. P. Act, 1857, section 16.

(*l*) Before the passing of our C. L. P. Act, 1857, the judges refused to grant orders attaching small debts, which might have had the effect of bringing into the superior courts innumerable suits within the jurisdiction of inferior courts, and increasing costs to a startling amount: *Topping et al* v. *Salt*, 3 U. C. L. J. 14.

(*m*) The order to attach and summons to appear are usually combined. When this is the case, the latter should be to appear in cases under this section before the judge of the county court of the county within which the garnishee resides, at some day and place appointed in writing by the judge.

(*n*) Taken from C. L. P. Act, 1857, section 16.

(*o*) See note *r* to section 290.

(*p*) "Into court" probably intended: see note *s* to section 290.

(*q*) See note *j* to section 288.

(*r*) See note *u* to section 290.

(*s*) See note *v* to section 290.

place appointed by such Judge, (*t*) then such Judge on proof of service of the order and appointment having been made four days previous, (*u*) may (*v*) make an order directing execution to issue out of the County Court or out of a Division Court according to the amount due, (*w*) and such order shall without any previous writ or process, be sufficient authority for the clerk of either of such Courts to issue execution for levying the amount due from such garnishee. (*x*) 20 Vic. c. 57, s. 16.

The Sheriff or Bailiff to levy the amount with costs and fees.

294. (*a*) The Sheriff or Bailiff to whom such Writ of Execution is directed shall levy the amount mentioned in the said Execution, towards satisfaction of the Judgment debt, together with the costs of the proceeding, (*b*) to be taxed, and his own lawful fees, according to the practice of the Court from which such Execution has issued. (*c*) 20 Vic. c. 57, s. 16.

Proceedings if he disputes the debt.

295. (*d*) If the garnishee disputes his liability, (*e*) then such Judge of the County Court may (*f*) order that the Judgment creditor shall be at liberty to proceed against the garnishee according to the usual practice of the County or Division Court, as the case may require, (*g*) for the alleged debt or for the amount due to the Judgment debtor if less than the Judgment debt, (*h*) and for costs of suit. (*i*) 20 Vic. c. 57, s. 16.

(*t*) See note *w* to section 290.

(*u*) *i. e.* Upon proof by affidavit of service four days previous.

(*v*) See note *y* to section 290.

(*w*) See note *z* to section 290.

(*x*) *On.* As to form of writs of execution: see note *a* to section 290.

(*a*) Taken from C. L. P. Act, 1857, section 16.

(*b*) See note *a* to section 290.

(*c*) *To be taxed*, by, it is presumed, the proper officers of the court whence the execution issued.

(*d*) Taken from C. L. P. Act, 1857, s. 16.

(*e*) See note *c* to section 291.

(*f*) See note *e* to section 291.

(*g*) As to form of writ in the superior court: see R. G. pr. Sch. No. 47.

(*h*) See note *g* to section 291.

(*i*) See note *h* to section 291.

Proceedings in County Courts when amount within the jurisdiction of Division Courts.

296. (*k*) In cases in the County Courts when the amount claimed as due from any garnishee is within the Jurisdiction of a Division Court, the order to be made under the two hundred and eighty-ninth section, shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides, at his office, at some day to be appointed in the said order by the Judge of the County Court; (*l*) and the said order shall be served on such garnishee, (*m*) and if the garnishee do not forthwith (*n*) pay the amount due by him (*o*) or an amount equal to the judgment debt, (*p*) and do not dispute the debt due or claimed to be due from him to the judgment debtor, (*q*) or if he do not appear before the Division Court Clerk named in the order at his office at the day appointed by such Judge, (*r*) then such Judge, on proof of the service of the order having been made four days previous, (*s*) may (*t*) make an order directing execution to issue out of the Division Court of the Division in which such garnishee resides, according to the amount due, (*u*) and such order shall without any previous summons or process, be sufficient authority for the Clerk of the said Division Court to issue execution to levy the amount due from such garnishee, (*v*) and the bailiff to whom such Writ of Execution is directed shall be thereby authorized to levy and shall levy the amount mentioned in the said execution towards satisfaction of the judgment debt, together with the costs of the proceeding to be taxed, and his own lawful

(*k*) Taken from C. L. P. Act 1857, s. 4.

(*l*) See note *l* to section 292.

(*m*) As to what is sufficient service see notes *m* and *o* to section 289.

(*n*) See note *r* to section 290.

(*o*) See note *j* to section 288.

(*p*) See note *u* to section 290.

(*q*) See note *v* to section 290.

(*r*) See note *w* to section 290.

(*s*) *i. e.* Upon proof by affidavit of service four days previous.

(*t*) See note *y* to section 290.

(*u*) See note *z* to section 290.

(*v*) *Qu.* as to form of writ of execution see note *a* to section 290.

fees; (*w*) but if the garnishee disputes his liability, (*x*) then such Judge may (*y*) order that the judgment creditor in the said County Court shall be at liberty to proceed against the garnishee, according to the practice of the said Division Courts, (*z*) for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, (*a*) and for costs of suit. (*b*) 20 Vic. c. 58, s. 4.

Payment by garnishee to be a valid discharge.

297. (*c*) Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid, (*d*) shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, (*e*) although the proceeding

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(*w*) See note *a* to section 290. The costs it is presumed are to be taxed by the proper officer.

(*x*) See note *c* to section 291.

(*y*) See note *e* to section 291.

(*z*) As to form of writ in the superior courts see R. G. pr. Sch. No. 47.

(*a*) See note *g* to section 291.

(*b*) See note *h* to section 291.

(*c*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 65.

(*d*) The mere issue of the attaching order is clearly no defence to an action brought against the garnishee by the judgment debtor: *Lockwood* v. *Nash*, 18 C. B. 536; see also *Denton* v. *Maitland et al*, 11 Jur. 42. It was at one time supposed that the service of the order would afford a defence: *Carr* v. *Bayeroft*, 4 U. C. L. J. 209; *McNaughton* v. *Webster*, 6 U. C. L. J. 17. But it is now settled that the garnishee is not discharged as against the judgment debtor till at all events served with a judge's order for the payment of the money: *Turner et al* v. *Jones*, 1 H. & N. 878; *Newman* v. *Rook*, 4 C. B. N.S. 434; *McGinnis* v. *The Corporation of Yorkville*, 21 U. C. Q. B. 163, 171. And the better opinion seems to be that until payment made or execution executed under the order to pay, the garnishee is not discharged: *Blevins* v. *Madden*, 11 U. C. C. P. 195, 198; *Sykes et al* v. *The Brockville and Ottawa R. Co.* 22 U. C. Q. B. 459; see also *Magrath* v. *Hardy*, 8 Scott, 627; *Westoby* v. *Day*, 22 L. J. Q. B. 418. Payment to the judgment creditor under the attaching order and before the order to pay is not sufficient: *Turner et al* v. *Jones*, 1 H. & N. 878; *Clark* v. *Clark*, 8 U. C. L. J. 107; but see *Cooper* v. *Brayne*, 27 L. J. Ex. 446; *Lockwood* v. *Nash*, 18 C. B. 536. If the garnishee after moving against the order voluntarily pay the amount attached, his rule nisi will be discharged with costs: *Adair* v. *Wallace*, 5 U.C. L.J. 113. Payment under a garnishee order of money pronounced due to a successful party by decree of the court of admiralty, is a satisfaction of the debt: *The Olive*, 1 Sw. Adm. 423. The law will never compel a person to pay a sum of money a second time which he has once paid under the sanction of a court having competent jurisdiction: *Wood* v. *Dunn*, L. R. 2 Q. B. 80.

(*e*) The garnishee, it will be perceived, is by the act of *his* creditor the judgment debtor in the original suit, after order to pay and payment or execution executed, placed in a situation in which he acquires a good answer to any action that may be brought against him by his creditor. Upon general principles it

should be afterwards set aside or the judgment be reversed. (*f*) 19 Vic. c. 43, s. 198; 20 Vic. c. 57, s. 16; 20 Vic. c. 58, s. 4.

Attachment books to be kept in the offices of the Clerks of the Crown and Deputies.

298. (*g*) There shall be kept at the several offices of the Clerks of the Crown and Deputy Clerks, and at the several County Court Offices, a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered and otherwise; (*h*) and the mode of keeping such books shall be the same in all the offices, and copies of any entries made therein may be taken by any person upon application to the proper officer. (*i*) 19 Vic. c. 43, s. 199.

Costs of such application.

299. (*k*) The costs of any application for an attachment of debt under this Act, (*l*) and of any proceedings arising from or incidental to such application, (*m*) shall be in the

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seems that where such answer arises before judgment, it may be pleaded to the further maintenance of the action or *puis darrein continuance*, if after plea pleaded: section 98. In both cases the plea is an effectual bar: see *Webb* v. *Hurrell*, 4 C. B. 287, 303. The plea it seems must be special in either case, and may be the same *mutatis mutandis* as that made use of when attachments are issued from the City Court of London: see *Nonell* v. *Hullett et al*, 4 B. & Al. 646; *Crosby* v. *Hetherington*, 4 M. & G. 933.

(*f*) The process of attachment in the City Court of London could only be resorted to when the cause of action against the original defendant arose within the jurisdiction of the court from which process issued: *In re Wadsworth and The Queen of Spain*, 17 Q. B. 171. And yet it was held that a garnishee paying a debt under a judgment of the court could not be afterwards compelled to pay it over again to his creditor, upon the ground that the original cause of action arose without the jurisdiction of the court: *Westoby* v. *Day*, 2 El. & B. 605; *Cooper* v. *Brayne*, 27 L. J. Ex. 446.

(*g*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 66.

(*h*) The form of book sanctioned by the courts has columns for the following information:—1. Name of plaintiff; 2. Name of judgment debtor; 3. Amount of judgment; 4. Date of judgment; 5. Name of garnishee; 6. Date of order for attachment; 7. Amount ordered to be paid by garnishee; 8. Date of such order; 9. Date of order for execution against garnishee; 10. Date of order that judgment creditor may proceed against garnishee: R. G. pr. 60, and schedule.

(*i*) *Proper officer*, *i. e.* the officer having the custody of the particular book from which copies of entries are required.

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 67.

(*l*) The words of the section thus far comprehend only preliminary proceedings.

(*m*) Whether these words could be taken to apply to proceedings had under the English enactment corresponding to our section 291 was for some time a ques-

discretion of the Court or Judge. (*n*) 19 Vic. c. 43, s. 200.

TO COMPEL SPECIFIC DELIVERY OF CHATTELS.

Specific delivery of a chattel may

300. (*o*) The Court or a Judge (*p*) upon the application of the Plaintiff in any action for the detention of any

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tion. It has since been held that they do not apply to the costs of such proceedings, and that they abide the event: see note *h* to section 291.

(*n*) In *The Bank of Montreal* v. *Yarrington*, 3 U. C. L. J. 185, Sir John B. Robinson made an order for the garnishee to pay, but declined to order costs, "on the ground that this is a special provision for the accommodation of the creditor, and therefore it is enough for him to receive the designed benefit by paying for it." Spragge, V. C. in *Evans* v. *Evans*, 1 U. C. L. J. N.S. 19, referring to the case of *The Bank of Montreal* v. *Yarrington*, said that "though he did not agree with the reason (for it), yet, as it was the rule in a court of coordinate jurisdiction, it would be convenient that there should be a similar one in this court (Chancery), and that he should therefore follow it until a different one should be established, with the concurrence of the other members of the court." *Evans* v. *Evans* afterwards came on before the full Court of Chancery, in appeal, when Spragge, V. C. said that "since giving his judgment he had conferred with one of the common law judges, and had been informed by him that it is now the practice at law to grant the costs of a garnishee application when there is a sufficient fund out of which to pay them; and he accordingly, in conformity with his opinion as expressed at chambers, concurred with the chancellor in reversing the previous decision:" *Ib.* p. 52. Upon an application by a judgment creditor for an order that the garnishee should appear before the master, the costs of these proceedings were allowed against the defendant in the action, and not against the garnishee: *Dockrill* v. *Boylan*, 2 Ir. Jur. N.S. 368. Upon making absolute an order for the garnishee to pay over, a rule was granted on the defendant to show cause why the plaintiff should not be at liberty to deduct the costs of the proceeding from the sum paid in by the garnishee: *Ib.* 380. The disposition of the costs may be reserved in the order, giving liberty to proceed by writ: *Waldron* v. *Parrott*, 9 Ir. C. L. R. 175.

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 78. Founded upon the second report of the Common Law Commissioners, section 47. This is a section which in some degree confers equitable jurisdiction upon the courts of common law. Courts of equity have from a very early period compelled the return of specific chattels: see *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 389; *Saville* v. *Tunkred*, 1 Ves. 101; *Fells* v. *Read*, 3 Ves. 71; *Papillon* v. *Voice*, 2 P. Wms. 470; *Ford* v. *Peering*, 1 Ves. jr. 72; *Duncomb* v. *Mayer*, 8 Ves. 319; *Jackson* v. *Butler et al*, 2 Atk. 306; *Gibson* v. *Ingo*, 6 Hare, 112; *Wood* v. *Rowcliffe*, 3 Hare, 304; *Lingen* v. *Simpson*, 1 S. & S. 600. It has been the practice of courts of law (especially in modern times), where they see that justice requires the interference of a court of equity, and that a court of equity would interfere, in every such case to save parties the expense of proceeding to a court of equity, by giving them the aid of the equitable jurisdiction of a court of common law to enable them to effect the same purpose: *Phillips et al* v. *Clagett*, 11 M. & W. 91, *per* Abinger, C. J. Courts of common law have now, under this section, the same jurisdiction after judgment in detinue to compel the return of a chattel as a Court of Equity: see *Mayall* v. *Higbey*, 1 H. & C. 148.

(*p*) The court will review the order of a judge made under this section: *Chilton* v. *Carrington et al*, 15 C. B. 730; see also *Grugeon* v. *Gerrard*, 4 Y. & C. 119; *Phillips et al* v. *Clagett*, 11 M. & W. 84; see further note *w* to section 48.

be compelled, and how.

chattel, (*q*) may, if he or they see fit, (*r*) order that execution shall issue for the return of the chattel detained, without giving the Defendant the option of retaining such chattel upon paying the valued assessed, (*s*) and may order that unless the Court or a Judge should otherwise direct, the Sheriff shall distrain the Defendant by all his lands and chattels in the said Sheriff's County, till the Defendant renders such chattel, (*t*) or at the option of the Plaintiff, the Court or Judge may order the Sheriff to make of the Defendant's

Option to the plaintiff.

goods the value of such chattel; (*u*) but the Plaintiff shall, either by the same or by a separate Writ or Writs of Execu-

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(*q*) This section is intended to deal with the ordinary finding of a jury which would in detinue be the finding of so much for value and so much for damages; whereupon the judgment is that plaintiff do recover the chattel *or* the sum assessed as the value, and also his damages and costs. In such a case a defendant hitherto, though he had the chattel sued for, might retain it, pay the value, and so obtain the chattel for himself, and might detain it from plaintiff, though the latter set a much higher value upon it than the value set upon it by the jury. This was a hardship; so recourse was had to that which is fair and reasonable, namely, the investment of the courts of common law with a discretion which the legislature thought should be exercised. Therefore it is enacted in cases where it would be unjust or improper that defendant should have the option of paying the money or keeping the chattel, the court or a judge may make an order *taking away the defendant's option.* But the act deals with a case of option only, and if the value of the chattel be not found by the jury now as formerly, that case does not arise: *Chilton* v. *Carrington et al*, 15 C. B. 730. Thus where at the trial of an action of detinue for a lease deposited as security for £150, the parties agreed that the jury should be discharged from finding the value of the lease, and a judge made an order on the defendant to deliver the lease, the court rescinded the order: *Ib.* Where plaintiff claims distinct parcels of goods, the jury should assess the value of each separately: *Sandford* v. *Alcock*, 10 M. & W. 689. Where the goods have been redelivered, the jury may confine their assessment to the damages for the detention: *Williams* v. *Archer*, 5 C. B. 318; *Crossfield et ux.* v. *Such*, 8 Ex. 159. Special damage may be recovered if laid in the declaration: *Ib.* Where the redelivery is after the commencement of the action, the defendant should plead the redelivery in bar of the further maintenance, upon which the plaintiff may confess the plea and obtain costs up to that time; otherwise plaintiff will obtain a verdict and the costs of proceeding to trial: *Leader et al* v. *Rhys*, 10 C. B. N.S. 369. Where a party places a definite price upon a chattel, the court or a judge will not interfere in aid of that which is a mere demand in money: *Dowling* v. *Betjemann*, 10 W. R. 574; s. c. 2 Johns. & H. 544. Formerly detinue was the only form of action in which at law a chattel might be recovered *in specie;* but the like remedy may now be had in an action of replevin: Con. Stat. U. C. c. 29.

(*r*) Clearly discretionary.

(*s*) See note *q*, *supra.*

(*t*) The command contained in the writ of execution closely follows the language of this section: see form of execution, R. G. pr. Sch. No. 57.

(*u*) Form of execution in this case: see R. G. pr. Sch. No. 58.

tion to be issued in the ordinary manner, be entitled to have made of the Defendant's goods or lands, the damages, costs and interest in such action. (*v*) 19 Vic. c. 43, s. 201. Damages, costs, &c.

THE REVIVAL OF JUDGMENTS AND OTHER PROCEEDINGS BY AND AGAINST PERSONS NOT PARTIES TO THE RECORD. (*a*)

(*v*) In detinue for railway scrip which had been delivered up to the plaintiff under judge's order after action brought, *Held* the judge was warranted in directing the jury at the trial that in estimating the damages they might take into consideration the difference in value of the scrip at the time of the *demand* and at the time of its *delivery* to plaintiff under the judge's order: *Williams v. Archer*, 5 C. B. 318. Upon the trial of an action of detinue and trover for shares it was arranged that the damages, £382, found by the jury should be reduced to a nominal amount upon the defendant delivering up the shares. Shares of a like denomination and to an equal amount with those which were the subject of the action were afterwards tendered; but the market value having greatly fallen, plaintiff sought to enforce the verdict. *Held* that he could not do so, that the bargain was binding upon him; and that it was fulfilled on the part of the defendant by tendering similar shares to those which were the subject of the action: *Jeffrey* v. *Oliver*, 28 L. T. Rep. 231. In detinue for title deeds where plaintiff shows himself clearly entitled to the deeds, but the defendant intending to do right, has given them up to another, the damages should not as of course be the value of the land, but left to the decision of the jury under all the circumstances: *Reynolds* v. *Waddell*, 12 U. C. Q. B. 9. In detinue for a watch and chain, it appeared the defendant had obtained possession of the things by redeeming them at the plaintiff's request from a person with whom they were pledged, and that defendant refused to give them up on payment of the money so advanced, claiming to retain them for a further sum due to him by the plaintiff for board, and, after verdict for plaintiff for the full value of the articles, it was shown on affidavits that before the trial defendant had obtained execution against plaintiff for this sum in the Division Court, under which the bailiff by plaintiff's direction had seized this watch and chain in the defendant's possession, and that to prevent their being sold the plaintiff had procured some one to advance money on them, a new trial was ordered without costs, unless the plaintiff would consent to reduce his verdict to nominal damages, and that he should in any event pay the costs of the application: *Johnson* v. *Lamb*, 13 U. C. Q. B. 508. Detinue held not to lie against a clerk of a Division Court for goods which had come into his possession under a warrant of attachment, without at all events showing that defendant before action was made acquainted with the claim of the plaintiff, and after demand refused to give up the goods: *Clark* v. *Orr*, 11 U. C. Q. B. 426.

(*a*) At common law a presumption arose from a plaintiff's delay beyond a year to issue execution that his judgment either had been satisfied or from some supervening cause ought not to be allowed to have its effect. After such delay therefore, plaintiff was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. As this was found to be unnecessarily vexatious and oppressive, the writ of *scire facias*, which had been in use at common law for the purpose of executing judgment in real actions after the delay of a year and a day, was adopted by the Statute Westm. II.: 13 Ed. I. St. 1, c. 45. This was a less expensive and dilatory course for plaintiff and equally affording protection to defendant if he had any cause to show why execution should not issue: *Hiscocks et al* v. *Kemp*, 3 A. & E. 679, *per* Denman, C. J. The *scire facias* was a writ founded on some matter of record, being as regards judgment the original judgment obtained against defendant: Bac. Abr. *Scire Facias*,

Execution without *Scire Facias* or revival.

301. (*b*) During the lives of the parties to a judgment, or of any of them, execution may be issued at any time within six years from the recovery of the judgment, (*c*) without a revival thereof by *Scire Facias*, or by Writ of Revivor. 20 Vic. c. 57, s. 10; 20 Vic. c. 58, s. 1; *and see* 22 Vic. c. 97.

A. If the party was prevented from suing out execution by a writ of error, or by injunction, the year did not begin to run till the judgment below was affirmed or the injunction dissolved: *Howard* v. *Pitt et al*, 1 Show, 402; *Winter* v. *Lightbound*, 1 Str. 301; *Michell* v. *Cue et ux.* 2 Burr. 660. The year was if there was no stay as above computed from the day of signing judgment: *Simpson* v. *Gray et ux.* Barnes, 197. The writ of error, when issued after the expiration of the year, revived the judgment so that if the plaintiff in error was nonsuited or discontinued or the judgment below was affirmed, execution might have issued without a *scire facias*: *Bellasis* v. *Hanford*, Cro. Jac. 364. It was a rule that where a new person who was not a party to the judgment derived a benefit by or became chargeable to the execution, there should be a *scire facias* to make him a party to the judgment: *Penoyer* v. *Brace*, 1 Ld. Rayd. 245. Thus the writ lay either between the original parties to the judgment, where an execution had not been issued within a year and a day from the signing of the judgment or between either of the original parties and the representatives of the other or the representatives of both, when it was sought to make parties to the judgment persons other than the original parties. The end attained by means of *scire facias* in any of these cases may now be attained by a much more simple and speedy mode of procedure. In this respect the sections following are founded upon the first report of the Common Law Commissioners, ss. 82-85 inclusive.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 128. Founded upon the first report of the Common Law Commissioners, s. 82. This section applies to judgments existing at the time the ac. came into force: *Boodle* v. *Davis*, 3 Ex. 351. Where a judgment more than a year and a day old but less than six years, when the Eng. C. L. P. Act, 1852, came into operation, had not been revived by *scire facias*, it was held that execution since the C. L. P. Act might issue without any revival of such judgment: *Ib.*

(*c*) A *scire facias* to revive a judgment before this act was either between the original parties to the suit or between new parties. The present section has reference more particularly to the former. If plaintiff before this act omitted for a year and a day to issue execution on his judgment, a *scire facias* became necessary. But where execution had been taken out, though not executed within a year after judgment, the *scire facias* was rendered unnecessary: *Simpson* v. *Heath*, 7 Dowl. P. C. 832; *Greenshields* v. *Harris*, 9 M. & W. 774; *Franklin* v. *Hodgkinson et al*, 3 D. & L. 554; *Holmes* v. *Newlands*, 5 Q. B. 634; but see *Sewell* v. *Thompson*, E. T. 2 Vic. *MS.* R. & H. Dig. "Scire Facias," 5; *Wilson* v. *Jamieson*, E. T. 7 Vic. *MS. Ib.*; *Hall* v. *Boulton*, 9 U. C. L. J. 213. If during the six years limited by this act a writ of execution be sued out, returned and filed, the same consequences follow as if under the old practice a writ had been sued out within a year: *Jenkins* v. *Kerby et al*, 2 U. C. L. J. N. S. 164. The Commissioners were of opinion that the limit of a year and a day "was not founded on good reason." They recommended that by analogy to the Statute of Limitations in the case of simple contract debts, six years should be the period within which execution might issue upon a judgment without revival. The necessity for a *scire facias* or writ of revivor, as it is termed in this act, (ss. 305-308) after six years have elapsed, may be waived by oral agreement of the parties or consent of defendant: *Hiscocks et al* v. *Kemp*, 3 A. &

Application for revival of judgment and execution thereupon.

302. (*d*) In case it becomes necessary to revive a judgment, either by reason of lapse of time (*e*) or of a change by death or otherwise of the parties entitled, or liable to execution, (*f*) the party alleging himself to be entitled to execution (*g*) may either sue out a Writ of Revivor in the form hereinafter mentioned, (*h*) or apply to the Court or a Judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment, and to issue execution thereupon. (*i*)

E. 676; *Morgan* v. *Burgess*, 1 Dowl. N. S. 850. Execution issued after the time limited without a writ of revivor is voidable, not void: *Goodtitle* v. *Badtitle*, 9 Dowl. P. C. 1009; *Blanchenay* v. *Burt et al*, 4 Q. B. 707; *McNally* v. *Stephens*, Tay. Rep. 263.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 129. Founded upon the first report of the Common Law Commissioners, section 83.

(*e*) *i. e.* After the expiration of six years from the recovery of judgment: section 301.

(*f*) See note *a* to section 301.

(*g*) An application made at chambers must be taken to be made on the part of the person who professes to apply, and in the character in which he is described, unless evidence to the contrary be produced: *Swan* v. *Cleland*, 2 U. C. L. J. 285. Thus where application was made under this section by the widow and executrix of a deceased conusee, though a person apparently her husband was joined with her, and it was therefrom argued that she had married a second time, but no affidavit to that effect was produced, the argument was held to be of no avail: *Ib.* According to the English authorities the party applying, if an executor, should show that probate has been taken out: *Vogel et al* v. *Thompson*, 1 Ex. 60.

(*h*) *i. e.* In section 305.

(*i*) Two courses are thus pointed out—either to apply for leave to enter a suggestion that it manifestly appears, &c., *or* to issue a writ of revivor by means of which the right to issue execution must be made to appear. Though the former be attempted, if unsuccessful the party applying will be still at liberty to try the latter: section 304. It is not said whether or not the suggestion if allowed can be traversed by defendant: see note *i* to section 134. From the use of the words "it manifestly appears to the court that such party is entitled to have execution, &c.," it is presumed that on the application to enter the suggestion the truth of the proposed suggestion will be tried, and that unless it "manifestly appear" that the party is entitled to issue execution the leave will not be given, and when given will not be open to a traverse: see section 304. If this be the proper construction of the section, it may be found to differ from the corresponding section 35 of the Ejectment Act, which expressly provides for the trial of a suggestion after trial and before execution, when denied by the defendant. The writ if to revive a judgment less than ten years old, shall be allowed without any rule or order. If more than ten years old, then not without a rule or order. If more than fifteen years old, not without a rule to show cause: section 309. The executors of an administrator are not entitled to revive a judgment more than fifteen

Such application to be by summons or rule to shew cause.

303. (*k*) Such leave shall be granted by the Court upon a rule to shew cause, or by a Judge upon a summons (*l*) to be served according to the practice of the Court, (*m*) or in such other manner as the Court or Judge directs, (*n*) and the rule or summons may be in the form (A) No. 9, or to the like effect. (*o*) 19 Vic. c. 43, s. 203.

If the Court be satisfied.

304. (*p*) In case it manifestly appears upon such application, that the party making the same is entitled to execution, (*q*) the Court or Judge (*r*) shall allow such suggestion as aforesaid to be entered in the form (A) No. 10, or to the like effect, (*s*) and execution to issue thereupon, (*t*) and shall order whether or not the costs of such application shall be

And if not.

paid to the party making the same; (*u*) and in case it does

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years old by entering a suggestion under this section: *Croft* v. *Foulkes*, 30 L. T. Rep. 241. And, *per* Crompton, J., "The act does not allow those who have an equitable interest only to come in:" *Ib.*

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 129.

(*l*) The concurrent jurisdiction of the court and a judge in chambers is here remarkably clear: "By the *court* upon a *rule* to show cause or by a *judge* upon a *summons*," &c.

(*m*) The practice to which reference is made is not free from doubt. It may be either the present practice as to rules and summonses generally, or rules and summonses to show cause why a party proceeding by *sci. fa.* should not have judgment. The latter seems to be intended. Personal service is not necessary if it can be shown that defendant is purposely avoiding service: *Dixon* v. *Thorold*, 9 Dowl. P. C. 827, and the service may, it would seem, be made on a defendant though residing out of the jurisdiction of the court: *Stockport* v. *Hawkins*, 1 D. & L. 204.

(*n*) This provision will enable the party taking proceedings to continue his proceedings, though defendant be concealed within the jurisdiction, or be resident without the same. Thus, where it was shown that defendant, having houses in Liverpool, had left England for America, notice of the sale stuck up in the office of the court and served on defendant's tenants in Liverpool, was directed to be sufficient service of the rule on defendant: *Macdonald* v. *Maclaren*, 11 M. & W. 465.

(*o*) The forms, whenever they can be followed, should be adopted. The use of the words "to the like effect" is intended to admit of a departure from necessity.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 130.

(*q*) The application to enforce a judgment more than twenty years old must state circumstances to shew a *prima facie* right on the part of the applicant: *Loveless* v. *Richardson*, 4 W. R. 617.

(*r*) See note *w* to section 48.

(*s*) See note *o* to section 303, *supra*.

(*t*) As to executions generally: see ss. 238, 239.

(*u*) *Qu.* If the order be silent as to costs, will the party applying be deprived of costs? The general rule is that in such case each party shall pay his own costs.

not manifestly so appear, the Court or Judge shall discharge the rule or dismiss the summons with or without costs; (*v*) but in the last mentioned case, the party making the application shall be at liberty to proceed by Writ of Revivor or action upon the Judgment. (*w*) 19 Vic. c. 43, s. 204.

Writ of Revivor and proceedings thereon.

305. (*a*) The Writ of Revivor (*b*) shall be directed to the party called upon to shew cause why execution should not be awarded, (*c*) and shall bear teste on the day it is issued, (*d*) and after reciting the reason why such writ has become necessary, (*e*) it shall call upon the party to whom it is directed, to appear within ten days after service thereof (*f*) in the Court out of which it issues, (*g*) to shew cause

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(*v*) See note *u* to this section.

(*w*) A party suing upon a judgment of the court will not be entitled to any costs unless the court otherwise order: section 323 of this act.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 131. Founded upon the first report of the Common Law Commissioners, sections 84, 85.

(*b*) This is the name of a new writ in many respects partaking of the nature of a *scire facias*, such as hitherto used. It is indeed the *sci. fa.* under a new name, or more properly an improved *sci. fa.* But though the old writ of *scire facias* is to some extent superseded, it is not abolished: see section 311. A *sci. fa.* on a judgment has been held to be, not a mere continuation of a former suit, but the origin of a new right: *Farrell* v. *Gleeson et al*, 11 Cl. & Fin. 702. The writ must be sued out of the court in which the judgment is entered: Com. Dig. Pleader, 3 L. 3. The writ is in the nature of an action, because the defendant may plead to it; 2 Wms. Saund. 7, note 4. As to to the pleadings: see note *n* to section 307.

(*c*) This is a new feature, the *sci. fa.* having been always directed to the sheriff, whose duty it was to make known the writ to defendant. Hence its name.

(*d*) Same as writ of summons: section 24.

(*e*) The writ should follow the judgment: *Panton* v. *Hall*, 2 Salk. 598. The judgment should be recited: *Preston* v. *Perton*, Cro. Eliz. 817. It is sufficient to set out the *recuperavit* in general terms: *Fowler et al* v. *Rickerby et al*, 9 Dowl. P. C. 682. If the writ omit to recite why it became necessary, it may be set aside as irregular: *Gallusia* v. *Butler*, 3 U. C. L. J. 108. A variance from the judgment, as, for example, in the sum recovered is error, if it appear on the face of the record: *Kilbourn* v. *Trot*, Cro. Eliz. 855; *Mara* v. *Quinn*, 6 T. R. 5. A writ of a judgment of assets *quando acciderint* would be bad if it pray execution against assets generally: *Mara* v. *Quinn*, 6 T. R. 1; see also *Smith et al* v. *Tateham et al*, 2 Ex. 205. The writ may be amended so as to make it correspond with the record: *Braswell* v. *Jeco*, 9 East. 316; and this even after a plea of nul tiel record: *Parkins* v. *Petit*, 2 B. & P. 275; *Holland* v. *Phillipps*, 10 A. & E. 149; or may be quashed on the application of plaintiff: *Oliverson et al* v. *Latour*, 7 Dowl. P. C. 605; but only on payment of costs, if defendant has appeared: R. G. pr. 59.

(*f*) Same as summons: see Schedule A, No. 1.

(*g*) Which must be the court in which the original action was brought: 2 Wms. Saund. 72 a; see also R. G. pr. 60.

why the party at whose instance it is so issued should not have execution against the party to whom such writ is directed, and it shall give notice that in default of appearance, the party who issues such writ may proceed to execution. (*h*) 19 Vic. c. 43, s. 205.

Form of Writ.

306. (*i*) Such writ may be in the form (A) No. 11, or to the like effect, (*j*) and may be sued out and served in any County, and otherwise proceeded upon, whether in Term or Vacation, in the same manner as a Writ or Summons. (*k*) 19 Vic. c. 43, s. 205.

Venue in such cases.

307. (*l*) The *venue* in a declaration upon such Writ may be laid in the County in which the Writ has been sued out; and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action. (*n*) 19 Vic. c. 43, s. 205.

(*h*) The object of the writ is to enforce a judgment by the issue of execution after the judgment has for a certain period lain dormant: see note *a* to section 301. It is for the party to whom the writ is directed to show cause why the judgment should not be enforced against him. This he is enabled to do by appearing and pleading his defence. If he neglect to appear judgment may be signed against him for default of appearance. Judgment so signed will carry costs: section 320. It is ordered that no judgment shall be signed for non-appearance to a *sci. fa.* without leave unless the defendant has been summoned (R. G. pr. 61), but the judgment may be signed by leave after eight days from the return of one *sci. fa.*: *Ib.*

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 131.

(*j*) The writ may be amended: see note *e* to section 305. A second writ would seem to be necessary if, after judgment obtained on the first, six years be allowed to elapse without execution: *Walker* v. *Thelluson*, 1 Dowl. N.S. 578.

(*k*) *Qu.* Is it in the power of the plaintiff in the writ of revivor to issue either a *capias*: see *Agassiz et ux.* v. *Palmer*, 5 M. & G. 697.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 131.

(*n*) No party can plead matters which might have been set up as a defence to the original action: *Allens* v. *Andrews*, Cro. Eliz. 283; *Middleton* v. *Hill*, *Ib.* 588; *West* v. *Sutton*, 1 Salk. 2; *Wheatley* v. *Lane*, 1 Wms. Saund. 219 *c*; *Bradley et al* v. *Eyre et al*, 11 M. & W. 451; *Holmes* v. *Newlands*, 5 Q. B. 367; *Philipson* v. *Earl of Egremont*, 6 Q. B. 587; nor can a party who did not avail himself of the opportunity of pleading in bar to the original action afterwards so plead to the writ of revivor founded upon the judgment obtained in the original action: *Skelton* v. *Hawling*, 1 Wils. 258; *Rock* v. *Leighton*, 1 Salk. 309; *Earle* v. *Hinton*, 2 Strange, 732. But a defendant may plead anything done under the original judgment that exonerates him from liability: *Clerk* v. *Withers*, 2 Lord Rayd. 1075; *Holmes* v. *Newlands*, 5 Q. B. 370; and there may be a plea of fraud to the original judgment: *Dodgson* v. *Scott*, 2 Ex. 457; *Thomas* v. *Williams*, 3 Dowl. P. C. 655; *Bosanquet* v. *Graham*, 6 Q. B. 601, n.

Notice to be a sufficient appearance.

308. (*o*) Notice in writing to the Plaintiff, his Attorney or agent, shall be sufficient appearance to a Writ of Revivor. (*p*) 19 Vic. c. 43, s. 205.

Age of judgment as respects Writs of Revivor.

309. (*q*) A Writ of Revivor to revive a judgment (*r*) less than ten years old, shall be allowed without any rule or order; (*s*) but if more than ten years old, then not without a rule of Court or Judge's Order; (*t*) and if more than fifteen years old, not without a rule to shew cause. (*u*) 19 Vic. c. 43, s. 207.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 133.

(*p*) This provision as to appearance by notice is taken from section 133 of Eng. C. L. P. Act, 1852, and is repeated in R. G. pr. 62. The notice, if by attorney, may be in this form: *Title of court and cause*—Take notice, that I appear for the defendant to the writ of revivor issued in this cause.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 134.

(*r*) This section provides for the revival of three descriptions of judgments:—

First. Those more than six but less than ten years old, as to which the writ may issue without any rule or order.

Second. Those more than ten but less than fifteen years old, as to which a rule of court or judge's order may be obtained *ex parte*.

Third. Those more than fifteen years old, as to which a rule to show cause must be obtained.

Whether a judgment more than twenty years old can be revived is a question: *Williams* v. *Welch et al*, 3 D. & L. 565; Con. Stat. U. C. cap. 78, s. 7. Supposing a rule to exist that it cannot, payment of interest within twenty years would take the case out of such a rule: *Williams* v. *Welch et al*, 3 D. & L. 56, *per* Williams, J. After twenty years have elapsed the Statute of Limitations *prima facie* applies: *Loveless* v. *Richardson et al*, 27 L. T. Rep. 192; s. c. 2 Jur. N. S. 716; s. c. 4 W. R. 617.

(*s*) Upon filing a *precipe*, it is presumed.

(*t*) The words "rule of court *or* judge's order" seem to exclude the inference that the rule in this case might be a side bar rule.

(*u*) To obtain a rule under this provision, without doubt an affidavit will be required. It should show a *prima facie* right to that which is asked: *Loveless* v. *Richardson et al*, 27 L. T. Rep. 192. It should be that of plaintiff himself, if he be the party applying or that of the person who was his attorney at the time the judgment was obtained: *The Duke of Norfolk* v. *Leicester*, 1 M. & W. 204. If the party applying be the representative of the original plaintiff an affidavit by the attorney seeking to enforce the judgment, though not the attorney of the original plaintiff, may be received: *Smith* v. *Mee*, 1 D. & L. 907. And *semble*—the rule that a matter cannot be agitated twice does not apply to the case of an application to issue a *scire facias* upon fresh materials: *Dodgson* v. *Scott*, 2 Ex. 457. The omission to sue out a *scire facias* when made necessary by this section would be a defect so material that it might be taken advantage of at any time: see *Goodtitle* v. *Badtitle*, 9 Dowl. P. C. 1009. The judgment cannot be impeached on showing cause against the rule, but a cross motion to set aside the judgment

Against executors as to assets in *futuro*.

310. (*v*) Proceedings against Executors upon a Judgment of assets in *futuro* (*w*) may be had and taken in the manner herein provided as to Writs of Revivor. (*x*) 19 Vic. c. 43, s. 216.

Certain Writs of *Scire Facias*

311. (*a*) All Writs of *Scire Facias* against bail on a recognizance, (*b*) or against members of a Joint Stock Com-

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should be made: *Thomas* v. *Williams*, 3 Dowl. P. C. 655. Substitutional service of the rule allowed where the defendant was out of the country, but had property in the country at the time of the granting of the rule: *Macdonald* v. *Maclaren*, 11 M. & W. 465.

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 91.

(*w*) In an action against an executor if he plead *plene administravit*, it is for plaintiff, if the plea be sufficient, either to admit or deny it. If he admit it he takes judgment and prays that the debt may be levied of such assets as may "afterwards" come to the hands of the executor to be administered: *Noell et al* v. *Nelson*, 2 Wms. Saunders, 219, n. 2. But if plaintiff deny the plea, and the issue be found against him, he cannot have this form of judgment: *Ib.* 217, n. 1. Supposing plaintiff to admit the plea and to enter up judgment *quando acciderint*, if assets do come to the hands of the executor, plaintiff may proceed under this section by writ of revivor. The proof of the executor having received assets is always confined to a period *subsequent* to the judgment: *Taylor* v. *Holman et al*, cited Bull. N. P. 169, *a*. It is right that such should be the rule of law, for if the creditor were permitted to litigate a second time, that which has been once settled between the parties either by verdict or admission, an executor would be harrassed and involved in infinite expense and litigation: *Mara* v. *Quin*, 6 T. R. 6, *per* Lord Kenyon, C. J. However, it was observed by Lord Kenyon, that it occurred to him on looking into the precedents that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct, for as on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, and if the judgment were to affect assets received *after* the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any assets, they could not be taken at all. Therefore it was his opinion that the judgment should be so entered up as to reach all assets received by the executor after the time of suing out the writ. Whereupon Mr. Justice Ashurst observed that as the plea of *plene administravit* was that "the executor hath not nor had at the time of the suing out of the writ, *nor at any time since, any assets, &c.*," he saw no objection to the plaintiff's replying to the latter part of the plea, "*that the executor had assets since, &c.*," if the facts were so: *Ib.* 10. The judgment of assets *quando acciderint* embraces not only the assets received by the executor after that judgment is signed, but also such assets as came into or ought to be in his hands between the issuing of the writ or the plea and the judgment, in the course of administration: *Smith et al* v. *Tateham et al*, 2 Ex. 205. If upon the writ of revivor assets be found in part, plaintiff may have judgment to recover that part *instanter*, and the residue of the demand *in futuro*: *Noel et al* v. *Nelson*, 2 Wms. Saund. 226.

(*x*) All the proceedings necessary under the old practice will be found reported at length in *Noel et al* v. *Nelson*, 2 Wms. Saund. 214.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 132. This section is so framed as to recognise a distinction between writs of revivor and *scire facias*.

(*b*) See Foster on "Scire Facias," 303; also R. G. pr. 60.

pany or other body, or upon a Judgment recorded against a public officer or other person sued as representing such Company or body, or against such Company or body itself, (*c*) and all such Writs by or against a husband to have execution of a Judgment for or against a wife, (*d*) or for restitution after a reversal on Error or Appeal, (*e*) or upon a suggestion of further breaches after Judgment, or for any penal sum pursuant to the Statute passed in the Session holden in the eighth and ninth years of the reign of King William the Third, intituled *An Act for the better preventing frivolous and vexatious suits*, (*f*) shall be tested, directed and proceeded upon in like manner as Writs of Revivor. (*g*) 19 Vic. c. 43, s. 206.

to be proceeded upon in like manner as Writs of Revivor.

312. (*h*) In case of the death of any one or more of the Defendants in any action, against whom a joint Judgment has been entered, in any Court of Record, the Plaintiff or Plaintiffs, or the survivor or survivors of them, or the executor or administrator of a sole Plaintiff or of the survivor, may proceed by Writ of Revivor against the representatives of of such Defendant or Defendants, (*i*) or by an application to

Proceedings by Writ of Revivor against the representatives of deceased joint contractors authorized.

(*c*) As to *scire facias* against members of a public company: see *Clowes et al* v. *Brettell*, 11 M. & W. 461; *Scott* v. *The Uxbridge and Rickmansworth, R. Co.* L. R. 1 C. P. 596; *Ilfracombe R. Co.* v. *The Devon and Somerset R. Co.* L. R. 2 C. P. 15; *Williams* v. *Sidmouth Railway and Harbour Co.* L. R. 2 Ex. 284; *Rigby et al* v. *Dublin Trunk Connecting R. Co.* L. R. 2 C. P. 586; *Shrimpton* v. *The Sidmouth R. Co.* L. R. 3 C. P. 80.

(*d*) See Foster on Scire Facias, 156.

(*e*) See Foster on Scire Facias, 64.

(*f*) See Foster on Scire Facias, 31; also section 148 of this act, and notes.

(*g*) Reference is further made in Eng. C. L. P. Act, 1852, s. 132, to two modes of procedure by *scire facias*, neither of which is used in this Province, viz.: 1. *Scire facias ad audiendum errores.* 2. *Sci. fa.* for recovery of land under an *elegit.* There are other proceedings by *sci. fa.* to which neither the Eng. C. L. P. Act nor ours applies, such as *scire facias* to repeal letters patent: Foster on Scire Facias, 236; on bonds to the crown: *Ib.* 330; and on inquests of office to recover simple contract debts due to the crown: *Ib.* 341. But for these provision is to some extent made by R. G. pr. 63, and, except as to provisions made by the new rules, it is presumed that the old rules as to crown proceedings will apply.

(*h*) Taken from our repealed Stat. 1 Vic. c. 7, s. 2, which was peculiar to this Province.

(*i*) In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint

the Court or a Judge as hereinbefore provided, notwithstanding there may be another Defendant still living, and against whom the Judgment may be in force; (*j*) but the property and effects of stockholders in Chartered Banks, or the members of other Incorporated Companies, shall not be liable to a greater extent than they would have been if this Section had not been passed. (*k*) 1 Vic. c. 7, s. 2.

Limitation of liability of Stockholders in Chartered Banks or Incorporated Companies.

PROVISIONS WITH RESPECT TO COSTS. (*l*)

contractors, obligors or partners, may proceed by action against the representatives of the deceased contractor, obligor or partner, in the same manner as if the contract, obligation or promise had been joint and several: Con. Stat. U. C. cap. 78, s. 6; and this notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person: *Ib.* This section is in principle the same as extended to judgments: see *Gilmore* v. *Crooks et al*, H. T. 6 Vic. *MS.* R. & H. Dig. "Executor," l. 11.

(*j*) See section 302 and notes thereto.

(*k*) This reservation was also contained in the repealed section 2 of 1 Vic. cap. 7.

(*l*) There was no such thing as costs at common law *eo nomine;* but they were generally included in the damages given by the jury. This, however, being discretionary and inadequate, the legislature in 1278 put a *plaintiff's* right to costs upon a surer basis. It was in that year that the statute of Gloucester was passed. It refers to certain original writs now obsolete, and enacts that "demandant may recover against the tenant the costs of his writ purchased together with the damages," and that the act "shall hold place in *all cases* where a party is to recover damages:" 6 Edw. I. cap. 1. Though the statute gives the costs of the "writ," it has been construed as extending to the costs of suit generally. But as by it costs were made recoverable in all cases indiscriminately, irrespective of the *quantum* of damages, however small, so long as *some* damages were recovered, plaintiffs having trifling demands forsook the inferior to bring their actions in the superior courts. To prevent this abuse the legislature enacted that "if upon any action personal to be brought in any of her majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to forty shillings or above, that in every such case the judge and justices before whom any such action shall be pursued shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions:" 43 Eliz. cap. 6, s. 2. The effect of this statute is to authorize a judge's certificate, the consequence of which is plainly to deprive plaintiff of costs beyond the amount of his verdict. In 1623 a statute was passed which operated differently. It enacts that "in all actions upon the case for slanderous words to be sued or prosecuted by any person or [illegible] &c. if the jury upon the trial of the issue in such action, or the jury that [illegible] of the damages, do find or assess the damages under forty shillings, [illegible] plaintiff or plaintiffs in such action shall have and recover only so much [illegible] the damages so given or assessed amount unto, without any further increase [illegible] the same:" 21 Jac. I. cap. 16, s. 6. The operation of this statute depends [illegible] upon any certificate, but upon the mere finding of the jury. Though

313. In cases not otherwise provided for by Statute or Rule of Court, the allowance of costs to either party in civil

When costs in civil suits to be regu-

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under the statute of Elizabeth plaintiff can have no more costs than damages, if the damages be under forty shillings, in case the judge certify, by a still later statute, if the damages be under forty shillings plaintiff shall have no more costs than damages *unless* the judge do certify. It is enacted that "in all actions of trespass, assault, and battery, and other personal actions wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto:" 22 & 23 Car. II. st. 2, cap. 9. This statute, notwithstanding the use of the words "other personal actions," was construed as extending only to actions of *trespass quare clausam fregit* and *assault and battery*. Afterwards, in 1697, "for the preventing of wilful and malicious trespasses," it was enacted that "in all actions of trespass to be commenced, &c. in any of his majesty's courts of record, &c. wherein at the trial of the cause it shall appear and be certified by the judge, under his hand upon the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover, not only his damages, but his full costs of suit:" 8 & 9 Wm. III. cap. 11, s. 4. Such were the chief features of the English law as to costs of plaintiffs when by the legislature of this Province it was expressly declared that "the allowance of costs to either party, plaintiff or defendant in all civil suits, &c. to be regulated by the statutes and usages which direct the payment of costs by the laws of England:" 2 Geo. IV. cap. 1, s. 38. Subsequently the legislature of this Province, in furtherance of the intention and spirit of the English statutes, enacted that in any suit brought in a superior court of common law of the proper competence of a county court, no more than county court costs should be taxed against defendant: 8 Vic. cap. 13, s. 59; and with respect to suits of the proper competence of a division court a similar provision was passed: 13 & 14 Vic. cap. 53, s. 78. Still later the Provincial legislature followed the example of the English legislature in extending the principle of the English statute of Charles to all actions of trespass. This was done by Prov. Stat. 16 Vic. cap. 175, s. 26, taken from Eng. Stat. 3 & 4 Vic. cap. 24, s. 2.

Until the statute of 23 Hen. VIII. cap. 15, a defendant was not entitled to costs in any case except on a writ of right of ward maliciously brought, which costs were given by the statute of Marlbridge. But even from the time of Hen. VIII. to the reign of James I. a defendant was entitled to costs only in certain specified actions. During the reign of James it was enacted "that if any person or persons, &c. shall commence, &c. any action, &c. wherein the plaintiff or demandant might have costs (if in case judgment should be given for him), and the plaintiff or plaintiffs, demandant or demandants, in any such action, &c. after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass by any lawful trial against the plaintiff, &c. in any such action, &c. that then the defendant, &c. in every such action, &c. shall have judgment to recover his costs against every such plaintiff," &c.: 4 Jac. I. cap. 3, s. 2. This, with other statutes giving costs to defendants in case of discontinuance, nonsuit and demurrer, noticed in other parts of this work and not necessary to be here repeated, were introduced into this Province in like manner and at the same time as the statutes giving costs to plaintiffs. In 1830 the legislature of this Province passed a statute entitling a defendant pleading a set-off and proving a greater one than plaintiff's demand, to recover a verdict "besides his costs and charges:" 11 Geo. IV. cap.

lated by the Law of England.

suits and penal actions, shall be regulated by the Laws of England. (*m*) 2 Geo. IV. c. 1, s. 38; 19 Vic. c. 43, s. 311.

Costs on Writs under this Act to be as heretofore until otherwise ordered.

314. (*n*) Until otherwise ordered under the provisions of this Act, (*o*) the costs of Writs issued and of all other proceedings under the authority of this Act, shall be and remain the same as at present established. (*p*)

Mileage.

315. (*q*) No mileage shall be taxed or allowed for the service of any Writ, paper or proceeding, (*r*) without an affidavit being made and produced to the proper taxing officer, stating the sum actually disbursed and paid for such mileage, and the name of the party to whom such payment has been made. (*s*) 19 Vic. c. 90, s. 18.

Party allowed costs after judgment on demurrer, &c.

316. (*t*) In case judgment be given either for or against a Plaintiff or Demandant, or for or against a Defendant or Tenant, upon any demurrer joined in any action whatever, the party in whose favour the Judgment is given shall also

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5, s. 1. This completes the sketch intended of the principal statutes which give to plaintiffs and defendants costs of suit.

(*m*) This is in effect a reenactment of our old Stat. 2 Geo. IV. cap. 1, s. 38, mentioned in the preceding note.

(*n*) This is a mere temporary provision.

(*o*) The judges of the superior courts of law, or any three of them (of whom one of the chief justices shall be one), may from time to time frame tables of costs for the county courts.

(*p*) See note *l* to section 313.

(*q*) Taken from County Court P. Act, 1857, 19 & 20 Vic. cap. 90, s. 18.

(*r*) *Paper or proceeding* embodies rules, orders, notices, &c.

(*s*) In the taxation of costs no fees shall be allowed for mileage or service of writs of summons, or other mesne process, unless served and sworn in the affidavit of service to have been served by the sheriff, his deputy or bailiff, except in the cases as provided in the eighteenth section of this act: section 277. Taxing officers should not allow any items for which there are not proper vouchers, and these vouchers (except briefs, &c.) shouled be filed: *Wilson* v. *Moulds*, 4 Prac. R. 101. On revision of a taxation had by deputy clerks of the crown, the master is not to allow any items which are not verified by vouchers: *Ib.* Where two witnesses were brought from abroad to prove a particular fact, but were not put in the box because the fact was admitted in cross-examination of a witness on the other side, the proper officer was directed to allow their expenses: *The Biddick*, 19 L. T. N.S. 705. Where a party shows cause in the first instance, he will not, as a rule, be entitled to costs: *Villesboisnet* v. *Tobin et al*, *Ib.* 693.

(*t*) Taken from repealed Stat. 7 Wm. IV. cap. 3, s. 26, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42. s. 34.

have Judgment to recover his costs in that behalf. (*a*) 7 Wm. IV. c. 3, s. 26.

Defendants entitled to costs after a *nolle prosequi*, unless the Judge certifies.

317. (*a*) In case several persons be made Defendants in any personal action, and a *Nolle Prosequi* be entered as to any one or more of them, or in case upon the trial of such action, a verdict passes for him or them, every such person shall have judgment for and may recover his reasonable costs, (*b*) unless, in the case of a trial, the Judge before whom the trial is had, certifies upon the record under his

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(*u*) In general the successful party on a demurrer is now entitled to his costs, whatever may be the ultimate determination of the cause: *Bentley* v. *Dawes*, 10 Ex. 347; *Taylor* v. *Rolf et al*, 5 Q. B. 337; *Kintoch* v. *Hall*, 26 U. C. Q. B. 134; but see *Macmartin* v. *Thompson*, *Ib.* 334; *Burdon* v. *Flower*, 7 Dowl. P. C. 786; though the party succeeding be not entitled to damages: *Gregory* v. *Duke of Brunswick et al*, 3 C. B. 481; *Bentley* v. *Dawes*, 10 Ex. 347. It seems that the costs of a demurrer to a plea in abatement are not within the operation of the statute: *Thomas* v. *Lloyd*, 1 Salk. 194; and at all events cannot be recovered till the determination of the suit: *Richmond et al* v. *Campbell*, H. T. 2 Vic. *MS.* R. & H. Dig. "Costs," v. 1. One of several defendants succeeding on a demurrer is entitled to his costs: *Clarke* v. *Durham et al*, T. T. 4 & 5 Vic. P. C. *MS.* R. & H. Dig. "Costs," v. 2. A declaration contained two counts—one for the seduction of the plaintiff's daughter and the other for necessaries supplied to the child. Plea of not guilty to the first count and demurrer to the second. Verdict for the plaintiff, five shillings. Judgment afterwards given for plaintiff on the demurrer; whereupon plaintiff remitted on the roll all the damages, without excepting costs under the second count, and signed judgment for the five shillings and full costs taxed. *Held* that plaintiff was entitled to the costs of the demurrer to the second count, although it would have been the more correct form to have excepted the costs from the remittitur: *Townsend* v. *Sterling*, 4 Prac. R. 125.

(*a*) Taken from repealed Stat. U. C. 7 Wm. IV. cap. 3, s. 24, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 32.

(*b*) Where there are several defendants and a verdict passes against one and for the others, the latter are to be allowed all their separate costs and *prima facie* an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed by reason of other special circumstances: *Griffiths* v. *Kynaston et al*, 2 Tyr. 757; *Norman* v. *Climenson et al*, 1 Dowl. N.S. 718; *Bartholomew* v. *Stephens et al*, 5 M. & W. 386. Where one of several defendants suffers judgment by default and the remainder obtain a verdict, they are entitled to the costs: *Price* v. *Harris et al*, 2 Dowl. P. C. 804. Where two defendants sever in their pleadings but plead the same pleas, all going to the whole cause of action, and one succeeds upon all the issues and the other upon one only, each defendant is entitled to his separate costs of the issues on which he succeeded and aliquot part of the joint costs: *Gambrell* v. *Earl Falmouth et al*, 5 A. & E. 403; and the costs of the successful defendant may, it seems, be deducted out of the plaintiff's costs and damages, without regard to the attorney's lien: *George* v. *Elston et al*, 1 Bing. N. C. 513; *Starling* v. *Cozens et al*, 3 Dowl. P. C. 782; s. c. 4 Dowl. P. C. 445; *Griffith* v. *Jones et al*, 4 Dowl. P. C. 159; *Lees* v. *Reffitt et al*, 3 A. & E. 707. But where the several defendants, though defending separately and apparently by different attorneys, though virtually by one attorney only, they are not entitled to claim by separate bills of costs, but must make a joint charge: *Nanny* v. *Kenrick*

hand, that there was a reasonable cause for making such person a Defendant in the action. (*c*) 7 Wm. IV. c. 3, s. 24.

Costs where *nolle prosequi* entered as to part of declaration.

318. (*d*) Where a *Nolle Prosequi* is entered upon any count, or as to part of any declaration, (*e*) the Defendant shall have judgment for his reasonable costs in that behalf. (*f*) 7 Wm. IV. c. 3, s. 25.

Costs on arrest of judgment or judgment *non obstante.*

319. (*g*) Upon an arrest of judgment or judgment *non obstante veredicto*, the Court shall adjudge to the party against whom such judgment is given, the costs occasioned by the trial of any issues in fact arising out of the pleading for defect of which such judgment is given and upon which such party has succeeded, (*h*) and such costs shall be set off

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et al, 2 Dowl. P. C. 334. Where there are several defendants who obtain a verdict, the costs of all must be taxed at the same time, though they defend separately: *Smith et al* v. *Campbell et al*, 6 Bing. 637.

(*c*) This certificate can only be given by the judge who tried the cause: *Southwell* v. *Bird*, 7 Dowl. P. C. 557. *Qu.* If the cause be taken down to trial and then refused? see *Nokes* v. *Frazer*, 3 Dowl. P. C. 339; *Parker* v. *Serle*, 6 Dowl. P. C. 334; *Wallen* v. *Smith*, 5 M. & W. 159. There is no time mentioned within which this certificate should be moved or granted, but it is presumed that it should be moved immediately after the verdict: see, however, *Ivey* v. *Young*, 5 Dowl. P. C. 450; *Broggref* v. *Hawke*, 3 Bing. N. C. 880.

(*d*) Taken from repealed Stat. U. C. 7 Wm. IV. cap. 3, s. 25, which was a transcript of Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 33.

(*e*) The previous section applies to the case of a *nolle prosequi* entered as to one or more of several defendants; this section to a case of a *nolle prosequi* entered "upon any count or as to part of any declaration."

(*f*) This is an application to the case of a *nolle prosequi* as to a count or part of a declaration, of the same equitable principles which regulate the costs of several issues according to the finding: see note *i* to section 110 of this act.

(*g*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 145.

(*h*) Before this act upon a motion in arrest of judgment, or for judgment *non obstante*, each party paid his own costs: *Tiffin* v. *Glass*, Barnes, 142; *Cameron et al* v. *Reynolds*, 1 Cowp. 407; *Goodburne* v. *Bowman*, 9 Bing. 667. The reason why the successful party was refused costs was that he ought to have taken his objection at an earlier stage of the proceedings, viz. by demurrer: *Hodgkinson* v. *Wyatt*, 1 D. & L. 672, *per* Patteson, J.; but if the rule of the party moving was discharged he was compelled to pay the costs of the application to the opposite party: *Ib.* 668. Now, although he succeed he must pay some costs, viz. the costs occasioned by the trial of any issues in fact, arising out of the pleadings, for defects in which he recovers judgment. Even before this act, although judgment was arrested on one count of a declaration, but judgment remained in favor of defendant as to others upon which he had succeeded at the trial, he was held to be entitled to the general costs of the cause: *Elderton* v. *Emmens*, 5 D. & L. 489. As to judgment *non obstante veredicto*, it has been held that neither party is entitled to costs where the issues are immaterial: *Goodburne* v. *Bowman*, 2 Dowl. P. C. 206. And where

against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any. (*i*) 19 Vic. c. 43, s. 219.

Plaintiff allowed costs on *scire facias* after judgment by default, &c.

320. (*k*) In all Writs of *Scire Facias*, (*l*) and of Revivor, (*m*) the Plaintiff, obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, (*n*) as well as upon a judgment after plea pleaded, or demurrer joined. (*o*) 7 Wm. IV. c. 3, s. 26.

Payment of costs by executors and administrators.

321. (*p*) In every action brought by an executor or administrator in the right of the testator or intestate, such executor or administrator in case of being non-suited, or of a verdict passing against him, and in all other cases in which he would be liable if he were suing in his own right upon a

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judgment *non obstante veredicto* was entered for plaintiff in the Queen's Bench, England, and afterwards reversed by a court of error, it was held that defendant was entitled to the costs of opposing the rule for judgment *non obstante veredicto*: *Evans et al* v. *Collins et al*, 2 D. & L. 989. So where a cause had been referred and judgment was for the plaintiff, but was arrested by a court of error, it was held under the order of reference, coupled with the section in the English act corresponding to the above, that the plaintiff was entitled to the costs of the arbitration, and also to the costs in the court below: *Whaley* v. *Laing*, 5 H. & N. 480.

(*i*) The effect of this provision will be, as intended, to lessen the frequency of motions either in arrest of judgment or for judgment *non obstante veredicto*. *Quære.* Would the set-off of costs here authorised be suffered to interfere with an attorney's lien for costs of suit? see *Doe d. Swinton* v. *Sinclair et al*, 5 Dowl. P. C. 26.

(*k*) Taken from repealed Statute U. C. 7 Wm. IV. cap. 3, s. 26. The origin of which was 8 & 9 Wm. III. c. 11, s. 3.

(*l*) Extends only it is apprehended to *scire facias* in civil suits, and not to *scire facias* to repeal letters patent, &c.: *Rex* v. *Miles*, 7 T. R. 367. In *Poole* v. *Broadfield*, Barnes, 431, it was held that costs could not be given against a plaintiff applying to quash his own writ of *scire facias*; and it was so ruled in *Pocklington* v. *Peck*, 1 Stra. 638, on plaintiff applying for leave for that purpose after plea in abatement; but the court said that if there had been no plea they would have made the plaintiff pay costs. It is now ordered that a plaintiff shall not be allowed a rule to quash his own writ of *scire facias* or revivor after a defendant has appeared, except on payment of costs: R. G. pr. 59.

(*m*) See sections 302, 305.

(*n*) There were no costs under 8 & 9 Wm. III. cap. 11, s. 3, in the case of judgment by default: *Biddulph* v. *Cooper* cited, 1 H. Bl. 108; *Bale* v. *Hodgetts*, 7 Moore, 602.

(*o*) As to which full provision was made by the 8 & 9 Wm. III. cap. 11, s. 3.

(*p*) Taken from repealed Stat. U. C. 7 Wm. IV. cap. 3, s. 23. The original of which is Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 31.

cause of action accruing to himself, (*q*) shall, unless the Court in which the action is brought, or a Judge thereof (*r*) otherwise orders, (*s*) be liable to pay costs to the Defendant, and the Defendant shall have judgment for such costs, and they shall be recovered in like manner. (*t*) 7 Wm. IV. c. 3, s. 23.

Circumstances under which

322. (*a*) In case the Plaintiff in any action does not obtain a verdict (*b*) for the amount for which the Defendant

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(*q*) The intention of this section is to put executors and administrators (where plaintiffs) on the same footing as other plaintiffs, subject to the exercise of the discretionary power in their favour noticed in notes *s* and *t infra*.

(*r*) The authority of any one of the judges is under this section co-ordinate with that of the whole court: *Maddock* v. *Phillips*, 3 A. & E. 198; but see *Lakin et al* v. *Massie*, 4 Dowl. P. C. 239; and see also note *w* to section 48. And therefore where a single judge, in the exercise of his discretion, made an order to relieve an executor plaintiff from payment of costs the court declined to review the exercise of discretion: *Lakin et al* v. *Massie*, 4 Dowl. P. C. 239.

(*s*) In order to induce the court or a judge in the exercise of their or his discretion to relieve a plaintiff executor from the payment of costs, it must be shewn not merely that the action was brought *bona fide* or even under the advise of counsel, but that due diligence was used and proper enquiry made of the defendant before the commencement of the action for the purpose of ascertaining whether he the plaintiff was in a position to prosecute his suit to a successful result, and so that in fact the failure of the action may not appear to have arisen from something like fraud or misapprehension on the part of the defendant; and the mere refusal of the defendant to disclose the precise nature or ground of his defence will not be sufficient for this purpose: *Wilkinson* v. *Edwards*, 1 Bing. N. C. 301; *Brown et al* v. *Croley et al*, 3 Dowl. P. C. 386; *Southgate et al* v. *Crowley et al*, 1 Bing. N. C. 518; *Godson* v. *Freeman*, 2 C. M. & R. 585; *Engler* v. *Twisden*, 2 Bing. N. C. 263; *Redmayne* v. *Moore*, 2 Jur. N.S. 691. Nor will the fact that the plaintiff was taken by surprise by the defence be sufficient: *Godson* v. *Freeman*, 2 C. M. & R. 585; *Farley et al* v. *Briant et al*, 3 A. & E. 839. Or that the defendant has been discharged under an insolvency or bankruptcy act: *Engler* v. *Twisden*, 2 Bing. N. C. 263. Mere silence by the defendant as to the nature of his defence is not sufficient ground for the application: *Birkhead* v. *North*, 4 D. & L. 732. The meaning of the statute is that executors shall be liable in those cases in which they were not liable before, but does not touch the case of an executor suing on a contract made with himself: see further *Ashton* v. *Poynter*, 1 C. M. & R. 740, *per* Parke, B.; *Spence et al* v. *Albert*, 2 A. & E. 784.

(*t*) The general rule established by the statute is that the executor or administrator shall, like other suitors, be liable to the payment of costs if unsuccessful in litigation, and it therefore devolves upon him, in order to escape liability, to bring his case clearly within the exception, and to do so he must establish special grounds such as mentioned in last note for interference on his behalf: *Farley et al* v. *Briant et al*, 3 A. & E. 865, *per* Lord Denman, C. J.

(*a*) Taken from repealed Stat. U. C. 49 Geo. III. cap. 4, s. 1, the original of which was Eng. Stat. 43 Geo. III. cap. 46, s. 3.

(*b*) The plaintiff must obtain a less amount by verdict or other compulsory process, or the statute will not apply: *Brooks* v. *Rigby*, 2 A. & E. 21; *Rowe* v. *Rhodes*,

has been arrested and held to special bail, (*c*) and in case upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, it be made to appear, to the satisfaction of the Court in which the action has been brought, (*d*) that the Plaintiff had not any reasonable or

defendant, when held to special bail, may be entitled to costs of suit.

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2 C. & M. 379; *Butler* v. *Brown*, 1 B. & B. 66. Therefore not applicable where a defendant pays into court a sum less than that sworn to and the plaintiff accepts it: *Ib.*; though it might be otherwise if the plaintiff replied damages *ultra* and obtained a verdict: see *Taylor* v. *Rolfe*, 13 L. J. Q. B. 39. So inapplicable if action compromised: *Linthwaite* v. *Bellings*, 2 Smith, 667; or referred to arbitration: *Keene* v. *Deeble*, 3 B. & C. 491; *Payne* v. *Acton et al*, 1 B. & B. 278; *Sherwood* v. *Tayler*, 6 Bing. 280; *McGregor* v. *Scott*, Tay. Rep. 56; *Powell* v. *Gott*, 1 U. C. Q. B. 418; unless a *verdict* be taken subject to a reference: *Jones* v. *Jehu*, 5 Dowl. P. C. 130; *Turner et al* v. *Prince*, 5 Bing. 191; *Kendrew* v. *Allen*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "Costs," iv. (1) 4; *McMicking* v. *Spencer*, H. T. 6 Vic. *MS. Ib.* "Costs," iv. (1) 6; *Nicholson* v. *Allan*, 6 O.S. 252; or perhaps the arbitrator having power to order, does order *judgment* to be entered up: *Holder* v. *Raith*, 4 N. & M. 466; but in that case, if the submission that the costs of the cause are "to abide the event," it would seem the statute would be inapplicable: *Thompson et al* v. *Atkinson*, 6 B. & C. 193; but see *Nicholson* v. *Allan*, 6 O.S. 252. If the arbitrator, having the same power as the court, does not make any award on this statute, the court will not interfere: *Greenwood* v. *Johnson*, 3 Dowl. P. C. 606. *Semble*, the word "obtain" in this act, or "recover" in the old act, are not necessarily to be construed the sum for which the verdict was rendered in order to prevent the plaintiff taxing any costs when the defendant is allowed his costs of defence: *Higson* v. *Phelan*, 1 Prac. R. 24; s. c. 2 Cham. R. 7. The act does not extend to the case of a plaintiff in debt on bond recovering a verdict for nominal damages and taking judgment for the penalty, the penalty being the sum in law recovered: *Cammack* v. *Gregory*, 10 East. 525; *Talbot* v. *Hodson*, 2 Marsh. 527.

(*c*) There must be an arrest as well as a holding to bail before the statute can be held to apply: *Bates* v. *Pilling*, 2 Dowl. P. C. 367; *Amor* v. *Blofield*, 1 Dowl. P. C. 277; *James* v. *Askew*, 8 A. & E. 351; *Robinson* v. *Powell*, 5 M. & W. 479; *Cash et al* v. *Trevor*, 3 Ir. L. R. 433. But *semble*, the words of the statute are satisfied by the defendant being arrested and imprisoned: *McGregor* v. *Scott*, Tay. Rep. 56; see also *Handley* v. *Levy*, 8 B. & C. 637; *Ricketts et al* v. *Noble*, 3 Ex. 521. A bailable writ having issued, the deputy sheriff went to defendant, informed him that he had the writ, and asked him to find bail. They both then went in search of bail, and a bail bond was executed. *Held* a sufficient arrest and holding to bail to make the statute applicable: *Morse* v. *Jeetzel*, 1 Prac. R. 369. But where defendant was arrested, and without putting in special bail was discharged under the Eng. Stat. 1 & 2 Vic. cap. 110, s. 7, the statute was held inapplicable: *Bennett* v. *Burton*, 9 Dowl. P. C. 492; see also *Edwards* v. *Jones*, 5 Dowl. P. C. 585; *Wilson* v. *Broughton*, 2 Dowl. P. C. 631; *Joel* v. *Peard*, 10 Ir. L. R. 550.

(*d*) The application must be made to the court wherein the action was commenced: *Costello* v. *Corlett*, 4 Bing. 474; *Handley* v. *Levy*, 8 B. & C. 637; *James* v. *Dawson*, 1 Dowl. P. C. 341; *Connel* v. *Watson*, 2 Dowl. P. C. 139; before the taxation of costs: *Rennie* v. *Yorston*, 8 Dowl. P. C. 326. The affidavit must state that the defendant was arrested without reasonable or probable cause: *McIntosh* v. *White*, Tay. Rep. 57; but if the facts disclosed in the affidavit shew the arrest to have been without reasonable and probable cause, that is sufficient without swearing to it in express terms: *Laderonte* v. *Cullen*, 1 Prac. R. 22; and it should also

probable cause for causing the Defendant to be arrested and held to special bail in such amount as aforesaid, (*e*) such

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appear by affidavit for what amount the plaintiff obtained his verdict: *Powell* v. *Gott*, 1 U. C. Q. B. 415; and in one case, where the affidavits were incorrectly intituled, the court refused leave to amend: *Rose et al* v. *Cook*, *Ib.* 5; but where the rule only was incorrectly intituled, the court allowed an amendment of it in accordance with the affidavits, on payment of costs: *Ball* v. *McKenzie*, T. T. 7 Vic. *MS.* R. & H. Dig. "Costs," iv. (1) 7. The judge's notes may be referred to: *Van Nyvel* v. *Hunter*, 3 A. & E. 243; *Higson* v. *Phelan*, 1 Prac. R. 24; and affidavits will not be received for the purpose of impeaching the verdict: *Tipton* v. *Gardner*, 4 A. & E. 317; see also *Twiss* v. *Osborne*, 4 Dowl. P. C. 107. The verdict is *prima facie* evidence of the amount due, and the court is in general guided by the evidence given at the trial: *Glenville* v. *Hutchins*, 1 B. & C. 91; *Ballantyne* v. *Taylor*, 5 A. & E. 792. The fact that the indorsement for bail on the *capias* by mistake stated a larger sum than that stated in the affidavit of debt (the arrest having been made for the amount really due) is immaterial: *Preedy* v. *Macfarlane*, 3 Dowl. P. C. 458.

(*e*) The defendant is only entitled to his costs under this statute if the plaintiff holds him to bail for a sum materially larger than that which was found to be due: *Sherwood* v. *Tayler*, 6 Bing. 280; *Roper* v. *Sheasby et al*, 1 C. & M. 496; and if the plaintiff acted on a conscientious persuasion that the larger sum is due, he may be held justified in arresting for that amount: *Clare* v. *Cooke*, 4 Bing. N. C. 269. The onus has been held to lie on the defendant to show that there was not reasonable grounds for making the arrest for the larger amount to the knowledge of the plaintiff: *Day* v. *Clark*, 7 Dowl. P. C. 147; *Edwards* v. *Jones*, 2 M. & W. 414; *White* v. *Prickett*, 6 Dowl. P. C. 445; *Hood* v. *Cronkite*, 29 U. C. Q. B. 98. Therefore where defendant set up her coverture to part of plaintiff's demand, of which plaintiff was ignorant, it was held that he had reasonable grounds for arresting for the amount incurred during her coverture: *Spooner* v. *Danks*, 7 Bing. 772; see also *Mantell* v. *Southall*, 2 Bing. N. C. 74. So where the debt was reduced by the Statute of Limitations, and the defendant had given the plaintiff reason to believe that he did not intend to set up that defence: *White* v. *Prickett*, 4 Bing. N. C. 237; s. c. 6 Dowl. P. C. 445; see also *Ballantine* v. *Taylor*, 1 N. & P. 219. So if unable to prove the full amount of his claim owing to some accidental circumstance: *Shatwell* v. *Barlow*, 3 Dowl. P. C. 709; such as a defect in his declaration: *Preedy* v. *McFarlane*, 1 C. M. & R. 819; or credit twice given for the same items by mistake: *Goldie et al* v. *Cameron*, 1 Prac. R. 20; or where a reasonable doubt in law as to plaintiff's right to recover part of her demand: *Stovin* v. *Taylor*, 1 Dowl. P. C. 697, note *a*. But plaintiff is bound by the statutes of set-off, and when about to make an arrest must consider the balance really due and make that the basis of the arrest: *Kendrew* v. *Allen*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "Costs," iv. (14.) If goods are sold partly on credit and part for ready money, and before the credit is expired the debtor is arrested for the full amount, there will be no reasonable and probable cause for the arrest for the larger sum: *Day* v. *Picton*, 10 B. & C. 120; *Gompertz* v. *Denton*, 1 Dowl. P. C. 623; *Russell* v. *Atkinson*, 2 N. & M. 667; and so where defendant, before action, had returned a part of the goods as being of bad quality: *Linley* v. *Bates*, 2 C. & J. 659. So if an attorney held his client to bail for a bill of costs larger in amount than that at which it is ultimately taxed: *Robinson* v. *Etsam*, 5 B. & Al. 661; *Lord Huntingtower* v. *Heely*, 7 D. & R. 369; *Griffiths* v. *Pointon*, 2 N. & M. 675. It requires a strong case to bring an executor within the operation of the act, as having made an arrest without reasonable or probable cause: *Foulkes et al* v. *Marsh*, 1 Marsh. 21; *James* v. *Francis*, 5 Price, 1; see further *Silversides* v. *Bowley*, 1 Moore, 92.

Court may, by rule or order, direct that the costs of suit shall be allowed to the Defendant, (*f*) and the Defendant shall thereupon be entitled to such costs of suit, and the Plaintiff, upon such rule or order being made, shall be disabled from taking out any execution for the sum recovered in such action, unless the same exceeds, and then in such sum only as the same exceeds the amount of the taxed costs of the Defendant, (*g*) and in case the sum recovered in any such action is less than the amount of the taxed costs of the Defendant, then after deducting the sum of money recovered by the Plaintiff from the amount of the Defendant's costs to be taxed as aforesaid, he may take out execution for the balance of such costs in like manner as a Defendant may now by law have execution for costs in other cases. (*h*) 49 Geo. III. c. 4, s. 1.

In actions on judgments, plaintiff not entitled to costs unless by rule of Court.

323. (*i*) In case of an action brought upon any judgment recovered in any Court of Record of Upper Canada, or in any Division Court, (*j*) the Plaintiff in such action shall not be entitled to any costs of suit, (*k*) unless the Court in which the action is brought, or some Judge of the same

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(*f*) *Semble*, that the statute is inapplicable to one of several defendants who had been arrested for more than the sum recovered: *Glass* v. *Carry et al*, 1 Prac. R. 132.

(*g*) Not only in the event of there being no reasonable and probable cause for the arrest is the defendant entitled to the costs of the suit, but generally to the costs of the application: *Higson* v. *Phelan*, 1 Prac. R. 24; and entitled to set off the amount of his costs as taxed against plaintiff's verdict: *Burrows* v. *Lee*, E. T. 3 Vic. *MS.* R. & H. Dig. "Costs," iv. (1) 2.

(*h*) In this way the set-off is made most effective; thus,

1. Defendant entitled to costs of suit.

2. Plaintiff entitled to execution only for balance, if any, between such costs and the verdict.

3. Defendant entitled to execution for balance if verdict less than costs of suit.

(*i*) Taken from repealed Stat. U. C. 49 Geo. III. cap. 4, s. 2, as consolidated with section 52 of 13 & 14 Vic. c. 53. The origin of which is Eng. Stat. 43 Geo. III. cap. 46, s. 4.

(*j*) The section extends only to judgments recovered by plaintiffs, and not to judgments of nonsuit or nonpros: *Bennett* v. *Neale*, 14 East. 343.

(*k*) The court will not interfere to stay proceedings in the action upon payment of the judgment debt without costs: *Wood* v. *Stilleto*, 1 Chit. Rep. 473.

Court, (*l*) otherwise orders. (*m*) 49 Geo. III. c. 4, s. 2; 13 & 14 Vic. c. 58, s. 52.

In trespass or case, Plaintiff to

324. (*n*) If the Plaintiff, in any action of trespass (*o*) or trespass on the case, (*p*) recovers by the verdict of a Jury,

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(*l*) The application ought when practicable to be made to the judge in chambers, and apparently to a judge of "the same court" in which the action is brought: *Claridge* v. *Wilson*, 26 L. J. Ex. 246. Although the statute allows it to be made to the full court: *Jones* v. *Lake*, 8 C. & P. 295. The application is not ex parte: *Lonax* v. *Berry*, 29 L. T. Rep. 129; s. c. 3 Jur. N.S. 446. If in chambers it must be by summons: *Ib.* If to the court, by rule nisi: *Fraser* v. *Moses*, 4 Scott, N. R. 749.

(*m*) It is not usual to give the costs: *Mason* v. *Nicholls*, 14 M. & W. 118; *Hanmer* v. *White*, 12 M. & W. 519; *Slater* v. *Mackay*, 8 C. B. 553; *Keeler* v. *Brouse*, 1 U. C. Q. B. 348; though defendant have occasioned delay by obtaining time to plead: *Hall* v. *Pierce*, 5 Dowl. P. C. 603; or plead a false plea of *nul tiel* record: *Hanmer* v. *White*, 12 M. & W. 519; *McDonald* v. *Clarke*, 1 U. C. Q. B. 527. But if the proceedings, instead of being rash or vexatious, have been directed by the court or are shown to be really necessary to enable plaintiff effectually to enforce his rights, costs will be allowed: *Fraser* v. *Moses*, 1 Dowl. N.S. 705; *Garnwell* v. *Barker*, 5 Taunt. 264; *Armstrong* v. *Fuller*, 1 Chit. Rep. 190; *Wood* v. *Stilleto*, *Ib.* 473; *Slater* v. *Mackie*, 19 L. J. C. P. 88; *Revell* v. *Wetherell*, 3 C. B. 321.

(*n*) This section is the one substituted by Stat. of Ontario 31 Vic. cap. 24, s. 1, for the former section 324 of the C. L. P. Act. The latter was a re-enactment of 16 Vic. cap. 175, s. 26, which was taken from Eng. Stat. 3 & 4 Vic. cap. 24, s. 2. It may be mentioned that the last named statute repealed the act of 43 Eliz. cap. 6, "so far as it relates to costs in actions of trespass or trespass on the case," and so much of the 22 & 23 Car. II. cap. 9, "as relates to costs in personal actions:" see *Morgan* v. *Thorne*, 7 M. & W. 400. But that our 16 Vic. cap. 175, s. 26, did not do so in express words any more than the section here annotated. Referring to 16 Vic. cap. 175, s. 26, Robinson, C. J., said: "The new provision forms a single clause in a statute which relates to a multitude of other subjects. No intention is expressed of consolidating the existing law on this point, or of affording one simple rule as a substitute for all others relating to the plaintiff's costs in actions of trespass and trespass on the case. It follows then, we think, that we can only take this isolated clause as it stands, and give effect to its provisions by allowing them to overrule any previous enactment with which they conflict. We cannot go so far as to hold that this clause virtually repeals all former laws on this subject, though we may and must hold it to have virtually repealed whatever is clearly inconsistent with it:" *Pedder* v. *Moore*, 1 Prac. R. 119. The Eng. Stat. 3 & 4 Vic. cap. 24, s. 2, was afterwards, in England, in accordance with the decision of *Pedder* v. *Moore*, held not to conflict with the 21 Jac. 1, cap. 16, s. 6, so as to repeal it, "but that both enactments may well stand together:" *Evans* v. *Rees*, 9 C. B. N.S. 391. But it has been decided by the court of Common Pleas that section 324 above annotated as amended by Stat. Ont. 31 Vic. cap. 24, s. 1, has in effect repealed the 21 Jac. 1, cap. 16, s. 6, so that a judge may now certify for full costs in an action for slander, though the damages recovered be only one shilling: *Stewart* v. *Moffatt*, 20 U. C. C. P. 89.

(*o*) *Quære.* Is the statute 8 & 9 Wm. III. cap. 11, s. 4, which allows plaintiffs full costs in actions of trespass upon a certificate of the presiding judge that the trespass proved is wilful and malicious, no matter what the amount of the verdict may be, repealed? see *Wise* v. *Hewson et al*, 1 Prac. R. 232.

(*p*) Though *assumpsit* is a species of trespass on the case, yet it is not contem-

less damages than eight dollars, such Plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, (*q*) whether the verdict be given on an issue tried, (*r*) or Judgment has passed by default, (*s*) unless the Judge or pre- recover no costs if verdict be less than eight dollars unless Judge

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plated by this section. The only species of actions on the case intended are those brought for "grievances," *i. e.* actions for tort: see *Morison et al* v. *Salmon*, 10 L. J. C. P. 91. Thus actions for the infringement of patents: *Gillett* v. *Green*, 7 M. & W. 347; for libel: *Foster* v. *Pointer*, 1 Dowl. N.S. 28; for slander: *Stewart* v. *Moffatt*, 20 U. C. C. P. 89; *Newton* v. *Roe*, 2 D. & L. 815; for nuisance: *Shuttleworth* v. *Cocker*, 9 Dowl. P. C. 76; *Reid* v. *Ashby et al*, 13 C. B. 897; for seduction; *Townsend* v. *Sterling*, 4 Prac. R. 125; and generally for any wrong committed (*ex delicto*) which is the subject of an action.

(*q*) If the plaintiff, &c., shall recover, &c., less damages than eight dollars, &c., such plaintiff shall not be entitled to recover in respect of such verdict *any costs whatever*. The penalty is different from that enacted by the statutes of Elizabeth, James and Charles II. which debar plaintiff from recovering "more costs than damages."

(*r*) The Eng. Stat. of 3 & 4 Vic. cap. 24, s. 2, which reads, "upon any issue *or issues* tried," &c. was clearly held to contemplate actions in which there were more issues than one: *Newton* v. *Rowe et al*, 1 C. B. 187. In an action for a libel the defendant pleaded not guilty and several pleas of justification. The plaintiff recovered a verdict on all the issues—damages three farthings. *Held* under Stat. 3 & 4 Vic. cap. 24, s. 2, that he was not entitled to any costs: *Ib.* Referring to this case the Court of Exchequer said, "We concur entirely in that decision:" *Sharland* v. *Loaring*, 1 Ex. 375. To a count of trespass *qu. cl. fr.* upon three closes the defendant pleaded several pleas; the plaintiff new assigned trespasses *extra viam* as to the third close, to which the defendant pleaded not guilty. The defendant had a verdict on some of the issues with respect to the first and second closes, and the plaintiff upon the others, so that the defendant succeeded as to the causes of action in those closes; the plaintiff had a verdict with one farthing damages upon the new assignment. There was no certificate under the Eng. Stat. of 3 & 4 Vic. cap. 24. *Held* that the causes of action were divisible, and that under Stat. 4 & 5 Anne, cap. 16, ss. 4, 5, the plaintiff was entitled to the costs of the issues found for him with respect to the causes of action in the first and second closes; but that he was deprived of all costs by the 3 & 4 Vic. cap. 24, with respect to the cause of action for trespasses in the third close: *Io.* By the one statute the defendant is punished for pleading pleas which he cannot support; by the other the plaintiff is punished for bringing a frivolous action, though he succeed: *Ib.* A plaintiff having obtained judgment upon a demurrer to a replication, the cause went down for trial upon the issues of fact without a *venire tam quam*: the plaintiff recovered only twenty shillings damages, and the judge refused to certify under 3 & 4 Vic. cap. 24. *Held* that plaintiff was only entitled to the costs of the demurrer: *Poole* v. *Grantham*, 2 D. & L. 622. This section does not affect the costs of a demurrer adjudged in favour of the plaintiff, which costs are irrespective of the finding of a jury: *Kinlock* v. *Hall*, 26 U. C. Q. B. 134; *Townsend* v. *Sterling*, 4 Prac. R. 125. But if plaintiff fail at the trial on the merits, he cannot afterwards have a demurrer argued merely for the purpose of getting costs against the defendant: *Macmartin* v. *Thompson*, 26 U. C. Q. B. 334.

(*s*) The words "issue tried" and "default" were held not to comprehend an inquiry after judgment on demurrer, though the verdict be only for one farthing damages: *Taylor* v. *Rolf et al*, 5 Q. B. 337.

certifies certain facts.

siding officer, before whom such verdict is obtained, (*l*) immediately afterwards, or at any future time to which he may

(*l*) An action of trespass *qu. cl. fr.* was referred to arbitration, and by the order of reference the arbitrator was empowered to certify in the same manner as a judge at nisi prius. The arbitrator, though awarding one shilling damages, did certify that the action was brought "to try a right besides the mere right to recover damages." *Held*, plaintiff entitled to full costs: *Spain* v. *Cadell*, 9 Dowl. P. C. 745. And *per* Alderson, B.: "It seems to me that the parties are concluded by their own agreement, upon which we must put a reasonable construction. By the order of reference the parties have consented that the arbitrator shall stand in the same situation and have the same power to certify as a judge at nisi prius. They have, then, given the arbitrator the same authority as a judge possesses to determine whether or not the verdict is to carry costs:" *Ib.* 747. By an order of reference in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim £500, costs forty shillings, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper, and to have all the same powers as the court or a judge sitting at nisi prius, and the costs of the suit to abide the event of the award. The arbitrator by his award found all the issues in the action in favor of the plaintiff, except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to one farthing. *Held* that the plaintiff was not, in the absence of a certificate under 3 & 4 Vic. cap. 24, s. 2, entitled to the costs of the cause: *Cooper* v. *Pegg*, 16 C. B. 454. Where in an action on the case for diverting a stream or water-course, "all matters in difference in the cause" were referred to arbitration, "the costs of the suit to abide the event of the award or umpirage," but no power was given to certify under 3 & 4 Vic. cap. 24, s. 2. *Held* that the true meaning of the submission was what its words import, that costs, *i. e.* the payment of costs, should follow the event, *i. e.* the legal event of the award, that he in whose favour the decision was should be paid by the other party the costs of the suit: *Griffiths* v. *Thomas*, 4 D. & L. 109. In this case the arbitrator found for the plaintiff on all the issues, and assessed his damages at sixpence. *Held* that plaintiff, notwithstanding, was entitled to full costs: *Ib.* If a *verdict* be taken at nisi prius subject to a reference, though no power to certify be conferred upon the arbitrator, still the case will come within the statute depriving a plaintiff of costs who recovers by the verdict of the jury less damages than eight dollars: *Reid* v. *Ashby et al*, 13 C. B. 897. In this case the first count of the declaration charged the defendants with injury to the plaintiff's party wall in excavating by the side of it and raising and overloading it. The defendants pleaded, first, as to the raising and overloading, not guilty by statute; secondly, as to the residue, payment into court of £30. The plaintiff joined issue on the first plea, and replied damages *ultra* to the second. At the trial a verdict was taken for the plaintiff for £2000, subject to an award, but no power was reserved to the arbitrator to certify under 3 & 4 Vic. cap. 24. The arbitrator having directed a verdict to be entered for the plaintiff on the first issue, damages twenty shillings, and for the defendant on the second issue: *held* that plaintiff was not entitled to any costs whatever: *Ib.* Where on a writ of inquiry in England, directed to the sheriff, the certificate granted under the 3 & 4 Vic. cap. 24, was by the under-sheriff, it was held necessary for him to sign it in the name of the sheriff and not in his own name: *Stroud* v. *Watts*, 3 D. & L. 799. If the record be so framed that a right beyond a mere right to recover damages *may* come in question, the court *in banc* cannot inquire whether the "judge or presiding officer" before whom such verdict shall have been obtained has exercised a sound discretion in granting a certificate: *Shuttle-*

postpone the consideration of the matter, (*u*) certifies on the

worth v. *Cocker*, 1 M. & G. 829. The judge or presiding officer has a discretion vested in him whether he will certify or not, in all cases of trespass or trespass on the case, with the exercise of which discretion no court has the right to interfere. If an attempt at appeal be made the questions to be asked are these: Is the action one of trespass or trespass on the case? Did the judge exercise his discretion? If affirmative answers must be given to both these questions there is no power to review: *Barker* v. *Hollier*, 8 M. & W. 513.

(*u*) *Immediately afterwards, &c.* The word "immediately" excludes all intermediate time and action; but it appears that in this section it has not necessarily so strict a signification: *Rex* v. *Francis*, Cas. Temp. Hardw. 114. To make good the deeds and intents of parties it should be construed such convenient time as is reasonably requisite for the doing of a thing: *Pybris* v. *Mitford*, 2 Leon. 77. If it were manifest that the intention of the legislature, when framing this section, was that not a single moment's interval should take place before the granting of the certificate, the courts would feel bound to submit to that declared intention: *Thompson* v. *Gibson et al*, 8 M. & W. 281. But such cannot be the interpretation. How, therefore, consistently with common sense and the principles of justice, are the words "immediately afterwards" to be construed? If they do not mean that the act is to be done the very instant afterwards, do they mean within ten minutes or a quarter of an hour afterwards? They should be interpreted to mean "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge, so as to disturb the impression made upon it by the evidence in the cause:" *Ib.* 286, *per* Abinger, C. B. It has been held too late to apply for the certificate after application made to the master to tax full costs and a refusal by him to do so: *Gillett* v. *Green*, 7 M. & W. 347. In an action on the case for a nuisance to the plaintiff's market, which was the last case tried at the assizes, a verdict was found for the plaintiff with nominal damages. The judge thereupon immediately adjourned the court to his lodgings and quitted the court. No application was made in court for a certificate under 3 & 4 Vic. cap. 24, but the plaintiff's counsel followed the judge to his lodgings, and there, within a quarter of an hour after the delivery of the verdict, obtained the certificate. *Held* that it was well given: *Thompson* v. *Gibson et al*, 8 M. & W. 281. In one case it was doubted whether the certificate could be granted after another cause had been called on: *Gillett* v. *Green*, 9 Dowl. P. C. 219; but that doubt has been set at rest by holding that, notwithstanding, the certificate may be granted: *Page* v. *Pearce*, 9 Dowl. P. C. 815. And *per* Lord Abinger, C. B.: "I think that a judge need not certify before he takes another case. He surely may take time to consider; and can it be said that he ought to postpone every other cause until he has made up his mind? Such a course would be unreasonable and very inconvenient:" *Ib.* 817. The effect of the decisions of *Thompson* v. *Gibson et al*, 8 M. & W. 28, and *Page* v. *Pearce*, 9 Dowl. P. C. 815, is that the word "immediately," in the sense in which it is employed in the act, does not mean so soon as the verdict is given, without any time whatever being taken for consideration, but that a reasonable time for consideration may be taken, and that a judge, if called upon to certify under the act, must have some time allowed him for consideration. If the word were construed to mean the moment the verdict is delivered, the judge would have no time whatever to view the bearings of the case: *Nelmes* v. *Hedges et al*, 2 Dowl. N.S. 352, *per* Patteson, J. A certificate applied for, even after one of the jurors in another cause had been sworn, and granted after the whole of them had been sworn, was held to be sufficient: *Ib.* 350. Where the judge took time to consider, but before judgment entered but after the first four days of term, certified, it was held that the certificate was in good time: *Wise* v. *Hewson et al*, 1 Prac. R. 232; and now that by the express terms of this section, as amended by the Stat. of Ont. 31 Vic. cap. 24, s. 1, the judge may postpone the considera-

If Judge do not certify defendant to set off his costs, unless Judge certifies that he is not entitled.

back of the Record (*v*) in the form hereinafter prescribed, to entitle the plaintiff to full costs; (*w*) and in case such certificate be not granted, then the defendant in such action shall be entitled to set off his costs against such verdict and recover judgment and issue execution against the plaintiff for the

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tion of the matter, and that the certificate may be given at such last-mentioned time, it is apprehended, if the certificate be moved in proper time, a liberal construction will be put upon the section as to the time of granting it: see further *Jones* v. *Williams*, 2 D. & L. 247.

(*v*) This was the practice as it existed before this act: see preceding note. The time within which it is necessary to move the judge or presiding officer for a certificate does not appear to be extended; but when made, if made in proper time, the certificate may be either granted on the spot or the consideration of it reserved to a future time.

(*w*) Before this statute, and under the section 324 as it stood before the amendment made by the Stat. of Ont. 31 Vic. cap. 24, s. 1, the judge was required to certify in form "that the action was really brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance complained of in respect of which the action had been brought was wilful and malicious." The only form now required to give a plaintiff full costs is: "I certify to entitle the plaintiff to full costs:" Stat. Ont. 31 Vic. c. 24, s. 3. But it is presumed that the judge, though the form of certificate is altered, will still be influenced in his decision in granting or refusing full costs by a consideration, as heretofore, of the character of the action, whether frivolous or vexatious. Actions of trespass or trespass on the case in which less damages than forty shillings were recovered were, as a rule, held to be frivolous and vexatious. Those suits were exceptions to it, which were in fact brought to try, not merely the right to recover damages, but to try a right beyond that or to vindicate the plaintiff from the vexation of a wilful or malicious injury: *Marriott* v. *Stanley*, 9 Dowl. P. C. 61, *per* Maule, J. The object of such acts is to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where very little damage has been sustained and there is no right in issue: *Shuttleworth* v. *Cocker*, 1 M. & G. 835, *per* Tindal, C. J. What the judge is called upon to do is to see the design which the plaintiff had in instituting the suit, and if satisfied by the course of the evidence that the plaintiff really thought he had a right which came in question, or which might by possibility come in issue, though the form of action may not be fitted for that purpose, and the right did not in fact come in question, he has a discretionary power in granting the certificate: *Morison et al* v. *Salmon*, 9 Dowl. P. C. 387, *per* Maule, J.; and the court will not interfere with the exercise of that discretion in cases proper for its exercise: see note *t* to this section. The judge has power to certify where the action is for selling medicines which the defendant falsely represented as prepared by the plaintiff: *Morison et al* v. *Salmon*, 9 Dowl. P. C. 387; or for a nuisance to the plaintiff's messuage from the defendant's factory: *Shuttleworth* v. *Cocker*, 1 M. & G. 829. But where the action was for leaving dangerous instruments in the highway, it was doubted whether a judge had a discretion to certify: *Marriott* v. *Stanley*, 9 Dowl. P. C. 59. In order to justify a judge in certifying in actions for libel, he must be satisfied that the conduct of the defendant arose from *personal* malice as contradistinguished from malice in law, which is essential to sustain the action: *Foster* v. *Pointer*, 8 M. & W. 395, *per* Alderson, B.; but in actions of trespass without personal malice the act may be considered so violent and outrageous as to be considered malicious within the meaning of the section: *Sherwin* v. *Swindall*, 12 M. & W. 788, *per*

balance of such costs as between attorney and client, (*x*) unless the said Judge or presiding Officer shall certify as hereinafter provided upon the record, in manner aforesaid, that the defendant is not entitled to recover his costs in the cause against the plaintiff. (*y*)

This shall not extend to certain trespasses.

325. (*a*) Nothing in the last section contained shall deprive the Plaintiff of costs in any action brought for a trespass over any land, (*b*) waste, close, wood, plantation or inclosure, or for entering into any dwelling, out-building or premises in respect to which notice not to trespass (*c*) had been previously served by or on behalf of the owner or occupier of the land trespassed over, or upon, or left at the last reputed or known place of abode of the Defendant in such action; (*d*) but nothing in this or in the last preceding section

Provision as to actions

Pollock, C. B. The fact that the plaintiff prays an injunction in an action in a superior court in which an injunction may be granted is not, even after verdict for plaintiff, sufficient to entitle plaintiff to recover superior court costs without the certificate of the judge who tried the case, when the amount of damages is clearly within the jurisdiction of an inferior court: *Emery* v. *Iredale*, 7 U. C. L. J. 181. The action itself must be of such a nature and the equitable relief sought be of such importance as to justify the judge who tried the cause in certifying for full costs: *Ib.*

(*x*) Under section 324 as it originally stood in the Consolidated Statutes of Upper Canada, it was held that if plaintiff was entitled to no costs whatever there could be no set-off of costs as between plaintiff and defendant: *Cross* v. *Waterhouse*, 10 U. C. L. J. 215; s. c. *Ib.* 320. This was felt to be an anomaly, and to remove it the section was amended as in the text by the Statute of Ontario 31 Vic. cap. 24, s. 1.

(*y*) See section 328 and notes thereto.

(*a*) The origin of this section is Eng. Stat. 3 & 4 Vic. cap. 24, s. 3.

(*b*) The word "commons" here followed in our Stat. 16 Vic. cap. 175, s. 26, as copied from Eng. Stat. 3 & 4 Vic. cap. 24, s. 3, but is intentionally omitted from the section here annotated.

(*c*) Read "thereon or therein" in Eng. Stat. 3 & 4 Vic. cap. 24.

(*d*) There is some difficulty in putting a construction upon this section. One interpretation of it may be that wherever a notice in writing has been given, the plaintiff shall be entitled to full costs without any certificate, although the amount of damages be less than 40s.; but if so, unless the fact of the notice appeared on the face of the declaration, it would seem that there must be a suggestion on the record for that purpose, which the defendant would be at liberty to traverse,—or the meaning may be that it shall be imperative on the Judge to certify where a written notice has been given, whereas in other cases it is discretionary. Probably in order to avoid the inconvenience of former decisions the latter is the true construction: *Sherwin* v. *Swindall*, 12 M. & W. 790, *per* Parke, B. However, where in trespass for placing stumps and stakes on the plaintiff's land the defendant paid 40s. into court, which the plaintiff took out in satisfaction of the trespass, and the plaintiff afterwards gave the defendant notice that unless he removed the stumps

which might have been brought in an Inferior Court.

shall entitle any Plaintiff to recover costs as of an action brought in a Superior Court in any case where by law his action might properly have been brought in an Inferior Court. (*e*) 19 Vic. c. 43, s. 312.

326. (*f*) Repealed by Stat. 23 Vic. cap. 42, s. 1.

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and stakes a further action would be brought against him; it was held that leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to full costs in an action for their continuance after the notice, though he recovered less than 40s. and the judge refused to certify that the trespass was wilful and malicious; and that the proper mode of obtaining the costs was by a suggestion that the trespass was committed after notice: *Bowyer* v. *Cook*, 4 C. B. 236. In an action of trespass where the plaintiff recovered less damages than 40s. and the trespass had been committed after a verbal notice not to do it, it was held a matter of discretion with the presiding judge to certify for costs under 8 & 9 Wm. III. cap. 11, s. 4, as altered by 3 & 4 Vic. cap. 24, s. 2: *Sherwin* v. *Swindal*, 12 M. & W. 783. It has been held that if in trespass the damages recovered be less than 40s. and the judge do not certify, proof that written notice not to trespass had been previously given, will not entitle plaintiff to full costs: *Daw* v. *Holl*, 15 L. J. Q. B. 32. The plaintiff in trespass for crossing a field had given notice to the defendant not to trespass on the field. Defendant justified under a right of way. Plaintiff traversed the right of way and new assigned. Defendant joined issue on the right of way, and suffered judgment to go by default on the new assignment. The jury found for the defendant as to the right of way, and gave the plaintiff 1s. damages on the new assignment. The judge refused to make any certificate under 3 & 4 Vic. cap. 24. *Held* the statute did not apply, and that plaintiff was not entitled to full costs: *Bourne* v. *Alcock*, 4 Q. B. 62. And, *per* Patteson, J., "Before this action was brought defendant asserted a right of way over the plaintiff's close. The plaintiff gave him notice not to trespass there, that is, in effect not to assert the right he claimed. If the plaintiff had succeeded on the justification his notice would have entitled him to costs; but the defendant has established his right to do what the notice forbade. The plaintiff says that the trespass *extra viam* was that which the defendant had notice not to do; but that is not so. If the plaintiff had said, 'It is true you have the right of way over a particular part of the close, but take care you do not go out of that way,' the case would have been different. Here he has only given a notice not to come upon the close at all:" *Ib.* 625.

(*e*) See note *u* to section 324.

(*f*) This section, which provides that suits within the jurisdiction of county courts might be brought and tried in the superior courts, subject to county court costs only, was in 1860 repealed by Stat. 23 Vic. cap. 42, s. 1. It was originally taken from Stat. 13 & 14 Vic. cap. 52, s. 1; 13 & 14 Vic. cap. 53, s. 78; 16 Vic. cap. 177, s. 2; 18 Vic. cap. 125, s. 4, and 19 Vic. cap. 43, s. 312, all of which it consolidated. It is now, however, enacted that all issues of fact and assessment of damages in actions in any county court may be tried and assessed, at the election of the plaintiff, at any sittings of assize and nisi prius for the county in which the venue is laid, without any order for that purpose: Stat. Ont. 32 Vic. cap. 6, s. 17, sub-sec. 2. The costs are the usual costs of the cases in the court in which the action is brought: *Ib.* sub-sec. 8. The judge has the same powers as to amendment of the record, adding and amending pleadings, putting off the trial, reference to arbitration, and making the cause a *remanet*, and otherwise dealing with the cause and proceedings therein as if the action had been commenced in a superior court of common law: Stat. Ont. 33 Vic. cap. 7, s. 1.

327. (*g*) Repealed by Stat. 23 Vic. cap. 42, s. 1.

328. (*h*) 1. In case a suit of the proper competence of a County Court be brought in either of the Superior Courts of the Common Law, or in case a suit of the proper competence of a Division Court be brought in either of such Superior Courts, or in a County Court, (*i*) the costs shall be taxed in the manner following: In Inferior Courts actions brought in Superior Courts;

2. In case the Judge, who presides at the trial of the cause, (*j*) certifies in open court immediately after the verdict has been rendered, (*k*) or at any future time to which he may If Judge certifies certain facts Plaintiff to recover full costs.

(*g*) This section, which made special provision as to the county of York for the trial of county court cases by a judge of a superior court of law, is, like the preceding section, repealed by 23 Vic. cap. 42, s. 1.

(*h*) Taken from Stat. Ont. 31 Vic. cap. 24, s. 2, which repealed the original section 328 of the C. L. P. Act and enacted the substituted section. The superior courts of law have an inherent jurisdiction over all causes, great or small. By the statute of Gloucester, damages, great or small, carry costs: see note *l* preceding note 313. But the legislature has appointed inferior courts for the trial and determination of smaller causes. It is therefore only proper that the time of the superior courts should not be occupied in the trial of causes which can be more conveniently, more cheaply, and more expeditiously determined in the inferior tribunals: see *Comstock* v. *Moore*, 6 U. C. C. P. 434. And it is necessary not only to declare that such causes ought to be tried in the proper tribunal, but that the party carrying it to another shall be subject to some penalty. The penalty here declared is loss of costs.

(*i*) Full costs should not be taxed without a certificate in cases of replevin more than in other cases, where for all that the verdict or determination shows the action might as well have been brought in the lower as the higher court: *Ashton* v. *McMillan*, 3 Prac. R. 10; *In re Coleman* v. *Kerr*, 28 U. C. Q. B. 297.

(*j*) A verdict by consent without taking of evidence or other hearing is not a trial within the meaning of this section: *Elmore* v. *Colman*, 4 O. S. 321; *Morse* v. *Tetzel*, 1 Prac. R. 375; *Cumberland et al* v. *Ridout et al*, 3 Prac. R. 14. Contra: *Bonter* v. *Pretty*, 9 U. C. C. P. 273. And where plaintiff *without a trial* recovers in a superior court an account within the pecuniary jurisdiction of an inferior tribunal defendant is not entitled to set off costs under this section: *Johnson* v. *Morley et al*, 9 U. C. L. J. 263. In an action of trover for a deed, the plaintiff recovered a verdict for £24 16s. It was ordered on motion that a new trial should be granted unless plaintiff would reduce his verdict and consent to accept only nominal damages, and to this he assented. The court under these circumstances refused an application to compel plaintiff to enter judgment and tax his costs, or allow the defendant to do so for him in order to set off costs of defence, because the verdict was not reduced till *after* the trial and plaintiff had no opportunity to apply for a certificate, which perhaps he might otherwise have obtained: *Ginn* v. *Scott*, 11 U. C. Q. B. 542.

(*k*) By this is meant "within a reasonable time:" *Page* v. *Pearce*, 8 M. & W. 677; *Mahoney* v. *Zwick*, 4 O. S. 99; see also *Falls et al* v. *Lewis*, E. T. 1 Wm. IV. *MS.* and *Patton* v. *Williams*, H. T. 3 Vic. *MS.* R. & H. Dig. "Costs," i. (3) 1; *Malloch* v. *Johnston*, 4 U. C. Q. B. 352. The certificate must be moved at the trial:

then postpone the consideration of granting or refusing the certificate, (*l*) that it is a fit cause to be withdrawn (*m*) from the County Court or Division Court, as the case may be, and brought in the Superior Court or a County Court, as the case may be, (*n*) the plaintiff shall recover his costs of suit accord-

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Hamilton v. *Clarke*, 2 Prac. R. 189; *Bonter* v. *Pretty*, 9 U. C. C. P. 278. Whether or not the motion may be made after another trial has been commenced has not yet received judicial determination: Marshall on Costs, 2nd ed. 18. Clearly it is too late after the trial of another cause has been finished: *McKee* v. *Irwine*, 1 U. C. Q. B. 160. But may be made on the same day and before the trial of another cause, notwithstanding an adjournment of the court: *Thompson* v. *Gibson et al*, 8 M. & W. 287; or even after jury sworn in the next succeeding cause: *Nelmes* v. *Hedges et al*, 2 Dowl. N. S. 350. It is too late after the lapse of several days: *Gillett* v. *Green*, 7 M. & W. 347. If moved in proper time it is usually by agreement between the parties not obtained till afterwards: *Serrell* v. *The Derbyshire, Staffordshire & Worcestershire Junction R. Co.* 10 C. B. 910; *Wise* v. *Hewson et al*, 1 Prac. R. 232; *Linfoot* v. *O'Neill*, 5 O. S. 343. The judge may examine witnesses for the purpose of satisfying his mind as to the propriety of granting the certificate: *Handcock* v. *Bethune*, 2 U. C. Q. B. 386. It is usual for the judge in his notes at the time of the application to make a note of it, and it is not usual to depart from the judge's notes as a record of what took place at the trial: *Gibbs* v. *Pike*, 9 M. & W. 360, *per* Lord Abinger, C. B. But in one case where on an application to rescind the judge's certificate it was asserted on the one side that the certificate had been moved and on the other denied, and the judge's notes contained no entry of it, the court referred to the judge (McLean, C. J.) as to the fact, and he, having reported in favor of the plaintiff's contention, the certificate was sustained: *McNaught* v. *Turnbull*, C. P. Temp., Richards, C. J., not reported. The right of a judge having granted a certificate himself to rescind it is doubtful: *Whalley* v. *Williamson*, 7 Dowl. P. C. 253; see further note *u* to section 324 of this act.

(*l*) This is new. If the application for the certificate be made in proper time the disposal of the application may be made at the time of the application, or the consideration thereof be postponed to a future time: see *Small* v. *Haney*, 4 U. C. L. J. N. S. 255.

(*m*) The word "withdrawn" is not to be taken literally. It means "not instituted," as if enacted that "the cause is a fit one to have been instituted in the superior court:" *Gardner* v. *Stoddard*, Dra. Rep. 102, *per* Macaulay, J. The word "withdrawn" is scarcely appropriate—the intention would have been better expressed by the word "withheld," for that is the real meaning of the word as used in the enactment: *per* Robinson, C. J., *Ib.* 110.

(*n*) The amount of the verdict in each case is *prima facie* against plaintiff's right to full costs. The burden is cast upon him to make a proper case for a certificate: see *Gardner* v. *Stoddard*, Dra. Rep. 101; *King* v. *Such*, 5 O. S. 81; *Washburn* v. *Longley*, 6 O. S. 217; *Hinds* v. *Denison*, 1 Cham. R. 194; *Hamilton* v. *Clarke*, 2 Prac. R. 189; *Brown* v. *McAdam*, 4 Prac. R. 54. If a plaintiff in good faith and on probable grounds seek to recover an amount beyond that which the jury award him, he has a right to the exercise of the discretionary power in his favour by the judge. The object of the enactment is not to inflict injustice, but to punish wilful contravention. Wherever it appears to the satisfaction of the judge that the plaintiff did sincerely urge and upon reasonable grounds a demand for debt or damages greater than could be recovered in the inferior court, although a jury may have given a verdict for a sum within the jurisdiction of the inferior court as to amount, it is usual for the judge to certify. Where there is no precise

ing to the practice of the Court in which the action is brought, in like manner and subject to the like deduction or set-off for costs of issues upon which the defendant may have succeeded, as he would have done and would have been subject to in case his suit had been of the proper competence of the Court in which the action is brought.

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computation to be arrived at on the evidence, and where the evidence would have warranted a verdict beyond the mark as well as below, it would be hard indeed that the plaintiff should be compelled at the peril of losing his costs to relinquish a large portion of what he may fairly claim, lest the jury, preferring the testimony of one witness to another or forming an arbitrary estimate of their own, may bring his verdict within the lower jurisdiction. The legislature never intended to work such hardship. So to construe the act as to convert a remedial measure into one of oppression, and that often to the detriment of the person in the right and to the advantage of the wrong doer. Take a case for example. A plaintiff sues in trespass to recover damages for a horse taken from him, and having given $60 for the horse and honestly valuing him at that price, brings an action in the county court. The jury, upon contradictory evidence as to value or from lenity to the defendant, find a verdict only for $40. Would it not be hard that he should lose his costs, when if the jury had chosen to value the horse one shilling higher it would have shown him to have beyond all question rightly resorted to the county court, and when the valuation of the horse at $60 may be more inconsistent with evidence than $40? The verdict of $40 may be correct; plaintiff, rather than have further litigation, may be satisfied with it; but in such a case to refuse him a certificate for costs would be, in all probability owing to set-off of costs, to deprive him of every farthing of his verdict, and entitle the wrong-doer to keep his horse. Take another case: A builder brings his action upon an agreement for work at a specified price, which would entitle him to $120. He proves the agreement and the work done under it, and thus makes out a case which he could not without abandoning the excess have proved in a division court. Having therefore necessarily brought his action in the county court, it may happen that defendant calls a witness to declare his opinion that the work is ill done, or hat the materials are bad, and thus make out a claim for reduction in value. The plaintiff's witnesses swear the contrary. Upon evidence which would warrant a determination either way, the jury see fit to reduce the price and give a verdict for $80. Ought it to follow in *such* a case that plaintiff must lose his costs, because he did not foresee that defendant would produce such witnesses as he did, and that the jury would decide the case just as they did, notwithstanding his own testimony to the contrary? It may in truth be rather hard that the decision should be against him upon the amount of damages, but to deny him a certificate would be to say he had no good reason either to advance his claim or produce his witnesses. It seems reasonable that plaintiff should lose his costs only where there is good reason to suppose that he proceeded unnecessarily, if not vexatiously, in the higher court, for a demand which he might have recovered in the lower jurisdiction. The enactment is directed, not against cases of accidental verdicts, but of wilful contravention. The power to certify is granted by the legislature for the protection of the plaintiff who, in good faith and with reasonable grounds of success, enters a demand for more than he recovers. It is easy to understand why a plaintiff suing in a county court on a promissory note for $80 should be deprived of costs, but it is difficult to see any analogy between such a case and cases of the nature above supposed: see remarks of Robinson, C. J. in *Stratford* v. *Sherwood*, 5 O.S. 169. Each case must to a very great extent depend on its own peculiar circumstances. But in some cases rules have been

If Judge certifies certain facts, plaintiff to recover costs of court in which action should have been brought.

3. In case the Judge, who presides at the trial of the cause certifies at the time aforesaid that the plaintiff had reasonable ground for believing he had the right of withdrawing his cause from the County Court, or Division Court, as the case may be, and bringing it in the Superior Court, or a County Court, as the case may be, and that the defendant, without just reason, defended the same, the plaintiff shall recover his costs of suit according to the practice of the Court in which the action should have been brought in like manner, and subject to the like deduction or set-off for costs of issues upon which the defendant may have succeeded, as he would have done, and would have been subject to in case he had brought his action in such Inferior Court. (*nn*)

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laid down for the exercise of the discretionary power conferred by the section. Thus if a debt or ascertained demand exceeding the pecuniary jurisdiction of a county court be reduced below the amount by payment before action, the certificate, except in very special cases, will be refused: *Donnelly* v. *Gibson*, 5 O.S. 704; *Mearns* v. *Gilbertson*, 6 O.S. 573; *Brown* v. *McAdam*, 4 Prac. R. 54. But if the proof of payments involve matters difficult of investigation, or if made after action brought, it is usual for the judge to certify: *Mearns* v. *Gilbertson*, 6 O.S. 573; *Kilborn* v. *Wallace*, 3 O.S. 17; *Turner* v. *Berry*, 5 Ex. 858. So if the trial of the cause involve difficult questions of law: *Thompson* v. *Crawford et al*, 9 U. C. L. J. 262. So if the jurisdiction of the inferior court be doubtful: *Fisher et al* v. *The City of Kingston*, 4 U. C. Q. B. 213. Or where there is no judge to preside over the court: *Jennings* v. *Dingman*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "Costs," i. (1) 13; *Willis* v. *Merriton*, *Ib.* "Costs," i. (1) 14; but see *Sutherland* v. *Tisdale*, 1 Cham. R. 213. Or a judge who is a party to the cause: *Jones et al* v. *Wing*, 3 O.S. 36. Or as to division courts, if necessary to issue a commission to examine witnesses: *Comstock* v. *Leaney*, 3 U. C. L. J. 13. But it would seem that it is not of itself a ground for a certificate that defendant's set-off could not be tried in the inferior court: *Gooderham* v. *Chilver*, 5 O.S. 496. Where plaintiff, suing in covenant only, recovered £2, full costs were refused: *Gardner* v. *Stoddard*, Dra. Rep. 101. So where plaintiff in covenant recovered only £40, and there was nothing special in the case: *Beattie et al* v. *Cook*, 6 O.S. 217. A mere surmise that the consideration of a promissory note will be disputed is not enough: *Cronyn* v. *Probat*, *Ib.* 192. Nor the fact that plaintiff is an attorney suing for his bill since privilege of suing in the superior courts is abolished: *Strachan et al* v. *Bullock*, 2 U. C. Q. B. 382. The court, on appeal, may inquire if the case was a proper one for the exercise of discretion, but will not review the exercise of discretion: see *Barker* v. *Hollier*, 8 M. & W. 513; *Shuttleworth* v. *Cocker*, 1 M. & G. 829. Until the passing of the Statute of Ontario there was no power in a superior court judge to certify for county court costs where an action was, as to amount, recovered within the jurisdiction of a division court: see *Cameron* v. *Campbell*, 11 U. C. Q. B. 159; *Harold* v. *Stewart*, 2 U. C. L. J. N.S. 245. But now the certificates may be as follow: "I certify to entitle the plaintiff to full costs;" *or*, "I certify to entitle the plaintiff to county (or division) court costs:" Stat. Ont. 31 Vic. cap. 24, s. 3.

(*nn*) Until the passing of the Statute of Ontario there was no power to certify to prevent the defendant deducting costs. The certificate in such case may be as

4. In case the Judge, who presides at the trial, shall not certify as aforesaid, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between attorney and client and so much thereof as exceeds the taxable [illegible] of defence which would have been incurred in the Co[illegible] Court or Division Court, shall, on entering judgment be set-off and allowed by the taxing officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed, and the amount of the verdict if it be necessary, and if the amount of the costs so set-off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff. (*o*)

If Judge do not certify, plaintiff to recover inferior court costs only and defendant entitled to set-off his costs.

329. (*p*) When several suits are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, or when several suits are brought against the maker and endorser of a note, or against the drawer, acceptor or endorser [illegible] a bill of exchange, (*q*) there shall be collected

Costs recoverable in one suit only.

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follows:—'[illegible]ay to prevent the defendant deducting costs:" Stat. Ont. 31 Vic. cap. 24, s. 3. And since the statute it has been held by a judge in chambers that where plaintiff had received a certificate entitling him to county court costs there could not be a set-off of costs on such certificate, although the certificate preventing defendant deducting costs had not been obtained: *Sed qu.* see *Moore* v. *Price et al*, 5 Prac. R. 1.

(*o*) It was made a question, owing to inaccuracy of language in the old statute, whether defendant could set-off his taxed costs against the plaintiff's taxed costs *and* verdict, but it was held that he could do so: *Cameron* v. *Campbell*, 12 U. C. Q. B. 159. This statute, which provides for a set-off of costs against the plaintiff's "costs to be taxed," or "against the costs to be taxed *and* the amount of the verdict, if it be necessary," removes all question about the point. So before this statute it was held that where plaintiff was not entitled to any costs there could be no set-off of costs on the part of the defendant: *Cross* v. *Waterhouse*, 10 U. C. L. J. 215; s. c. 2[illegible] U. C. Q. B. 590. In other words it was held that there could be no set-off of costs against a mere verdict, and this absurdity followed, that a plaintiff with a small verdict and no costs was in a better position than a plaintiff with a small verdict and some costs. The Statute of Ontario is intended to remove this absurdity. Whether it has done so or not remains to be decided. It does not in terms provide for a set-off against "plaintiff's verdict" where plaintiff is not entitled to tax any costs. Where a plaintiff *without a trial* (*i. e.* by a reference) recovers in a superior court an amount, with the jurisdiction as to amount of an inferior court, there can be no set-off or deduction of costs under this section: see note *j*, *ante*.

(*p*) Taken from repealed Stat. U. C. 5 Wm. IV. cap. 1, s. 1.

(*q*) This statute is inapplicable to the case where one of the parties to the note sued on it at the time of the commencement of the suit out of the jurisdiction of

And disbursement in others.

Not to extend to interlocutory cost.

or recovered from the Defendant the costs taxed in one suit only at the election of the Plaintiff, and the actual disbursements only in the other suits; (*r*) but this provision shall not extend to any interlocutory costs in the progress of a cause. (*s*) 5 Wm. IV. c. 1, s. 1.

Costs in actions against Clerks and Bailiffs of Division Courts.

330. (*t*) In case any suit be brought in any of Her Majesty's Courts of Record in respect of any grievances committed by any Clerk, Bailiff or Officer of a Division Court, under colour or pretence of the process of such Court, (*u*) and the Jury upon the trial find no greater damages for the Plaintiff than ten dollars, the Plaintiff shall not have costs unless the Judge certifies in Court upon the back of the Record, that the action was fit to be brought in such Court of Record. (*v*) 13 & 14 Vic. c. 53, s. 108.

Revision of taxation of costs.

331. (*a*) Either party may as of right, upon giving two days' notice to the opposite party, have the taxation of costs

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the court: *The Bank of British North America* v. *Elliott*, 6 U. C. L. J. 16. So inapplicable where plaintiff sued on the same declaration for two promissory notes, the parties to which were different, but at the trial, owing to an accident, was forced to enter a *nolle prosequi* as to one of the notes: *Geddes* v. *Rogers*, 5 U. C. Q. B. 1.

(*r*) If there be two endorsers on a promissory note, and the holder of the note bring several actions against them, he will be entitled to tax the costs in one suit only at his election, and disbursements in the other: *Shuter* v. *Dee*, 1 U. C. Q. B. 292. So where plaintiff commenced separate actions against the acceptor and indorser of a bill of exchange, and the acceptor paid the amount of the claim against him, but without the costs, and judgment was entered and execution issued against him for their amount and the costs of the suit against the indorsees, the court ordered the writ to be restrained to the costs of the acceptor alone: *Gillespie et al* v. *Cameron*, 3 U. C. Q. B. 45.

(*s*) The costs of interlocutory proceedings in a cause, not otherwise provided for, are in general allowed as costs in the cause: *Pugh* v. *Kerr*, 6 M. & W. [illegible]: *Mummery* v. *Campbell*, 2 Dowl. P. C. 798.

(*t*) Taken from repealed Stat. U. C. 13 & 14 Vic. cap. 53, s. 108.

(*u*) This section is designed peculiarly for the protection of [illegible] bailiffs, and other officers of a division court, as against trifling or vexatious [illegible] see further Con. Stat. U. C. cap. 19, ss. 195, 196, 197, 198.

(*v*) The rule is that in the event of the jury finding no greater [illegible]nt of damages for the plaintiff than $10, the plaintiff shall not have costs. The [illegible]onus, therefore, to sustain the exception in favour of a certificate is in such case cast upon the plaintiff. It is not said when the certificate is to be asked, but it is presumed immediately after the trial, as it is provided that the judge is to certify in court, upon the back of the record: see note *u* to section 324, and note *k* to section 328.

(*a*) Taken from C. L. P. Act, 1856, section 12.

by any Deputy Clerk of the Crown and Pleas revised by the principal Clerk of the Court wherein the proceedings have been had; (*b*) and the Court or a Judge may by rule or summons, call upon the Deputy Clerk who has taxed any Bill, to shew cause why he should not pay the costs of revising his taxation and of the application, if in the opinion of the Court or Judge, on the affidavits and hearing the parties, such Deputy Clerk was guilty of gross negligence, or of wilfully taxing fees or charges for services or disbursements larger or other than those sanctioned by the Rules and Practice of the Court. (*c*) 19 Vic. c. 43, s. 12.

When Deputy Clerks liable to be charged with costs.

THE JUDGES MAY FRAME A TABLE OF COSTS FOR COUNTY COURTS.

332. (*d*) The Judges of the said Superior Courts, or any three of them (of whom one of the Chief Justices shall be one), may, from time to time, frame a Table of Costs for the several County Courts, and ascertain, determine, declare and adjudge all and singular the fees allowed to be taken by

Judges of the Superior Courts may frame Table of Costs for County Courts.

(*b*) The late Mr. Justice Burns was of opinion that a revision under this section could only be obtained on judge's order: see *Cochrane* v. *Scott et al*, 3 Prac. R. 32. But the practice is to have the costs revised as a matter of course upon giving two days' notice to the opposite party. This is done, in the language of the section, "as of right." There can be no revision under this section of a bill taxed by a deputy clerk of the crown unless taxed in a cause in court: *Bouchier et al* v. *Patton et al*, 3 U. C. L. J. 108. And certainly not if the parties have settled it: *Ib.* Taxing officers should not allow any items for which there are not proper vouchers, and these vouchers (except briefs, &c.) should be filed: *Wilson* v. *Moulds*, 4 Prac. R. 101. On revision the master is not to allow any items which are not verified by vouchers which have been filed on the original taxation: *Ib.*

(*c*) This provision for the summary punishment of deputy clerks, if not in the nature of a penal enactment, will probably be construed strictly by the courts, and unless "*gross* negligence" is brought home to the "*guilty*" party, the complainant will be left to his remedies at common law. Indeed, as the deputy clerk in taxing costs occupies a *quasi* judicial authority—little short of what would sustain a criminal proceeding, would, it is apprehended, move the summary and rigorous interference of the courts. Nevertheless, the provision is a wise one. The power given for the punishment of gross or wilful misconduct could not be more safely reposed than in the "court or a judge." The appearance of such an enactment in the statute book is, to some extent, evidence that the evil of hasty and ill-judged taxations by deputy clerks has not been unknown to the courts. In any view of the matter, it is extremely important that such deputies should act on uniform principles in the taxation of costs, and have ample materials to guide them, subject, as they will be, to stringent regulations in the discharge of multifarious duties.

(*d*) Taken from the County Courts Amendment Act of 1857, section 8, before the passing of which the power of the judges of the superior courts to make rules for county courts was doubted: *Chard* v. *Lout*, 2 U. C. L. J. 227.

Counsel, Attorneys, Sheriffs, Coroners and Officers of the said Courts respectively, in respect of any business done or transacted in the said County Courts, in all matters, causes, and proceedings depending in the said Courts, or before the Judges thereof, in all actions and proceedings within the jurisdiction of such County Courts or of the Judges thereof; (*e*) and the costs and fees authorized by such table or by any amended table from time to time made, and no other or greater, shall be taken or received by Counsel, Attorneys, Sheriffs, Coroners, or Officers of any of the said Courts, for any business by them respectively done in the said County Courts or before the Judges thereof; and the said Judges so framing or altering such Table of Costs may, if they think fit, associate with them, in framing or altering such table, any one of the County Court Judges appointed under the sixty-third section of the Division Courts Act, for making rules for the Division Courts. 20 Vic. c. 58, s. 8.

THE JUDGES MAY MAKE RULES. (*f*)

(*e*) The powers conferred are:—

1. To frame a table of costs for the several county courts;

2. *And* ascertain, determine, declare and adjudge all and singular the fees allowed to be taken by counsel, attorneys, sheriffs, coroners and officers of the said courts respectively, &c.

And this may be done from "time to time." So they may extend and apply to the several county courts all or any of the rules and orders at any time made under this act, with and under such modifications as they may deem necessary, &c.: section 339. On 25th August, 1857, there was framed a tariff of fees and rules for the county courts, in accordance with this section. The practice of all the common law courts of record in Ontario, both of superior and inferior jurisdiction, is now as nearly the same as the differences of jurisdiction will permit.

(*f*) The power of superior courts of common law to make regulations for the practice in their courts, so long as not inconsistent with some express statutory provision, seems never to have been doubted. A distinction, however, appears to exist between practice properly so called and pleading. The distinction is evidenced by the language used in the English Common Law Procedure Acts. The act of 1852 is intituled "An Act to amend the Process, Practice and Mode of Pleading in the Superior Courts of Common Law," &c. The act of 1854 is intituled "An Act for the further amendment of the Process, Practice and Mode of Pleading, &c." In the preamble to the act of 1852 it is recited that "the Process, Practice and Mode of Pleading in the Superior Courts of Common Law at Westminster may be rendered more simple and easy," &c. Whatever the reasons for the distinction may be, it is evident that throughout the Eng. C. L. P. Acts a line is drawn between process, practice and mode of pleading. Our C. L. P. Act, however, is simply intituled "An Act to regulate the *procedure* of the Superior Courts of Common Law and of the County Courts."

333. (*g*) The Judges of the Superior Courts of Common Law, or any four or more of them, of whom the Chief Justices shall be two, (*h*) may from time to time make— Power to make rules.

1. Such orders and rules as they deem fit respecting the manner of justifying and perfecting bail when taken by Commissioners of either of the said Courts, and respecting the notices to be given previous to justification, the attendance of bail before a Commissioner or a Judge, and the affidavits or examinations to be required, and any other matter or thing which to them seems expedient; (*i*) and also, 2 Geo. IV. c. 1, s. 41. Respecting the justification of bail taken by Commissioners.

2. All such general rules and orders for the government and conduct of the Ministers and Officers of their respective Courts in and relating to the distribution and performance of the duties and business to be done and performed by them; (*j*) and also, 12 Vic. c. 63, s. 32. Respecting the duties of the Officers.

3. All such general rules and orders for the effectual execution of this Act, so far as respects such Courts, and of the intention and object thereof; (*k*) and All necessary general rules.

4. For fixing the fees and costs to be allowed for and in respect of the matters herein contained and the performance thereof; (*l*) and Respecting fees.

5. For apportioning the costs of issues; (*m*) and Apportioning costs.

6. For the purpose of enforcing uniformity of practice in

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 223.

(*h*) The Eng. C. L. P. Act reads: "It shall be lawful for the judges, &c. or any eight or more of them, of whom the chief justices of each of the courts shall be three," &c.

(*i*) See R. G. pr. 66-91, inclusive.

(*j*) See R. G. pr. 144-153, inclusive.

(*k*) The power here conferred is to "make *general* rules and orders for the efficient execution of this act," &c. Immediately following there is power given to make rules and orders for subjects of practice specifically mentioned, as "for fixing the fees and costs to be allowed," &c. These rules, whether general or particular, are clearly to be made "for the effectual execution of this act and of the intention and object thereof."

(*l*) See Schedule B to N. Rs.

(*m*) See R. G. pr. 51.

Uniformity in the allowance of costs.

the allowance of costs in the said Courts, (*n*) as in their judgment may be necessary or proper, and for that purpose may meet from time to time as occasion may require. (*o*) 19 Vic. c. 43, s. 313; 12 Vic. c. 63, s. 32.

To make further alterations in mode of pleading, &c.

334. (*q*) And the said Judges, (*r*) or any four or more of them, of whom the Chief Justices shall be two, (*s*) may, also by any rule or order from time to time (*t*) by them made in Term or in Vacation, make such further alterations in the time and mode of pleading in the said Courts (*u*) and in the mode of entering and transcribing pleadings, judgments and other proceedings in actions at law, and in the time and manner of objecting to errors in pleadings and other proceedings, and in the mode of verifying pleas and obtaining final judgment without trial in certain cases, as to them may seem expedient. (*v*) 19 Vic. c. 43, s. 313.

335. (*a*) All such Rules, Orders and Regulations shall,

(*n*) The Eng. C. L. P. Act here continues, "and of ensuring, as far as may be practicable, an equal division of the business of taxation among the masters of the said courts."

(*o*) The powers conferred are very extensive; but it is a question whether they authorize the judges to make rules overruling the C. L. P. Act or in any way altering its provisions, though in the opinion of the judges necessary for the effectual execution of the act: see *Rowberry* v. *Morgan*, 9 Ex. 730.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 223.

(*r*) The Eng. C. L. P. Act reads: "And it shall be *further* lawful," &c. The inference is that the section proceeds to confer powers such as are not conferred by the previous part of the section. The remainder of the section here annotated is taken from Eng. Stat. 13 & 14 Vic. cap. 16, which, never having been in force in this Province, is specifically enacted. In the Eng. C. L. P. Act it is simply provided that "it shall be lawful for the judges .... from time to time to exercise all the powers and authority given them by Stat. 13 & 14 Vic. cap. 16, with respect to any matter in the C. L. P. Act contained relative to practice or pleading:" Eng. C. L. P. Act, 1852, section 223.

(*s*) See note *h* to section 333.

(*t*) *Within five years*, &c. was the limitation in the C. L. P. Act, 1856, sec. 313.

(*u*) "To make alterations in the *time* and mode of pleading," &c. The power to make alterations in the *time* of pleading, which is a power neither conferred by Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 1, nor 13 & 14 Vic. cap. 16, would seem to contemplate alterations at variance with the C. L. P. Act, which makes provision for the time of pleading: s. 82, *et seq.*

(*v*) With the exception pointed out in the previous note, this part of the section is an enactment of Eng. Stat. 13 Vic. cap. 16.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 223.

immediately upon making the same, be transmitted to the Governor and be by him laid before both Houses of the Parliament of this Province, if Parliament be then sitting, or if Parliament be not sitting, then within twenty days after the next meeting thereof; (*b*) and no such Rule, Order or Regulation, shall have effect until three months after the same has been so laid before both Houses of Parliament. (*c*) 19 Vic. c. 43, s. 313.

Such rules, &c., to be laid before both Houses of Parliament.

336. (*d*) Every Rule, Order and Regulation so made shall, from and after such time as aforesaid, (*e*) be binding and obligatory on the said Courts and on all Courts of Error and Appeal in this Province, into which the judgments of the said Courts or either of them may be removed, (*f*) and shall be of like force and effect as if the provisions contained

And then to be binding on all the Courts, &c.

(*b*) And all *such* rules, &c. A question might be raised whether the rules intended are those for which provision is made in section 333 as in section 334. Though the words of the section might bear such a construction, it would be a construction quite at variance with the Eng. C. L. P. Act. Both the Eng. C. L. P. Act and our C. L. P. Act provide for at least two sets of rules—the one for practice, the other for pleading. It is intended that the former shall take effect from the time of their promulgation, but the latter only after having been laid before parliament for a specified period of time. Such was the view taken by the judges of this Province, who, in issuing the rules of Trinity Term 1856, made the first division of the rules relating to practice take effect immediately, but declared that the second division relating to pleading should not take effect until Easter Term 1857.

(*c*) The object of submitting the rules to the legislature is that they may be either confirmed or rejected as the legislature in its wisdom may see fit. This presumes an inspection if not a critical examination of the rules submitted. But the presumption is not supported by facts, and the form of submission is known to be idle and useless. The rules in general provide for matters of practice in detail, and are made by men fully competent, from knowledge and position, to frame them properly. This is more than can be said of any mixed body of men such as a parliament, of whom few members are lawyers. The majority have neither the disposition nor capacity to revise rules of court made by the judges of the courts. Under these circumstances the wisdom of enacting that "no such rule, &c. shall have effect for three months until after the same shall have been laid before both houses of parliament," difficult of discernment. In Ontario now there is only one house of parliament, known as the Legislative Assembly: B. N. Am. Act, 1867, ss. 69, 70.

(*d*) Taken from Eng. Stat. 13 Vic. cap. 16.

(*e*) *i. e.* After the expiration of three months, &c., as mentioned in the last section.

(*f*) There is only one court of Error and Appeal in this province: Con. Stat. U. C. cap. 13.

therein had been expressly enacted by the Parliament of this Province. (*g*) 19 Vic. c. 43, s. 313.

The Governor or either house of Parliament may, within three months, suspend all or any such rules.

337. (*h*) The Governor may, by proclamation, or either of the Houses of Parliament may, by resolution, at any time within three months next after such Rules, Orders and Regulations have been laid before Parliament, suspend the whole or any part thereof, (*i*) and in such case the whole or the part so suspended, shall not be binding or obligatory on the said Courts or on any Court of Error and Appeal; (*j*) and nothing herein contained shall restrain the authority or limit the jurisdiction of the said Courts or of the Judges thereof, to make rules or orders, or otherwise to regulate and dispose of the business therein. (*k*) 19 Vic. c. 43, s. 313.

Power of the Courts to make occasional rules not restrained.

As to issue, &c., of new or altered Writs.

338. (*l*) The Judges of the said Courts, or any four or more of them, of whom the Chief Justices shall be two, (*m*) may, from time to time, frame and make such new or altered Writs and forms of proceeding as the Judges as aforesaid deem necessary or expedient for giving effect to the provisions hereinbefore contained, and may think fit to order; (*n*) and such Writs, Forms and proceedings shall be used and enforced in such and the same manner as other Writs, forms

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(*g*) The effect of laying rules before parliament is of moment. Should the rules clash with existing statutes, the statutes would become virtually repealed. When two acts of the legislature are inconsistent, the later of the two being the last expressed intention of the legislature is considered as an abrogation of the former. It is enacted that the rules intended by this section shall "be of like force and effect as if the provision contained therein had been expressly enacted by the parliament of this province."

(*h*) Taken from Eng. Stat. 13 Vic. cap. 16.

(*i*) In Ontario now there is only one house of parliament, viz., the Legislative Assembly of Ontario: see the British North American Act 1867, ss. 69, 70.

(*j*) It is enacted that the rules, &c., "suspended" shall "not be binding or obligatory" on the courts. The word "suspended" seems to be used in the sense of the word "annulled." To annul a thing is to put an end to it for all time to come; but to suspend it is only to put an end to it for a certain time. In this sense we speak of "suspending the Habeas Corpus Act."

(*k*) The rules authorized by this section appear to be general rules of practice, rules of pleading, and rules for the disposal of business pending in the courts.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 224.

(*m*) See note *h* to section 333.

(*n*) See Schedule of Forms to R. G. pr. of T. T. 1856.

and proceedings of the said Courts are acted upon and enforced, or as near thereto as the circumstances of the case will admit; (*o*) and any existing writ or proceeding, the form of which is in any manner altered in pursuance of this Act, shall, nevertheless, be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Act. (*p*) 19 Vic. c. 43, s. 314; 19 Vic. c. 90, s. 8.

As to existing Writs of which the form is altered by this Act.

339. (*q*) The Judges of the said Superior Courts, or any three of them, of whom one of the Chief Justices shall be one, may extend and apply to the several County Courts, all or any of the rules and orders at any time made under this Act, with and under such modifications as they may deem necessary, (*r*) and such Judges may also make such rules and orders for and specially applicable to the said County Courts as may appear to them expedient for carrying into beneficial effect the laws applicable to the said County Courts, and to actions and proceedings therein. (*s*) 20 Vic. c. 58, s. 9; 19 Vic. c. 90, s. 3.

Judges may extend Superior Court rules to County Courts with modification.

340. (*t*) All Rules and Orders of the said Superior Courts, made after this Act takes effect, shall (unless the contrary be expressed therein) extend to the several County Courts. (*u*) 20 Vic. c. 58, s. 9.

Superior Court rules hereafter.

(*o*) One change brought about by the forms attached to the New Rules is that of making writs of execution returnable "immediately after the execution thereof:" see Forms Nos. 29 *et seq.* to R. G. pr.

(*p*) With the exception of writs of execution being made returnable "immediately after the execution thereof," as mentioned in the preceding note, the writs remain substantially the same as before the C. L. P. Act 1856.

(*q*) Taken from County Court Amendment Act 1857, s. 9, as consolidated with the County Court Amendment Act 1856, s. 3.

(*r*) This the judges did on 25th August, 1857. See note *e* to s. 332.

(*s*) Under this section the powers are two fold—

1. To extend and apply to the several county courts all or any of the rules and orders at any time made under this act, with and under such modifications as they may deem necessary.
2. To make such rules and orders for and specially applicable to the said county courts as may appear to them expedient for carrying into beneficial effect the laws applicable to the said county courts, &c.

(*t*) Taken from the County Court Amendment Act, 1857, section 9.

(*u*) *i. e.* so far as applicable and with such modifications as necessary.

In unprovided cases the practice of the Superior Courts shall apply to the County Courts.

341. (*v*) In all cases not expressly provided for by law, the practice and proceedings in the several County Courts shall be regulated by and shall conform to the practice for the time being of the said Superior Courts of Common Law, (*w*) and the practice of the said Superior Courts shall in matters not so provided for, apply and extend to the County Courts and to all actions and proceedings therein. 19 Vic. c. 90, s. 19.

First and last days of all periods of time limited

342. (*a*) Unless otherwise expressed, (*b*) the first and last days of all periods of time limited by this Act, or by any

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(*v*) Taken from the County Court Amendment Act, 1856, section 19.

(*w*) This is a most important section. Its operation is very extensive. Its effect will be to secure, as much as possible, uniformity of practice in all the courts of record of common law jurisdiction. The anomaly of a practice in the county courts defective in that in which the practice of the superior courts is complete cannot now well occur. Provision has been made in express language for extending to county courts so much of the practice of the superior courts as appeared to the legislature to be suited to the inferior courts. But so infinite are the possible combinations of events and circumstances that they elude the power of enumeration, and are beyond the reach of human foresight. The least reflection serves to evince that it would be impossible by positive and direct legislative authority specially to provide for every particular case which *may* happen. However much, therefore, is the subject of express provision, there may, as regards the practice of county courts, be more for which no positive provision is made. To meet such it is enacted that "in all cases not expressly provided for by law, the practice and proceedings in the several county courts shall be regulated by and shall conform to the practice, for the time being, of the superior courts of common law at Toronto, &c." The superior courts of this Province are not so restricted with regard to practice as the county courts. The superior courts possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction: Con. Stat. U. C. cap. 10, s. 3.

(*a*) Taken from our old King's Bench Act, 2 Geo. IV. cap. 1, s. 22. The rule No. 174 Pr. in England is different, viz., exclusive of first day and inclusive of last day: see *Mumford* v. *Hitchcocks*, 14 C. B. N.S. 361; *Weeks* v. *Wray*, L. R. 3 Q. B. 212; see also *Lewis* v. *Calor*, 1 F. & F. 306. But the English cases are conflicting: see *Hughes et al* v. *Griffiths*, 13 C. B. N.S. 324; *Evans* v. *Jones*, 2 B. & S. 45; *Flower* v. *Bright*, 2 J. & H. 590. In some English cases *a dies non*, though the last of the days is counted: see *Peacock* v. *The Queen*, 4 C. B. N.S. 264; *Woodhouse* v. *Woods et al*, 29 L. J. M. C. 149; *Pennell* v. *The Churchwardens of Uxbridge*, 31 L. J. M. C. 92. And in others the Monday following allowed: *Rowberry* v. *Morgan*, 9 Ex. 730; *Mayer* v. *Harding*, L. R. 2 Q. B. 410.

(*b*) When expressed to be *clear* days both first and last days must be excluded: *Liffin* v. *Pitcher*, 1 Dowl. N.S. 767. Where a statute says a thing shall be done "so many days" or "so many days at least" before a given event, the day of the thing done and that of the event must both be excluded: *Regina* v. *The Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster*, 9 Dowl. P. C. 527; *In re Sams* v. *The Corporation of Toronto*, 9 U. C. Q. B. 181. So where "so many days" shall intervene between two events: *Young* v. *Higgon*, 6 M. & W. 49; *Chambers* v. *Smith*, 12 M. & W. 2. Where a party may do a thing "until a given day," such day is

rules or orders of Court for the regulation of practice, shall be inclusive. (*c*) 2 Geo. IV. c. 1, s. 22.

by this Act or any rules or orders to be inclusive.

343. (*d*) All Rules in the County Courts in Term time shall be two-day Rules, (where the same Rules in the Superior Courts would be four-day Rules,) and shall be answerable or returnable on the third day inclusive, after service, and may be made absolute at the rising of the Court on that day, (*e*) and in all proceedings in Term not otherwise provided for, one-half of the period allowed in the Superior Courts when exceeding one day shall be allowed in the County Courts. (*f*) 9 Vic. c. 7, s. 3; 20 Vic. c. 58, s. 17; 8 Vic. c. 13, s. 43.

All rules in the County Court to be two-day rules.

INTERPRETATION CLAUSE. (*g*)

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generally included: *Kerr* v. *Jeston*, 1 Dowl. N. S. 538. Where he is not to do a thing "until after the expiration of so many days from" some day, both days are excluded: *Blunt* v. *Heslop*, 8 A. & E. 577. The court will take judicial notice of the *fraction* of a day, if necessary for the ends of justice: *Thomas et al* v. *Desanges et al*, 2 B. & Al. 585; *Pewtress et al* v. *Annan*, 9 Dowl. P. C. 828. A "month" generally speaking means a lunar and not a calendar month, unless so stated: *Soper* v. *Curtis*, 2 Dowl. P. C. 237; *Tullet* v. *Linfield*, 3 Burr. 1415; But the word "month," as used in the Consolidated Statutes of Upper Canada, cap. 2, s. 13, or Canada, cap. 5, s. 6, sub-s. 11, means a calendar month. "Three months after" an event was held to exclude the day of the event: *In re Higham* v. *Jessop*, 9 Dowl. P. C. 203. "Until" a particular day construed as including that day: *Kerr* v. *Jeston*, 1 Dowl. N.S. 538. But the words "from the time" may be held either as inclusive or exclusive of the first day, according to the context: *Boulton* v. *Ruttan*, 2 O. S. 362. The word "year" as used in the Consolidated Statutes of Upper Canada means a calendar year: cap. 2, s. 13. "Before its expiration, may be renewed for one year," held to include the day of its date: *Bank of Montreal* v. *Taylor*, 15 U. C. C. P. 107.

(*c*) All periods of time — 1. Limited by this act; 2. Or by any rules or orders of court for the regulation of practice, shall be inclusive. As to time under a judge's order: see *Morris* v. *Barrett*, 7 C. B. N.S. 139; *Connelly* v. *Bremner*, L. R. 1 C. P. 557; see further R. G. pr. 166.

(*d*) Taken from Stat. U. C. 8 Vic. cap. 13, s. 43, as consolidated with 9 Vic. cap. 7, s. 3, and 20 Vic. cap. 58, s. 17.

(*e*) *i. e.* Two *clear* days.

(*f*) Terms in the County Courts are only of one week's duration: Stat. Ont. 32 Vic. cap. 6, s. 2; while in the superior courts, with the exception of Hilary Term, which is of two weeks, each term is of three weeks' duration: 29 & 30 Vic. cap. 40, s. 2.

(*g*) It is usual for the legislature of late years, in order to avoid unnecessary repetition and secure uniformity of interpretation, to append to every statute of great length an interpretation clause, or key to words of general import, whose signification is intended to be more general than perhaps the words themselves, standing alone, would indicate. This the legislature has attempted in the act here annotated, but the interpretation clause is neither as clear nor as extensive as the necessities of the act require.

The words "a Judge" to include Judges of both of the Superior Courts.

344. (*h*) Whenever any power is given by this Act to the Superior Courts or to a Judge thereof, the words "a Judge" shall be held to authorize any Judge of either of the said Superior Courts of Common Law to exercise such power, although the particular proceedings may not be in a cause pending in the Court whereof he is a Judge. (*i*) 19 Vic. c. 43, s. 315.

Meaning of words "Clerk" and "Deputy Clerk."

345. The term "Clerk" in this Act shall mean the Clerk of the Crown of each of the Superior Courts, or the Clerk of the County Court according as the proceeding with reference to which the term "Clerk" is used, applies to the Superior Courts or County Courts, and the term "Deputy Clerk" shall mean Deputy Clerk of the Crown. (*l*)

Short Title of Act.

346. (*m*) This Act shall be called and known as and in all proceedings may be cited as "The Common Law Procedure Act." 19 Vic. c. 43, s. 317.

347. The following Forms are those referred to in the foregoing sections of this Act:—

(*h*) Taken from C. L. P. Act, 1856, section 315.

(*i*) "To the superior courts or to *a* judge *thereof*." These are the words upon which the interpretation is placed. Where they and no others are used there can now be no doubt as to their meaning. But in some places words apparently of similar import, but not precisely the same, will be found, and as to these considerable difficulty must arise. Thus, "any judge of *the* court in which the action is pending," &c. (section 37): see note *y* to section 37; see further *Palmer* v. *The Justice Assurance Co.* 28 L. T. Rep. 120.

(*l*) Little difficulty will be found in the application of this enactment. It is rendered necessary owing to the attempt successfully made in this act to blend the process, practice, pleading and procedure of the superior courts of law and the county courts.

(*m*) This section, giving a short title to the act, corresponds with s. 235 of Eng. Stat. 15 & 16 Vic. cap. 76.

A.

No. 1.—(*Vide* Section 2.)

WRIT OF SUMMONS WHEN THE DEFENDANT RESIDES WITHIN THE JURISDICTION.

Upper Canada, County of } VICTORIA, by the Grace of God, &c.
To C. D., of , in the County of

(SEAL.)

We command you that within ten days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court (*or* County Court) of , in an action at the suit of A. B.; and take notice that in default of your so doing the said A. B. may proceed therein to Judgment and Execution.

Witness, &c.

In the margin.

Issued from the Office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas, (*or* Clerk of the County Court in the County of).

(*Signed*) J. H., Clerk (*or* Deputy Clerk,)
(*or* Clerk of the County Court.)

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsements to be made on the Writ before the service thereof.

This Writ was issued by E. F., of , Attorney for the said Plaintiff, *or* this Writ was issued in person by A. B., who resides at (*mention the* City, Town, Incorporated *or other* Village, *or* Township *within which such Plaintiff resides*).

Also the Indorsement required by the fourteenth Section of this Act.

Indorsement to be made on the Writ after service thereof.

This Writ was served by X. Y. on C. D. (the Defendant *or* one of the Defendants), on , the day of , one thousand eight hundred and

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WRIT OF CAPIAS.

No. 2.—(*Vide* Section 3.)

Upper Canada, County of } VICTORIA, &c.,
To the Sheriff of, &c.

(SEAL.)

We command you that you take C. D., if he shall be found in your County (*or* United Counties), and him safely keep until he shall have given you bail in an action on promise (*or* of debt, *or* covenant, *or* trespass on the case, *or as the cause of action may be, &c.*), at the suit of A. B., against the said C. D., (and E. F., &c., *if there be one or more Defendants not to be arrested*) or until the said C. D. shall

by other lawful means be discharged from your custody: And we do further command you, that on execution hereof on the said C. D., you do deliver a copy hereof to the said C. D.: (And we further command you that you serve a copy hereof on the said E. F., &c., *if there be one or more Defendants not to be arrested*): And we hereby require the said C. D. to take notice that within ten days after execution hereof on him, inclusive of the day of such execution, he cause special bail to be put in for him in our (Court *or* County Court) of , according to the warning hereunder written (*or* indorsed hereon), and that in default of his so doing, such proceedings may be had and taken as are mentioned in the said warning: (And we hereby command the said E. F., &c., that within ten days after the service hereof on him, &c., inclusive of the day of service, he do cause an appearance to be entered according to the warning No. 3:) And we do further command you, the said Sheriff, that immediately after the execution hereof, you do return this Writ to the said Court, together with the manner in which you shall have executed the same, and the day of the execution thereof; or if the same shall remain unexecuted, then that you do return the same at the expiration of two months from the date hereof, or sooner if you shall be required thereto by order of the Court or of a Judge.

Witness, &c.

In the margin,

Issued from the Office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas, (*or* of the Clerk of the County Court in the County of).

(*Signed,*) J. H., Clerk (*or* Deputy Clerk,)
(*or* Clerk of the County Court.)

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be executed within two months from the date hereof, including the day of such date, and not afterwards.

Warning to the Defendant.

1. If a Defendant, being in custody, shall be detained on this Writ, or if a Defendant, being arrested thereon, shall go to prison for want of bail, the Plaintiff may declare against any such Defendant before the end of the Term next after such arrest, and proceed thereon to judgment and execution;

2. If a Defendant having given bail to the Sheriff on the arrest, shall omit to put in special bail conditioned for his surrender to the Sheriff of the County from which the Writ of *Capias* issued, and file the bail piece in the Office of the Clerk or Deputy Clerk of the Crown and Pleas (*or* of the Clerk of the County Court) for the same County, the Plaintiff may proceed against the Sheriff or on the bail bond;

3. If a Defendant having been served with this Writ and not arrested thereon, shall not enter an appearance within ten days after such service, in the Office of the Clerk or Deputy Clerk of the Crown (*or* of the Clerk of the County Court) from which the Writ issued, the Plaintiff may proceed to judgment and execution.

Indorsement to be made on the Writ before the service thereof.

This Writ was issued by E. F., of , Attorney, &c., *as in Form No.* 1.
Bail for $ by order of , (*naming the Judge who makes the order.*)

Also the Indorsement required by the fourteenth Section of this Act.

Indorsement to be made on the Writ after execution thereof.

This Writ was executed by X. Y., by arresting C. D., (*or as the case may be as to service on any Defendant,*) on , the day of , one thousand eight hundred and .

No. 3.—(*Vide* Sections 43 and 49.)

WRIT WHERE THE DEFENDANT, BEING A BRITISH SUBJECT, RESIDES OUT OF UPPER CANADA.

Upper Canada, } VICTORIA, &c.,
County of } To C. D., of .

(SEAL.)

We command you that within days, (*here insert a sufficient number of days according to the directions in the Act,*) after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court (*or* County Court) of , in an action at the suit of A. B.; and take notice that in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed therein to Judgment and Execution.

Witness, &c.

In the margin.

Issued from the Office of, &c. (*as in foregoing cases.*)

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six months from the date thereof, or if renewed, then from the date of such renewal, including day of such date, and not afterwards.

Indorsements to be made on the Writ before the service thereof.

This Writ is for service out of Upper Canada, and was issued by E. F., of , Attorney for the Plaintiff, *or* this Writ was issued in person by A. B., who resides at , (*mentioning Plaintiff's residence, as directed in Form No.* 1.)

(*Also the Indorsement required by the fourteenth Section of the Act, allowing the Defendant two days less than the time limited for appearance, to pay the debt and costs.*)

No. 4.—(*Vide* Sections 45 and 49.)

WRIT WHERE THE DEFENDANT, NOT BEING A BRITISH SUBJECT, RESIDES OUT OF UPPER CANADA.

Upper Canada, } VICTORIA, &c.
County of } To C. D., late of , in the County of

(SEAL.)

We command you that within days (*insert a sufficient number according to the directions of the Act*), after notice of this Writ is served on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court (*or* County Court) of , in an action at the suit of A. B.; And take notice that in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed thereon to Judgment and execution.

Memorandum to be subscribed on the Writ.

The same as on form No. 3.

Indorsement, also as on form No. 3.

In the margin.

Issued from the Office of, &c. (*as in foregoing cases.*)

Notice of the foregoing Writ.

To C. D. late of (the City of Hamilton, in Upper Canada,) *or* (now residing at Buffalo, in the State of New York.)

Take notice that A. B. of , in the County of , Upper Canada, has commenced an action at law against you, C. D., in Her Majesty's Court (*or*

County Court) of , by a Writ of that Court, dated the day of A.D. one thousand eight hundred and , and you are required within days, after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the Office of the Clerk (*or* Deputy Clerk) of the Crown, (*or* of the Clerk of the County Court) for the County of , to the said action, and in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed thereon to judgment and execution.

(*Signed*) A. B., the Plaintiff in person,
or
E. F., Plaintiff's Attorney.

No. 5.—(*Vide* Section 15.)

SPECIAL INDORSEMENT.

(*After the Indorsement required by the fourteenth Section of the Act, this special Indorsement may be inserted.*)

The following are the particulars of the Plaintiff's claim:

1851. January 10.	—Five barrels of Flour, at $4	$ 20 00
July 2.	—Money lent to the Defendant	120 00
October 1.	—A Horse sold to Defendant	100 00
		$240 00
	Paid	30 00
	Balance due	$210 00

Or,

To Bread (*or* Butcher's Meat) supplied between the 1st January, 1851, and the 1st January, 1852.....$160 00

Paid..... 50 00

Balance due $110 00

(*If any account has been delivered, it may be referred to with its date, or the Plaintiff may give such a description of his claim as on a particular of demand, so as to prevent the necessity of an application for further particulars.*)

Or,

$400 (*or*, £100, *as the case may be, and so throughout these forms,*) principal and interest, due on a bond, dated the day of , conditioned for the payment of $800 (*or* £200) and interest.

Or,

$400 (*or* £100), principal and interest, due on a covenant contained in a deed, dated the day of , to pay $2000 (*or* £500) and interest.

Or,

$400 (*or* £100), on a Bill of Exchange for that amount, dated the 2nd February, 1851, accepted (*or* drawn *or* indorsed) by the Defendant, with interest and Notarial charges.

Or,

$400 (*or* £100), on a Promissory Note for that amount, dated the 2nd February, 1851, made (*or* indorsed) by the Defendant, with interest and Notarial charges.

Or,

$400 (or £100), on a Guarantee, dated the 2nd February, 1851, whereby the Defendant guaranteed the due payment by E. F., of goods supplied (*or* to be supplied) to him.

(*In all cases where interest is lawfully recoverable, and is not above expressed, add* "the Plaintiff claims interest on $, from the day of , until Judgment.")

N.B.—Take notice, that if a Defendant served with this Writ within Upper Canada, do not appear according to the exigency thereof, the Plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed (with interest) and the sum of , for costs, and issue execution at the expiration of eight days from the last day for appearance.

(No. 6.—*Vide* Section 42.)

WRIT OF CAPIAS IN AN ACTION ALREADY COMMENCED.

Upper Canada, County of } VICTORIA, &c. To the Sheriff of, &c.

(SEAL.)

We command you, that you take C. D., if he shall be found in your County (*or* United Counties), and him safely keep, until he shall have given you bail in the action on promises (*or* of debt, &c.), which A. B. has commenced against him, and which action is now pending, or until the said C. D. shall, by other lawful means, be discharged from your custody. And we do further command you, that on execution hereof, you do deliver a copy to the said C. D., and that immediately after execution hereof, you do return this Writ to our Court (*or* County Court) of , together with the manner in which you shall have executed the same and the day of the execution hereof; and if the same shall remain unexecuted, then that you do so return the same at the expiration of two months from the date hereof, or sooner if you shall be required thereto by order of the said Court or a Judge. And we do hereby require the said C. D., that within ten days after execution hereof on him, inclusive of the day of such execution, he cause special bail to be put in for him in our said Court, according to the warning hereunder written (*or* indorsed hereon), and that in default of his so doing, proceedings may be had and taken as are mentioned in the warning in that behalf.

Witness, &c.

In the margin.

Issued from the office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas (*or* of the Clerk of the County Court in the County of .)

(*Signed*) J. H., Clerk (*or* Deputy Clerk), (*or* Clerk of the County Court.)

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be executed within two months from the date hereof, including the day of such date, and not afterwards.

Warning to the Defendant.

1. This suit, which was commenced by the service of a Writ of Summons, will be continued and carried on in like manner as if the Defendant had not been arrested on this Writ of *Capias*;

2. If the Defendant, having given bail to the Sheriff on the arrest on this Writ, shall omit to put in special bail for his surrender to the Sheriff of the County from which the Writ of *Capias* issued, and to file the bail-piece in the office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas, (*or* of the Clerk of the County Court) for the County of , the Plaintiff may proceed against the Sheriff or on the Bail Bond.

Indorsements to be made on the Writ before the execution thereof.

1. This writ was issued by E. F., of, &c. (*as in Form No. 1*).
2. Bail for $, by order of , (*naming the Judge who makes the order.*)

Also the Indorsement required by the fourteenth Section of this Act.

Indorsement to be made on the Writ after the execution thereof.

This Writ was executed by arresting C. D., (*according to the facts*) on the day of , one thousand eight hundred and .

No. 7.—(*Vide* Section 55.)

In the , &c. (*state the Court*).

On the day of , one thousand eight hundred and .

(*Day of signing Judgment.*)

Upper Canada, } A. B., in his own person (*or* by his Attorney),
To wit: } sued out a Writ of Summons against C. D., indorsed according to the Common Law Procedure Act, as follows:

(*Here copy Special Indorsement.*)

And the said C. D. has not appeared, therefore it is considered that the said A. B. recover against the said C. D., $, together with $, for costs of suit.

No. 8.—(*Vide* Section 150.)

In the Q. B., (*or* C. P., *or* C. C.)

The day of , in the year of our Lord one thousand eight hundred and .

County of , } Whereas A. B. has sued C. D., and affirms and
To wit: } denies,

(*Here state the question or questions of fact to be tried.*)

And it has been ordered by the Honorable Mr Justice , (*or* by His Honor , Judge of the County Court, &c.) according to the Common Law Procedure Act, that the said question shall be tried by a Jury; therefore let the same be tried accordingly.

No. 9.—(*Vide* Section 303.)

FORM OF A RULE OR SUMMONS WHERE A JUDGMENT CREDITOR APPLIES FOR EXECUTION AGAINST A JUDGMENT DEBTOR.

(*Formal parts as at present.*)

C. D., to show cause why A. B. (*or as the case may be*) should not be at liberty to enter a suggestion on the roll in an action wherein the said A. B. was Plaintiff, and the said C. D., Defendant, and wherein the said A. B. obtained Judgment for $ (*or* £), against the said C. D., on the day of , that it manifestly appears to the Court that the said A. B. is entitled to have execution of the said Judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. the costs of this application to be taxed.

NOTE.—*The above may be modified so as to meet the case of an application by or against the representative of a party to the Judgment.*

No. 10.—(*Vide* Section 304.)

FORM OF SUGGESTION THAT THE JUDGMENT CREDITOR IS ENTITLED TO EXECUTION AGAINST THE JUDGMENT DEBTOR.

And now, on the day of , it is suggested and manifestly appears to the Court, that the said A. B. (*or* E. F., as executor of the last Will and Testament of the said A. B., deceased, *or as the case may be*,) is entitled to have execution of the judgment aforesaid, against the said C. D., (*or* against G. H., as executor of the last Will and Testament of the said C. D., *or as the case may be*); therefore, it is considered by the Court that the said A. B., (*or* E. F., as such executor as aforesaid, *or as the case may be*) ought to have execution of the said judgment against the said C. D., (*or* against G. H., as such executor as aforesaid, *or as the case may be*).

No. 11.—(*Vide* Sections 306, 141.)

FORM OF WRIT OF REVIVOR.

VICTORIA, &c.,
To C. D., of GREETING:

We command you, that within ten days after the service of this Writ upon you, inclusive of the day of such service, you appear in our Court (*or* County Court) of , to shew cause why A. B., (*or* E. F., as executor of the last Will and Testament of the said A. B., deceased, *or as the case may be*,) should not have execution against you, (*if against a representative, here insert*, as executor of the last Will and Testament of , deceased, *or as the case may be*,) of a judgment whereby the said A. B. (*or as the case may be*) recovered against you, (*or as the case may be*,) $ (*or* £); and take notice that in default of your doing so, the said A. B. (*or as the case may be*) may proceed to execution.

Witness, &c.

B.

FORMS OF PLEADINGS.—(*Vide* Section 87.)

ON CONTRACTS.

1. Money payable by the Defendant to the Plaintiff for (*these words* "money payable," &c. *should precede money counts like* 1 *to* 11, *but need only be inserted in the first*,) goods bargained and sold by the Plaintiff to the Defendant.

2. Work done and materials provided by the Plaintiff for the Defendant at his request.

3. Money lent by the Plaintiff to the Defendant.

4. Money paid by the Plaintiff for the Defendant at his request.

5. Money received by the Defendant for the use of the Plaintiff.

6. Money found to be due from the Defendant to the Plaintiff on accounts stated between them.

7. A messuage and lands sold and conveyed by the Plaintiff to the Defendant.

8. The Defendant's use by the Plaintiff's permission of messuage and lands of the Plaintiff.

9. The hire of (*as the case may be*) by the Plaintiff let to hire to the Defendant.

10. Freight for the conveyance of the Plaintiff for the Defendant, at his request, of goods in (*ships*, &c.)

11. The demurrage of a (*ship*) of the Plaintiff kept on demurrage by the Defendant.

12. That the Defendant on the day of , A.D. , by his Promissory Note now overdue, promised to pay to the Plaintiff $ (*or* £), (*two*) months after date, but did not pay the same.

13. That one A., on, &c. (*date*) by his Promissory Note now overdue, promised to pay to the Defendant or order $ (*or* £), (*two*) months after date, and the Defendant indorsed the same to the Plaintiff, and the said Note was duly presented for payment and was dishonored, whereof the Defendant had due notice, but did not pay the same.

14. That the Plaintiff on, &c. (*date*) by his Bill of Exchange now overdue, directed to the Defendant, required the Defendant to pay to the Plaintiff $ (*or* £), (*two*) months after date, and the Defendant accepted the said Bill, but did not pay the same.

15. That the Defendant on, &c. (*date*), by his Bill of Exchange to A., required A. to pay the Plaintiff $ (*or* £), (*two*) months after date, and the said Bill was duly presented for acceptance and was dishonored, of which the Defendant had due notice, but did not pay the same.

16. That the Plaintiff and Defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the Plaintiff has always been ready and willing to marry the Defendant, yet the Defendant has neglected and refused to marry the Plaintiff.

17. That the Defendant by warranting a horse to be then sound and quiet to ride, sold the said horse to the Plaintiff, yet the said horse was not then sound and quiet to ride.

18. That the Plaintiff and Defendant agreed by charter party, that the Plaintiff's schooner called the *Toronto*, should with all convenient speed sail to *Hamilton*, and that the Defendant should there load her with a full cargo of flour and other lawful merchandize, which she should carry to *Kingston* and there deliver, on payment of freight per barrel, and that the Defendant should be allowed four days for loading and four days for discharging, and four days for demurrage, if required, at $ (*or* £), per day; and that the Plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said schooner at *Hamilton*, and that the time for so loading has elapsed, yet the Defendant made default in loading the agreed cargo.

19. That the Plaintiff let the Defendant a house, being (*designate it*) for years, to hold from the day of A.D. , at $ (*or* £) a year, payable quarterly, of which rent quarters are due and unpaid.

20. The Plaintiff by deed let to the Defendant a house (*designate it*) to hold for seven years from the day of , A.D. , and the Defendant by the said deed covenanted with the Plaintiff well and substantially to repair the said house during the said term (*according to the covenant*), yet the said house was during the said term out of good and substantial repair.

FOR WRONGS INDEPENDENT OF CONTRACT.

21. That the Defendant broke and entered certain land of the Plaintiff called lot No. &c., and depastured the same with cattle.

22. That the Defendant assaulted and beat the Plaintiff, gave him into custody to a Constable, and caused him to be imprisoned in the Common Gaol.

23. That the Defendant debauched and carnally knew the Plaintiff's wife.

24. That the Defendant converted to his own use (*or* wrongfully deprived the Plaintiff of the use and possession of) the Plaintiff's goods, that is to say—(*mentioning what articles, as for instance,* household furniture.)

25. That the Defendant detained from the Plaintiff his title deeds of land called lot No. &c. , in, &c. , that is to say (*describe the deeds*).

26. That the Plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the Defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

27. That the Defendant, having no reasonable or probable cause for believing that the Plaintiff, unless forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally, or the said Defendant in particular, maliciously represented that such was the fact, and thereupon maliciously procured a Judge's order for the issue of bailable process against the said Plaintiff, and caused the Plaintiff to be arrested and held to bail for $ (*or* £).

28. That the Defendant falsely and maliciously spoke and published of the Plaintiff the words following, that is to say, "He is a thief" (*if there be any special damage, here state it, with such reasonable particularity as to give notice to the Defendant of the peculiar injury complained of, as for instance,* whereby the Plaintiff lost his situation as shopman in the employ of N.)

29. That the Defendant falsely and maliciously published of the Plaintiff in a newspaper called the words following, that is to say: ("He is a regular prover under bankruptcies") the Defendant meaning thereby that (the Plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious) or as the case may be.

COMMENCEMENT OF PLEA.

30. The Defendant by , his Attorney (*or* in person), says (*here state the substance of the Plea.*)

31. And for a second Plea, the Defendant says (*here state the second Plea.*)

PLEA IN ACTIONS ON CONTRACTS.

32. That he never was indebted as alleged. (*N.B.—This plea is applicable to other declarations like those numbered* 1 *to* 11.)

33. That he did not promise as alleged. (*This plea is applicable to other declarations on simple contracts not on bills or notes, such as those numbered* 16 *to* 19. *It would be* [IN ED.] *objectionable to use* "did not warrant," "did not agree," *or any other appropriate denial.*)

34. That the alleged deed is not his deed.

35. That the alleged cause of action did not accrue within years, (*state the period of limitation applicable to the case*), before the suit.

36. That before action be satisfied and discharged the Plaintiffs claim by payment.

37. That the Plaintiff, at the commencement of this suit, was, and still is, indebted to the Defendant in an amount equal to (*or* greater than) the Plaintiff's claim for (*state the cause of set off as in a declaration, see form ante,*) which amount the Defendant is willing to set off against the Plaintiff's claim, (*or,* and the Defendant claims to recover a balance from the Plaintiff.

38. That after the claim accrued, and before this suit, the Plaintiff, by deed, released the Defendant therefrom.

PLEAS IN ACTIONS FOR WRONGS INDEPENDENT OF CONTRACT.

That he is not guilty.

40. That he did what is complained of by the Plaintiff's leave.

41. That the Plaintiff first assaulted the Defendant, who thereupon necessarily committed the alleged assault in his own defence.

42. That the Defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof, for twenty years before this suit, enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land of the Plaintiff to the said land of the Defendant, and from the said land of the Defendant over the said land of the Plaintiff, to the said public highway, at all times of the year, for the more convenient occupation of the said land of the Defendant, and that the alleged trespass was the use by the Defendant of the said way.

REPLICATIONS:

43. The Plaintiff takes issue upon the Defendant's first, second, &c., pleas.

44. The Plaintiff as to the second Plea, says: (*here state the answer to the plea, as in the following forms.*)

45. That the alleged release is not the Plaintiff's deed.

46. That the alleged release was procured by the fraud of the Defendant.

47. That the alleged set-off did not accrue within six years before this suit.

48. That the Plaintiff was possessed of land whereon the Defendant was trespassing and doing damage, whereupon the Plaintiff requested the Defendant to leave the said land, which the Defendant refused to do, and thereupon the Plaintiff gently laid his hands upon the Defendant in order to secure him, doing no more than was necessary for that purpose, which is the alleged first assault by the Plaintiff.

49. That the occupiers of the said land did not, for twenty years before this suit, enjoy, as of right and without interruption, the alleged way.

NEW ASSIGNMENT.

50. The Plaintiff as to the and pleas, says, that he sues, not for the trespasses therein admitted, but for trespasses committed by the Defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions and for other purposes than those referred to in the said pleas.

If the Plaintiff replies and new assigns, the new assignment may be as follows:

51. And the Plaintiff, as to the and pleas, further says that he sues, not only for the trespasses in those pleas admitted, but also for, &c.

If the Plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows:

52. And the Plaintiff, as to the and pleas, further says that he sues, not for the trespasses in the pleas (*the pleas not replied to*) admitted, but for the trespasses in the pleas (*the pleas replied to*) admitted, and also for, &c.

WRITS OF MANDAMUS AND INJUNCTION.

CON. STAT. U. C., CAP. 23.

An Act respecting Writs of Mandamus and Injunction.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

MANDAMUS. (*a*)

(*a*) A peculiarity in the constitution of the courts of England and of Ontario is the existence of two distinct sets of tribunals for the administration of justice. These tribunals, known as courts of law and equity, though in many respects acting independently of each other, in some cases occupy a common ground of jurisdiction. Proceedings in each tribunal have one object, which is the recovery of rights and the prevention of wrongs. The steps by which a person may seek his civil rights in a court of law constitute a mode of procedure known as an action. With few exceptions actions have only one object, which is compensation in damages, or, in the words of the Common Law Commissioners, "to procure a stipulated sum, payable in respect of some debt, or duty, or damage in money for the loss sustained by plaintiff by the non-performance of a contract, or for an injury sustained by a wrongful act." In this act, which was originally a part of the C. L. P. Act, 1856, an attempt is made to effect an extension of the operation of an action at law. Compensation is not always adequate redress. To satisfy the demands of justice there must be a power lodged somewhere to *protect* rights and *prevent* wrongs. Until the passing of the C. L. P. Act, 1856, that power was almost exclusively confined to courts of equity. It appeared to the Common Law Commissioners that "courts of common law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate common law rights and to prevent wrongs, whether existing or likely to happen, unless prevented." In their opinion "a consolidation of all the elements of a complete remedy in the same court is obviously most desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of jurisprudence." In pursuance of this opinion, the Commissioners recommended a transfer from courts of equity to courts of law of "the power, in certain cases, of common law obligations and rights to enforce specific performance, and in other cases of legal wrongs commenced or threatened to prohibit by injunction the commission of wrongful acts."

There may be a breach of contract or other injury for which no damages that a jury can award would be adequate compensation. In such cases a jurisdiction to *prevent* the breach of contract or other wrongful act would be much more salutary if exercised than a jurisdiction to indemnify against the consequences of its commission. The want of some court having such a jurisdiction was felt and acknowledged at a very early period in the history of English jurisprudence: see *Monkton* v. *Attorney-General*, 2 Coop. 527. Courts of equity

When a *Mandamus* may be obtained on equitable grounds.

1. (*b*) **The Plaintiff, in any action in either of the Superior Courts of Common Law, except replevin or ejectment,** (*d*) **may indorse upon the Writ and copy to be served,** (*g*) **a notice that the Plaintiff intends to claim a Writ of *Mandamus*,** (*h*) **and the Plaintiff may thereupon claim in the declara-**

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having observed the want seized the opportunity of administering the desired relief, and in so doing arrogated to themselves a most useful and powerful jurisdiction. Having assumed to exercise it, these courts did not confine its operations to mere equitable rights, but administered the relief as well where there were legal as purely equitable rights. In this manner a great inroad was made upon the jurisdiction of courts of common law, so much so that in many cases no satisfactory redress could be had at law without first having invoked the supplementary aid of a court of equity. The attention of the Common Law Commissioners of 1834 having been directed to this state of the law, they reported that there was no reason "why a court of law should not exercise the same jurisdiction as a court of equity, and restrain the violation of legal rights in cases in which an injunction might issue for that purpose from courts of equity." The advantages to arise from such a change also received the attention of the commissioners. Their report was to this effect: "It would obviously be attended with great advantage and convenience; that where common law rights are concerned, the whole litigation relating to them should fall within the cognizance of a common law court, not only because the expense and delay of a suit in equity may be thus evoided, but because the common law judges are more competent than those in quity to decide any question of law which the application for an injunction may involve, and can exercise more conveniently a controlling or directing power over any action connected with the matter in dispute." It was ascertained that to carry out these recommendations no creation of machinery was necessary. "Little more would be required than to give an existing writ a wider application of a kind sanctioned by ancient usage. For in former times a writ of prohibition was granted not only to prevent excess of jurisdiction but to restrain waste. Prohibition of waste lay at common law for the owner of the inheritance against the tenant by the curtesy tenant in dower and guardian in chivalry; and this, says Lord Coke, 'was an excellent law, for preventing injustice excelleth punishing injustice:'" Second report of the Common Law Commissioners, section 48. It is the design of the latter part of this act, which was also originally a part of the C. L. P. Act, 1856, to put these recommendations, which received the approval of the Common Law Commissisners of 1850, into practice.

(*b*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 68. Founded upon the second report of the Common Law Commissioners, section 46.

(*d*) In each of which forms of action the judgment is for the delivery of a specific thing, and not mere compensation for the wrong of detaining it, and therefore not requiring the remedy contained in this and the following sections: see *Land* v. *Gilkison*, 7 U. C. L. J. 151; *Baylis* v. *LeGros et al*, 2 C. B. N.S. 38.

(*g*) *Must* indorse, if the intention be to claim a *mandamus*.

(*h*) The writ of *mandamus* here intended is the old prerogative writ of that name amplified both in form and efficacy. The use intended is that of enforcing the specific performance of certain duties, "in the fulfilment of which the plaintiff is personally interested." The right of courts of common law to issue the writ for such purposes, so far as the same is dependent upon this statute, is a supplementary jurisdiction received from courts of equity, and will not generally be exercised, unless in cases wherein a bill for specific performance would lie in

tion, either together with any other demand which may be enforced in such action, or separately, (*i*) a Writ of *Mandamus* commanding the Defendant to fulfil any duty (*j*) in the fulfilment of which the Plaintiff is personally interested. (*k*) 19 Vic. c. 43, s. 275.

Form of Declaration

2. (*l*) The declaration in such action shall set forth suffi-

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equity. But it by no means follows that the converse of this proposition holds good, viz., that wherever courts of equity will entertain a bill for specific relief courts of law will grant a writ of *mandamus*. There are cases in which equity will entertain such a bill, although the party applying has no legal right whatever, and in which courts of law, in the absence of a legal right, would not interfere: see *Regina* v. *The Balby & Worksop Turnpike Road*, 22 L. J. Q. B. 164; *Edwards* v. *Lowndes*, 1 El. & B. 81. In such cases the remedy exclusively belongs to equity. There is a larger class of cases in which, although hitherto there has been a remedy at law, yet, because of its inadequacy, equity exercises a concurrent jurisdiction by granting specific relief where courts of law could only grant pecuniary compensation. To this class of cases the section under consideration appears to be chiefly directed, but in the opinion of the courts have to a great extent failed to embrace them. The declared intention of the commissioners was that each court should possess within itself the elements of complete redress. But the words used by the legislature to carry out this intention have fallen far short of the purpose intended: see *Bush et al* v. *Beavan*, 1 H. & C. 500. The only class of cases to which the section can without doubt be said to apply is that in which there is a duty of a public nature, or a duty created by act of parliament, in the fulfilment of which some other party has a personal interest: *Benson* v. *Paull*, 6 El. & B. 273; *Ward et al* v. *Lowndes*, 7 W. R. 489; s. c. 6 Jur. N.S. 247; *Bush* v. *Beavan*, 1 H. & C. 500. The remedy, however, may be held to extend to cases of a more private nature than those to which the prerogative writ would apply: *Norris* v. *The Irish Land Co.* 8 El. & B. 527, *per* Coleridge, J.; see further *Swan* v. *The North British Australasian Co.* 7 H. & N. 603; s. c. in appeal, 2 H. & C. 175; *Ward et al* v. *Lowndes*, 1 E. & E. 940; affirmed in error, 1 E. & E. 956; *Worthington et al* v. *Hulton*, L. R. 1 Q. B. 63; and in actions even though no actual damage be sustained: *Fotherby* v. *The Metropolitan R. Co.* L. R. 2 C. P. 188. A discretion will be exercised as to the granting or refusing of the writ in actions in which it may be properly claimed: *Nicholl et al* v. *Allen*, 1 B. & S. 916; in appeal, 1 B. & S. 934. It has been held that practice court has no jurisdiction to grant the prerogative writ: *In re Williams and the Great Western Railway Co.* 26 U.C.Q.B. 340; see also *Crysdale* v. *Moorman*, 17 U. C. C. P. 218.

(*i*) In equity there may be a bill for specific performance, and a supplemental bill, in principle answering to an action under this section and a supplementary right to *mandamus*. Thus, if pending a suit for the specific performance of an agreement, for instance, of a demise of quarries, a part of the subject matter be abstracted, compensation therefor may be obtained by a supplemental bill: *Nelson* v. *Bridges*, 2 Beav. 239.

(*j*) See note *h* to this section.

(*k*) The public has an interest in the removal or abatement of a nuisance; but any private individual who suffers particular injury may at common law have his action for damages: see *Brown* v. *Mallett*, 5 C. B. 599; *Dobson* v. *Blackmore*, 9 Q. B. 991; also *Russell* v. *Shenton*, 3 Q. B. 449; *Goldthorpe* v. *Hardman*, 2 D. & L. 442; *Fay* v. *Prentice*, 1 C. B. 828.

(*l*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 69. Founded upon the second report of the Common Law Commissioners, section 46.

cient ground upon which the claim is founded, (*m*) and shall set forth that the Plaintiff is personally interested therein, (*n*) and that he sustains or may sustain damage by the non-performance of such duty, (*o*) and that performance thereof has been demanded by him and been refused or neglected. (*p*) 19 Vic. c. 43, s. 276.

The pleadings to be as in ordinary actions as near as may be.

3. (*q*) The pleadings and other proceedings in any action in which a Writ of *Mandamus* is claimed, shall be the same in all respects as nearly as may be, (*r*) and costs shall be

(*m*) This differs from the practice as to the prerogative writ of *mandamus*. The ground upon which the claim to the writ is founded here required to be set forth in the declaration must, as regards the prerogative writ, be set forth upon the face of the writ itself: *Regina* v. *Hopkins et al*, 1 Q. B. 161; and if in this respect the writ be defective, nothing appearing in the return can cure the defect: *Ib.* Even after the return, objections, whether in form or substance, can in certain cases be made to the writ: *Rex* v. *Margate Pier Co.* 3 B. & Al. 220.

(*n*) See note *k* to section 1.

(*o*) The specific amount of a debt sought to be recovered by *mandamus* need not be ascertained upon the declaration: *Ward et al* v. *Lownnes*, 1 E. & E. 940, 956.

(*p*) The demand must be specific, and non-compliance therewith clearly made to appear: see *Regina* v. *Frost*, 8 A. & E. 822; *Regina* v. *The Bristol & Exeter R. Co.* 4 Q. B. 162; *Regina* v. *Justices of Worcestershire*, 3 El. & B. 477. Where a rule for a *mandamus* was discharged on the ground of there being no demand and refusal, the court declined to grant a second rule, although upon the second application it was shown that since the discharge of the former rule a demand and refusal had taken place: *Ex parte Thompson*, 6 Q. B. 721. As to sufficiency of demand and when necessary: see *Rex* v. *Ford et al*, 2 A. & E. 588; *Regina* v. *Frost*, 8 A. & E. 822; *Rex* v. *Mayor of West Looe*, 3 B. & C. 677.

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, ss. 70, 71. Founded upon the second report of the Common Law Commissioners, section 46.

(*r*) It is necessary for the party to whom a *mandamus* is addressed to make a return to it: 9 Anne, cap. 20, s. 1. The party prosecuting the writ may plead to or traverse all or any of the material facts contained in the return: *Ib.* s. 2. To which the person who makes the return may reply, take issue, or demur: *Ib.* As to the applicability of the Statute of Limitations by way of plea, see *Ward et al* v. *Lowndes*, 1 E. & E. 940, 956; *Bush et al* v. *Beavan*, 1 H. & C. 500. The party demurring may thereby impeach the validity of the writ: *Clarke* v. *The Leicestershire and Northamptonshire Canal Co.* 6 Q. B. 898. The objection that defendant is not bound to perform the act, the performance of which plaintiff seeks to enforce, may be made upon demurrer to the return as well as in opposition to the original motion for the writ: *Regina* v. *Whitmarsh*, 19 L. J. Q. B. 185. If issue be joined upon a traverse of a matter of fact, and the prosecutor do not proceed to trial according to the practice of the court, judgment for not proceeding may be had against him: *Rex* v. *Mayor, &c. of Stafford*, 4 T. R. 689; and after trial, if there be sufficient ground therefor, judgment *non obstante veredicto* may be given for the party who made the return: *Regina* v. *The Governors of the Darlington Free Grammar School*, 6 Q. B. 682. The provisions of the Statute of Anne,

recoverable by either party, as in an ordinary action for the recovery of damages; (*s*) and in case Judgment shall be given for the Plaintiff that a *Mandamus* do issue, (*t*) the Court in which such Judgment is given, besides issuing execution in the ordinary way for the costs and damages, (*u*) may also issue issue a peremptory Writ of *Mandamus* to the Defendant, commanding him forthwith to perform the duty to be enforced. (*v*) 19 Vic. c. 43, s. 277.

4. (*a*) Such Writ (*b*) need not recite the declaration or

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cap. 20, have been extended to all writs of *mandamus*: Stat. 28 Vic. cap. 18, s. 3; see further section 4 of the same act. Proceedings do not abate by death, resignation, or removal from office: *Ib.* section 5; and the person dissatisfied with the decision of the court may appeal or bring error: see *Ib.* ss. 7, 8, 10.

(*s*) In all cases of application for the prerogative writ of *mandamus*, whether the writ be granted or refused, the costs are in the discretion of the court: Stat. 28 Vic. cap. 18, s. 6. Where the necessity of issuing a *mandamus* to a *court* has arisen from the mistake of the court, the party relying upon the judgment of that court is not generally required to pay costs: *Regina* v. *Justices of Surrey*, 9 Q. B. 37. But the court of Queen's Bench in England, without binding itself absolutely to general rules, has always exercised a discretionary power as to such costs: *Regina* v. *The Commissioners of the Thames and Isis Navigation*, 5 A. & E. 804. Formerly, there was a practice of going at great length into the merits on an application for costs of a *mandamus*, but that was found to be inconvenient, and a general rule laid down that the court, without entering into the merits, would order the unsuccessful party to pay the costs: *Regina* v. *Ingham*, 17 Q. B. 884. It is the ordinary practice to make a separate application for costs of a prerogative *mandamus*: *Regina* v. *The East Anglian R. Co.* 2 El. & B. 475. Costs have been refused where both parties were to blame: *In re Poussett and the Corporation of the County of Lambton*, 22 U. C. Q. B. 80.

(*t*) The form of which judgment shall be according to R. G. pr. form No. 55 in schedule.

(*u*) See section 238, *et seq.* of C. L. P. Act.

(*v*) Provision is made for the issue of only one *mandamus*, viz. that in the nature of an execution, which therefore must be of a peremptory nature. The declaration represents the first writ of *mandamus* or *mandamus nisi* issued in proceedings independently of this act. It is a rule in such a proceeding that no peremptory writ shall issue until the proceedings on the first writ of *mandamus* are completed: *Regina* v. *Baldwin*, 8 A. & E. 947; and when granted peremptorily, the court will not hear any return to it: *Regina* v. *Ledgard et al*, 1 Q. B. 616; other than that of compliance: section 4. The writ may be made returnable forthwith, and may be signed and issued by the clerk of process: *Burdett* v. *Sawyer*, 2 Prac. R. 398. Persons acting in obedience to a peremptory writ of *mandamus* issued by any court having authority to issue such writs, are indemnified against action, suits or other proceedings: Stat. 28 Vic. cap. 18, s. 9.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 72. Founded upon the second report of the Common Law Commissioners, section 46.

(*b*) *Such writ*, *i. e.* the peremptory writ of *mandamus* mentioned in the preceding section.

What the Writ shall require.

other proceedings or the matter therein stated, (*c*) but shall simply command the performance of the duty, (*d*) and in other respects shall be in the form of an ordinary Writ of Execution, except that it shall be directed to the party and not to the Sheriff, (*e*) and may be issued in Term or Vacation and be made returnable forthwith, (*f*) and no return thereto, except that of compliance, shall be allowed, (*g*) but time to return it may upon sufficient ground be allowed by the Court or a Judge, (*h*) either with or without terms. (*i*) 19 Vic. c. 43, s. 278.

(*c*) A peremptory *mandamus* issued independently of this statute need not, in general, recite the previous writ of *mandamus*, to which, in a great measure, the declaration under the practice established by this act corresponds. But in form the peremptory writ must be the same as the writ originally awarded, that is to say, there must not be any substantial variance, otherwise defendants would have a right to make a new return to it, a step which the practice forbids. The *mandamus nisi* orders the act to be done, or cause to be returned for not doing it; whereas the peremptory *mandamus* commands the act to be done, and will admit of no return except that of performance: *Regina* v. *The Lord Mayor and Aldermen of the City of London*, 18 Q. B. 1.

(*d*) Great particularity must be observed in the mandatory part of the writ. To support a writ commanding the doing of several things, all must be valid, else the writ must be quashed. If the writ be bad as to one of the things commanded to be done it will be bad as to all: *Regina* v. *The Tithe Commissioners*, 14 Q. B. 459. It is quite settled that if any part of what is commanded by a peremptory *mandamus* go beyond the legal obligation, the whole writ must be set aside: *Regina* v. *The Caledonian R. Co.* 16 Q. B. 19; *The South Eastern R. Co.* v. *Regina*, 17 Q. B. 485; *Regina* v. *The East and West India Docks and Birmingham Junction R. Co.* 2 El. & B. 466. The courts have refused to amend prerogative writs of *mandamus* when peremptory: *Regina* v. *The Church Trustees of St. Pancras*, 3 A. & E. 535; *Regina* v. *The Tithe Commissioners*, 14 Q. B. 459; *Regina* v. *The Kidwelly and Llanelly Canal and Tramroad Co. Ib.* 481, *n.* The motion against such a writ upon the ground of some defect in it is not too late, on a motion for an attachment, because of disobedience: *Regina* v. *Ledgard et al*, 1 Q. B. 616.

(*e*) The writ should be directed to those who are bound to perform the duty commanded: *Regina* v. *The Mayor, &c. of Hereford*, 2 Salk. 701. It may be directed to a corporation by name or to those members of it who have the power to do the thing required: *Harcourt* v. *Fox*, Comb. 213, *per* Holt, C. J. But it must be directed either to that part of the corporation who are bound to do the act or to the corporation at large: *Rex* v. *The Mayor of Abingdon*, 2 Salk. 699.

(*f*) The prerogative writ of *mandamus* is regulated by a like practice: sections 7, 8.

(*g*) This is the rule also as to the prerogative writ when peremptory: *Regina* v. *Ledgard et al*, 1 Q. B. 616.

(*h*) *Relative powers:* see note *w* to section 48 of C. L. P. Act.

(*i*) If prosecutor endeavour to enforce a return within an unreasonable time or otherwise in an unreasonable manner, further time will, it is apprehended, be granted without terms.

5. (*k*) The Writ of *Mandamus*, so issued as aforesaid, (*l*) shall have the same force and effect as a Peremptory Writ of *Mandamus*, (*m*) and in case of disobedience may be enforced by attachment. (*n*) 19 Vic. c. 43, s. 279. Force and effect of the Writ.

6. (*o*) The Court (*p*) may, upon application by the Plain-

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 73. Founded upon the second report of the Common Law Commissioners, section 46.

(*l*) *i. e.* Issued under section 3.

(*m*) In Eng. C. L. P. Act, "shall have the same force and effect as a peremptory writ of *mandamus* issued out of the court of Queen's Bench," because before the Eng. C. L. P. Act the writ of *mandamus* in England was issuable only from the court of Queen's Bench. In this Province since the constitution of the court of Common Pleas, that court and the Queen's Bench have in all respects exercised a concurrent jurisdiction: Con. Stat. U. C. cap. 10, s. 3.

(*n*) The peremptory *mandamus* commands obedience. No return can be made to it except that of compliance: section 4. If that return be not made within a reasonable time, the court will grant an attachment against the persons to whom the writ is directed, with this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, the attachment is granted only against those particular persons who refuse to pay obedience; but where it is directed to several persons in their natural capacity the attachment for disobedience must issue against all, though when they are brought before the court the punishment will be proportioned to the offence of each: Buller's N. P. 201; *Regina* v. *Ledgard et al*, 1 Q. B. 616. The attachment does not lie simply for not making the return, but for not obeying the writ: *The Queen* v. *The School Trustees of Tyendenaga*, 3 Prac. R. 43. A *mandamus* was directed to two bailiffs, one of whom inclined to obey the writ and the other would not obey it nor join in a return. The court granted an attachment against both, saying it would be endless to try in all cases who was in the right and who wrong, and that if the same were done it would be used as a handle for delay: *In re Bailiffs of Bridgenorth*, 2 Str. 808. In answer to a rule for an attachment against school trustees, it was shown that one was willing to levy the rate; that a second, owing to ill health, had resigned his office before the receipt of the writ; and the court thereupon discharge the rule as to these two on payment of costs, but granted the attachment as to the third trustee, who took no notice of the rule: *Regina* v. *The School Trustees of Tyendinaga*, 20 U. C. Q. B. 528. An attachment was ordered against the mayor of a corporation for not making a return to a *mandamus* within the time prescribed by the writ, though there had been no personal service thereof upon the mayor: *Rex* v. *The Mayor and Corporation of Fowey*, 5 D. & R. 614. A *mandamus nisi* having been directed to M. S. "Treasurer of Belleville," an attachment being moved for after he had ceased to hold the office, was refused: *Burdett* v. *Sawyer*, 2 Prac. R. 398; see further *Regina* v. *The School Trustees of Tyendinaga*, 3 Prac. R. 43. If the return, upon the face of it, be good, but the matter of it false, an action upon the case lies for the party injured against the person making such false return: Buller's N. P. 202; see further Tapping's Mandamus, 383, 421. An attachment may be issued against persons making a fraudulent use of the writ of *mandamus*: *In re McLay et al*, 24 U. C. Q. B. 54.

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 74. Founded upon the second report of the Common Law Commissioners, section 46.

(*p*) *Qu.* Court *or* judge: see note *v* to this section.

When the Court may direct a substituted performance.

tiff, besides or instead of proceeding against the disobedient party by attachment, (*q*) direct that the act required to be done may be done by the Plaintiff or some other person appointed by the Court, at the expense of the Defendant; (*r*) and upon the act being done, (*s*) the amount of such expense may be ascertained by the Court either by an enquiry in the nature of an assessment of damages (*t*) or by reference to the proper officer, (*u*) as the Court or a Judge may order, (*v*) and the Court may order payment of the amount of such expenses and costs, (*w*) and enforce payment thereof by execution. (*x*) 19 Vic. c. 43, s. 280.

Jurisdiction as to Prerogative Writs of *Manda-*

7. (*a*) Nothing in this Act contained shall take away the Jurisdiction of either of the Superior Courts to grant Writs of *Mandamus*; (*b*) nor shall any Writ of *Mandamus*

(*q*) Under section 5.

(*r*) This may apply to abatement of nuisances, &c.: see note *k* to section 1.

(*s*) The doing of which must be made to appear on affidavit.

(*t*) As to form of writs see R. G. pr. Sch. No. 56.

(*u*) *i. e.* Clerk of the court.

(*v*) It is enacted *the court* "may, upon application, &c. direct that the act required to be done may be done by the plaintiff, &c. and that upon the act being done the amount of the expense of doing it may be ascertained, &c. as "*the court or judge*" may order, &c. and that "*the court*" may order judgment of such expense, &c. These changes of expression shewing apparently when power rests with the court or a judge and when with the court exclusively, are material to be observed in the practical application of this section.

(*w*) An order for payment of the expenses and costs, from the peculiar wording of the section, would appear to be unnecessary to warrant issue of the execution.

(*x*) The execution intended is, it is presumed, the ordinary writ of *fieri facias*. Whether other forms of execution can be issued remains to be decided.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 75.

(*b*) *Mandamus* is a high prerogative writ of a most extensive remedial character, issuable in this Province out of either of the superior courts of common law, directed to any corporation or company, inferior court of judicature, or person, requiring them to do some particular thing specified therein, which appertains to their office, and which it is their duty to perform: Impey on Mandamus, 1. The writ being one of prerogative issuable from courts of common law can only be issued to enforce a *legal* ascertained right: *Rex* v. *Archbishop of Canterbury*, 8 East. 213; *Rex* v. *Stafford et al*, 3 T. R. 646; *In re the Vicarage of Orton*, 13 Jur. 1049; *Ex parte Napier*, 18 Q. B. 692; *Regina* v. *Trustees of the Balby and Worksop Turnpike Road*, 22 L. J. Q. B. 164; *In re Barnhart* v. *The Justices of the Home District*, 5 O. S. 507; *Regina* v. *The District Council of the District of Gore*, 5 U. C. Q. B. 351; in general where there is no other specific remedy, or one that is doubtful or inconsistent: *Rex* v. *Bishop of Chester*, 1 T. R. 396; *Rex* v.

issued out of such Courts be invalid by reason of the right of the prosecutor to proceed by action for *Mandamus* under this Act, (*d*) but the provisions of this Act, so far as they are

mus not to be affected.

The Directors of the Bristol Dock Co. 12 East. 429; *Rex* v. *The Treasurer and Directors of the St. Katherine Dock Co.* 4 B. & Ad. 360; *Rex* v. *Windham*, 1 Cowp. 377; *Rex* v. *The Minister and Churchwardens of Stoke Damerel*, 5 A. & E. 584; *Rex* v. *The Nottingham Old Waterworks Co.* 6 A. & E. 355; *Regina* v. *The Rector and Churchwardens of Birmingham*, 7 A. & E. 254; *Regina* v. *The Hull and Selby Railway Co.* 6 Q. B. 70; *Regina* v. *The Great Western Railway Co.* 14 U. C. C. P. 462; *Regina* v. *The School Trustees of Tyendinaga*, 20 U. C. Q. B. 528; *In re Judge of County of Elgin*, *Ib.* 588; *In re Keenahan and Preston*, 21 U. C. Q. B. 461; and to enforce the performance of a duty imperative and clear: *Rex* v. *The Bailiffs and Corporation of Eye*, 1 B. & C. 85; *Rex* v. *The Justices of Lancashire*, 7 B. & C. 691; *Rex* v. *The Bishop of Gloucester*, 2 B. & Ad. 158; *Ex parte Becke*, 3 B. & Ad. 704; *Rex* v. *The Mayor and Aldermen of London*, *Ib.* 255; *Rex* v. *The Justices of the West Riding of Yorkshire*, 5 B. & Ad. 667; *Regina* v. *The South Eastern Railway Co.* 4 H. L. Cas. 471; *Rex* v. *Hughes*, 3 A. & E. 425; *Rex* v. *Greene et al*, 6 A. & E. 548; *Regina* v. *The Eastern Counties Railway Co.* 10 A. & E. 531; *Regina* v. *The Municipal Council of Bruce*, 11 U. C. C. P. 575; being one of a public or *quasi* public character, that is to say, one in which applicant is not at all events the sole person interested: *Rex* v. *Barker et al*, 3 Burr. 1265; *Rex* v. *Lord Montacute et al*, 1 W. Bl. 60; *Rex* v. *Cheere*, 4 B. & C. 902; *Ex parte Robins*, 7 Dowl. P. C. 566; *Regina* v. *Eastern Counties Railway Co.* 10 A. & E. 531; but will not be issued to enforce the doing of an act which if done would serve no good purpose: *Anon.* Lofts. 148; *Rex* v. *The Commissioners of the Llandio District of Roads in Carmarthenshire*, 2 T. R. 232; *Regina* v. *The Directors of the Blackwell Railway Co.* 9 Dowl. P. C. 558; *Rex* v. *The Justices of Staffordshire*, 6 A. & E. 84; *Regina* v. *Pitt*, 10 A. & E. 272; *Regina* v. *Harrison et al*, 9 Q. B. 794; or cause unnecessary trouble, vexation, or confusion: *Regina* v. *St. John's College*, Comb. 238; *Rex* v. *Bishop of Ely*, 1 W. Bl. 52; *Rex* v. *Coleridge*, 1 Chit. R. 588; or direct the doing of an act which is impossible; *Regina* v. *London and North West Railway Co.* 6 Rail. Cas. 634; or be otherwise fruitless and useless: *Regina* v. *Bridgman*, 15 L. J. M. C. 44; *Rex* v. *Heathcote*, 10 Mod. 48; *Regina* v. *The Trustees and Managers of the Northwich Savings Bank*, 9 A. & E. 729; or generally to do an act, the doing of which would subject the party to an action; *Rex* v. *Dayrell et al*, 1 B. & C. 485; *In re O'Leary and the School Trustees of the Township of Blandford*, 19 U. C. Q. B. 556; or be an interference with the decision of a competent tribunal: *In re Judge of the County of Elgin and Macartney*, 13 U. C. C. P. 73. No waiver of objections will entitle a party to a *mandamus*, unless the party applying of himself disclose a good right thereto: *Regina* v. *The Lords Commissioners of the Treasury*, 16 Q. B. 357. The party applying must show that there has been a specific demand for the performance of the duty, followed by a refusal in terms or by circumstances which distinctly show the intention of the party not to do the act required of him, and which it is the object of the *mandamus* to enforce: *Rex* v. *The Brecknock and Abergavenny Canal Navigation Co.* 3 A. & E. 217; *Regina* v. *The Select Vestrymen of St. Margaret Leicester Vestry*, 8 A. & E. 889; *Regina* v. *The Bristol and Exeter Railway Co.* 4 Q. B. 162; *ex parte Thompson*, 6 Q. B. 721. The application must be made within a reasonable time: *Regina* v. *The Leeds and Liverpool Canal Co.* 11 A. & E. 316; *Regina* v. *Townsend*, 28 L. T. Rep. 100.

(*d*) It is a rule that the prerogative writ of *mandamus* can only be had in cases where there is no other specific remedy. The statutory *mandamus* allowed by this act will be in some cases a specific remedy, but in no case such a remedy as will it is apprehended prevent the interference of the court by the issue of the prerogative writ.

applicable, shall apply to the pleadings and proceedings upon a prerogative Writ of *Mandamus* issued by either of the Superior Courts. (*e*) 19 Vic. c. 43, ss. 281, 282.

Writs may issue in the first instance.

8. (*f*) Upon application by motion for any Writ of *Mandamus*, (*g*) the rule may in all cases be absolute in the first instance, if the Court thinks fit, (*h*) and the Writ may bear teste on the day of its issuing, (*i*) and may be made returnable forthwith, whether in term or in vacation, (*j*) but time may be allowed to return it by the Court or a Judge either with or without terms. (*k*) 19 Vic. c. 43, s. 282.

INJUNCTION.

When a Writ of Injunction may issue by

9. (*l*) In case of breach of contract or other injury, (*m*) where the party injured is entitled to maintain and has

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(*e*) The latter part of this section is taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 77, and is in many respects an important provision.

(*f*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 76.

(*g*) In Eng. C. L. P. Act, "Upon any application by motion for any writ of *mandamus* in the court of Queen's Bench:" see note *m* to section 5.

(*h*) This has always been the rule of practice. As to when the rule should be *nisi* and when absolute, see Impey's Mandamus, p. 114; Tapping on Mandamus, 297, 298.

(*i*) And herein conform with the practice regulating writs of summons and execution: section 249 C. L. P. Act. Hitherto all writs of *mandamus* were tested in term: Com. Dig. "Mandamus," C. 4; *Regina* v. *Conyers et al*, 8 Q. B. 981. And in practice were supposed to issue on the day when ordered by the court: *Ib.* Under this section the writ may bear date "on the date of its issuing" "either in term or vacation," and without reference to the day when ordered by the court.

(*j*) Same rule as applied to writs of execution: see *Burdett* v. *Sawyer*, 2 Prac. R. 398.

(*k*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*l*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 79. Founded upon the second report of the Common Law Commissioners, section 48.

(*m*) The application of this section is in some degree made to depend upon a reference to the *mandamus* clauses. It is enacted that in all cases of breach of contract or other injury, &c. plaintiff "may in like cases and manner as hereinbefore provided with respect to writ of *mandamus*, claim a writ of injunction." &c. It is not in every case of a breach of contract or other injury that plaintiff may obtain a writ of *mandamus*: see note *h* to section 1. But between the cases in which the proper application would be for a *mandamus*, and those for an injunction, there is at least one obvious distinction. The former writ issues to command the doing of something and is in general issued in cases of non-feasance: whereas the latter writ does not so much issue to command the doing of a thing

brought an action, (*n*) he may, in like case and manner as Courts of Law.

as to desist from doing something, and issues generally in cases of misfeasance, or in the words of this section, the injunction may issue "against the *continuance*" of a breach of contract or other injury. However in some degree the enactment is anticipatory, for relief may be asked not only against the continuance, &c. but against the "repetition" and against the "committal" of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The words "breach of contract *or other injury*" are also deserving of attention. The first inference is that a breach of contract is an injury within the meaning of the section. Cases have arisen in which great doubts were entertained as to whether, for the breach of a particular contract, the remedy was on the contract or in tort. The distinction appears to be that whenever there is a duty arising from a general employment, then the action may be brought in tort, though the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty by the party on whom the general duty is imposed: *Courtenay* v. *Earle*, 10 C. B. 78; see also *Boorman et al* v. *Brown*, 3 Q. B. 511, reported as affirmed in 11 Cl. & F. 1; *Wood* v. *Finnis*, 21 L. J. Ex. 138. Where the command to desist from the doing of an act involves the doing of some other act, the injunction may nevertheless be granted: *Jessel* v. *Chaplin*, 4 W. R. 610. Thus, in an action for the obstruction of plaintiff's lights by the erection of a wall, the court granted an injunction, the effect of which was of necessity to compel defendant *to take down the wall*: *Ib.* Many cases of a like kind will readily suggest themselves: see *Bradbee* v. *The Mayor, &c. of London, Governors of Christ's Hospital*, 4 M. & G. 714; *Rose* v. *Groves et al*, 5 M. & G. 613; *Firmstone et al* v. *Wheeley et al*, 2 D. & L. 203; *Goldthorpe* v. *Haraman*, 16 442; *Russell* v. *Shenton*, 3 Q. B. 449; *Fay* v. *Prentice et al*, 1 C. B. 828; *Brown et al* v. *Mallett*, 5 C. B. 599, decided in courts of common law; and the cases of *Martin et ux.* v. *Nutkin et al*, 2 P. Wms. 266; *Haines* v. *Taylor*, 2 Ph. 209, affirmed 10 Beav. 75; *Spencer* v. *London & Birmingham Rw. Co.* 8 Sim. 193; *Squire* v. *Campbell*, 1 M. & C. 459; *Attorney-General* v. *Forbes*, 2 M. & C. 123; *Earl of Ripon et al* v. *Hobart et al*, 3 M. & K. 169, decided in courts of equity. There are cases in which courts of equity grant injunctions prohibitory in form but mandatory in effect, the principles of which will govern the application of the section under consideration: see *Earl of Mexborough* v. *Bower*, 7 Beav. 127. But a writ of injunction, the effect of which would be to compel defendant to do an illegal act, will not be granted: *London and North Western Railway Co.* v. *Webb*, 9 L. T. N.S. 291.

(*n*) The "breach of contract or other injury" must be one for which plaintiff is *entitled* to bring and for which he *has* brought an action. There must be the legal right infringed upon by the wrongful act or injury, the subject of the action. Courts of equity have observed the principles involved in this provision with as much strictness as courts of law can well do. In application to courts of equity for relief in cases depen ling upon legal rights, these courts have at all times taken good care that the right should be ascertained before their jurisdiction by injunction is exercised. In all applications of the kind the first question to be determined is the legal right. If the court doubt that, it may commit injustice by interfering until it be decided. A great objection to granting an injunction before the legal right is ascertained is that the granting of the writ itself operates upon the question before that question is discussed and determined in the ordinary mode. Hence courts of equity, unless quite clear as to the legal right, have deemed it the safer course to abstain from exercising their jurisdiction until the determination of that right: see *Rigby* v. *Great Western Railway Co et al*, 1 Coop. C. C. 3; *Clayton* v. *Attorney-General*, *Ib.* 139; *Saunders et al* v. *Smith et al*, 3 M. & C. 711; *Bramwell* v. *Halcomb*, *Ib.* 737; *Pidding* v. *How*, 8 Sim. 477; *Collard* v. *Allison*, 4 M. & C. 487; *Ringer* v. *Blake*, 3 Y. & C. 591; *Smith* v. *Elger*, 3 Jur. 790;

hereinbefore provided, with respect to *Mandamus*, (*o*) claim a Writ of Injunction (*p*) against the repetition (*q*) or continuance of such breach of contract or other injury, (*r*) or the

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Spottiswoode v. *Clarke*, 2 Phill. 154; *Stevens* v. *Keating*, *Ib* 333; *Semple* v. *The London and Birmingham Railway Co.* 1 Rail. Cas. 120; *Electric Telegraph Co.* v. *Nott et al.* 11 Jur. 157; *England* v. *Curling*, 8 Beav. 129; *Bridson* v. *McAlpine*, *Ib.* 229; *Haines* v. *Taylor*, 10 Beav. 75; *South* v. *Webster*, 10 Beav. 561; *Lidgett* v. *Williams*, 4 Hare, 464; *Hadfield* v. *Manchester South Junction and Altringham, Railway Co.* 12 Jur. 1083; *Dakin* v. *The London and North Western Railway Co.* 13 Jur. 579. There are, however, cases in which equity, in the exercise of its peculiar jurisdiction, will grant relief by injunction, though there be no legal subsisting right, as in cases of breach of trust, confidence, &c.: see *Prince Albert* v. *Strange et al*, 1 Mac. & G. 25; and on the other hand some cases in which equity will not interfere though there be the legal right: see *Duke of Bedford* v. *British Museum*, 1 Coop. C. C. 90; *Davenport* v. *Davenport*, 7 Hare, 217; *Clark* v. *Freeman*, 11 Beav. 121; *Sainter* v. *Ferguson*, 1 Mac. & G. 286. Where a court of equity sees that there is a question between the parties, and that that question may be dealt with but cannot be wholly decided at law, while a part of the relief sought by plaintiff can only be obtained in equity, the court of equity will, on a motion for an injunction to restrain an action at law, grant the injunction until the hearing of the cause: *The Athenæum Life Assurance Co.* v. *Pooley et al*, 27 L. T. Rep. 232. But it must be on plaintiff's paying into court the amount, if any, due from them to the defendants in equity, and undertaking to pay what may become due up to the hearing of the cause: *Ib.*

(*o*) It has been contended that the words "in like case," as used in this section, mean in actions of the same description as mentioned in section 1, which gives the remedy by mandamus in any action except "ejectment or replevin." But whether these two forms of action are to be excepted from the operation of the section here annotated has been made a question: *Fraser* v. *Robins*, 3 U. C. L. J. 112. In England an injunction has been refused in an action of ejectment: *Baylis* v. *LeGros et al*, 2 C. B. N.S. 318; and such, notwithstanding some cases to the contrary, *Bell* v. *White*, 3 U. C. L. J. 107; *Robins* v. *Porter*, 2 U. C. L. J. 230; *Fraser* v. *Robins*, 3 U. C. L. J. 112; is now the settled practice here: *Land* v. *Gilkison*, 7 U. C. L. J. 151.

(*p*) The effect of these sections as to injunctions is to allow it only to plaintiffs claiming unliquidated damages: *Carnes* v. *Nisbett*, 4 L. T. N.S. 558; s. c. 30 L. J. Ex. 348; and in such cases to give the same power to a court of law as to granting an injunction which courts of equity exercise in cases where the injunction is granted *without terms*; in other words, the courts of common law will only grant an injunction where, under similar circumstances, a court of equity would grant an absolute injunction: *Mines Royal Societies* v. *Magnay*, 10 Ex. 489. Interlocutory injunctions seem to be grantable under sections 12, 13.

(*q*) Fraudulent use of trade marks: *Crawshay* v. *Thompson et al*, 4 M. & G. 357; *Rodgers et al* v. *Nowill et al*, 5 C. B. 109. Piracy of designs: *Millingen* v. *Picken*, 1 C. B. 799. Infringement of patents: *Mayall* v. *Higbey*, 31 L. J. Ex. 329; *Huntington* v. *Lutz et al*, 13 U. C. C. P. 168; *Stead* v. *Williams et al*, 7 M. & G. 818; *Russell* v. *Ledsam et al*, 14 M. & W. 574; or of copyrights: *Wright* v. *Tallis et al*, 1 C. B. 893; making and selling reduced copies of photographs: *Mayall* v. *Higbey*, 1 H. & C. 148; manufacture of plowshares: *Huntington* v. *Lutz et al*, 13 U.C.C.P. 168; may be cited as examples.

(*r*) This part of the section will apply either to the continuance of a wrong properly so called, for instance, a trespass by placing stakes on plaintiff's land

committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, (*s*) and he may also in the same action include a claim for damages or other redress. (*t*) 19 Vic. c. 43, s. 283.

The Summons and Indorsement thereon.

10. (*u*) The Writ of Summons in such action (*v*) shall be in the same form as the Writ of Summons in a personal action, (*w*) but on every such Writ and copy thereof, there shall be indorsed a notice, that in default of appearance the Plaintiff may, besides proceeding to Judgment and Execution for damages and costs, apply for and obtain a Writ of Injunction. (*x*) 19 Vic. c. 43, s. 284.

The proceedings to be similar to those in

11. (*a*) The proceedings in such action (*b*) shall be the same as nearly as may be, and subject to the like control as the proceedings in an action to obtain a *Mandamus* under

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and continuing them there notwithstanding a verdict in plaintiff's favour: *Bowyer* v. *Cook*, 4 C. B. 236; or of a breach of duty arising out of a contract, for instance, a covenant to keep insured: *Dormay* v. *Borradaile*, 5 C. B. 380; see further *Lovelock* v. *Franklyn et al*, 8 Q. B. 371; *Cannock* v. *Jones*, 3 Ex. 233.

(*s*) These words may be held to apply to a class of cases where a party violates confidence reposed in him as an agent, who, having obtained possession of property belonging to his principal for a given purpose, in fraud of that principal, appropriates it to some other purpose: see *Phillips et al* v. *Huth et al*, 6 M. & W. 572; *Eden* v. *Turtle*, 10 M. & W. 635; *Hatfield* v. *Phillips et al*, 14 M. & W. 665; see also *Sykes* v. *Giles*, 5 M. & W. 645; *Raleigh et al* v. *Atkinson*, 6 M. & W. 670; *Pickwood* v. *Neate*, 10 M. & W. 206.

(*t*) Plaintiff claiming a writ of *mandamus* must allege either that he "sustains or may sustain damage from the non-performance of the duty" to be fulfilled: section 2. But when claiming an injunction, it would seem from the peculiar language of this section, he may or may not in addition "include a claim for damages or other redress." The granting or refusing of the writ is discretionary with the court: *Carnes* v. *Nesbitt*, 7 H. & N. 778; *Jessel* v. *Chaplin et al*, 2 Jur. N. S. 931; *Lumley* v. *Wagner*, 1 DeG. M. & G. 604; *London and South Western Railway Co.* v. *Webb*, 15 C. B. N.S. 450; *Matthews* v. *King*, 3 H & C. 910; *Sutton* v. *The South Eastern Railway Co.* L. R. 1 Ex. 32.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 80.

(*v*) *Such action*, *i. e.* an action brought for a breach of contract or other injury, and such as mentioned in the preceding section.

(*w*) See Form A. No. 2 C. L. P. Act.

(*x*) Plaintiff must indorse the claim for injunction on his writ of summons, and failing to do so can have no injunction: *Arkland v. Hall*, 2 Prac. R. 388. Besides the form of indorsement must comply with that given in the statute: *Ritchey* v. *The Toronto Roads Co.* 23 U. C. Q. B. 62.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 81.

(*b*) *Such action.* See note *v* to section 10.

cases of *Mandamus.*

the provisions hereinbefore contained, (*c*) and in such action Judgment may be given that the Writ of Injunction do or do not issue as justice may require; (*d*) and in case of disobedience, such Writ of Injunction may be enforced by attachment by the Court, (*e*) or when such Court is not sitting, by a Judge. (*f*) 19 Vic. c. 43, s. 285.

12. (*g*) The Plaintiff may at any time after the com-

(*c*) A demurrer to a claim for the writ in the declaration will not be allowed unless the declaration clearly shew the remedy by injunction inapplicable: *Bilke et al* v. *The London, Chatham and Dover Railway Co* 3 H. & C. 95. The claim is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time. It cannot, therefore, be pleaded to: *Booth* v. *Taylor*, L. R. 1 Ex. 51.

(*d*) The limits of the jurisdiction of courts of law as to injunctions are not yet well defined. Courts of equity constantly decline to lay down any rule which may limit their powers or discretion. For this reason, and owing to the difference in the constitution of courts of law and of equity, the latter courts no doubt will, with respect to writs of injunction, exercise a more extensive jurisdiction than courts of law. The absence of a remedy in other courts for a supposed wrong is not of itself a sufficient reason to entitle courts of equity to assume jurisdiction: *Ryves* v. *The Duke of Wellington*, 9 Beav. 579. There must be in each case wherein application is made to a court of equity for an injunction, circumstances at least disclosing equitable if not legal ground for relief: see *Hammon* v. *Sedgwick*, 6 Hare, 256; also *Smith* v. *Jeyes*, 4 Beav. 503; *England* v. *Curling*, 8 Beav. 129; *Hall* v. *Hall*, 12 Beav. 414. If there be a clear legal remedy for the supposed wrong in courts of law, equity will not interfere: *Clark* v. *Freeman*, 11 Beav. 112: also *Goodheart* v. *Lowe*, 2 J. & W. 349; *Baily* v. *Taylor*, 1 Russ. & M. 73; *Southey* v. *Sherwood et al*, 2 Meriv. 435. But if there be no remedy or an insufficient remedy at law, and there be equitable as distinct from legal grounds, equity will interfere: *Ridgway* v. *Roberts*, 4 Hare, 106; also *Greatrex* v. *Greatrex*, 1 DeG. & S. 692; *Abernethy* v. *Hutchinson*, 1 H. & T. 28; *Routh* v. *Webster*, 10 Beav. 561; *Prince Albert* v. *Strange et al*, 1 Mac. & G. 25; *McCrea* v. *Holdsworth*, 12 Jur. 820; *Geary* v. *Norton*, 1 DeG. & S. 9; *Dickens* v. *Lee*, 8 Jur. 183; *Kelly* v. *Hooper*, 1 Y. & C. Cy. C. 197; *Chappell* v. *Purday*, 4 Y. & C. 485. Where any act involving a breach of trust is intended to be done, though not in its consequences irremediable, courts of equity will prevent it by injunction: *Attorney-General* v. *Aspinall*, 2 M. & C. 613. Thus an injunction was granted to restrain the disclosure of secrets, of which defendant received a knowledge in the course of a lawful employment: *Evitt* v. *Price*, 1 Sim. 483. But courts of equity will not exercise any jurisdiction in criminal cases when the acts are of such a nature as to injuriously affect rights of property: *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq 551.

(*e*) The proceedings to enforce obedience to a writ of injunction under this section will resemble those of enforcing the performance of awards, as to which see note *i* to section 163 C. L. P. Act.

(*f*) The power of a judge to act is only when the court is not sitting. Hence during the term no single judge can issue an attachment under this section.

(*g*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 82, the origin of which seems to be Eng. Stat. 15 & 16 Vic. cap. 83, s. 42, as to infringements of letters patent for invention.

mencement of the action, and whether before or after Judgment, (*i*) apply *ex parte* to the Court or a Judge (*j*) for a Writ of Injunction to restrain the Defendant in such action (*k*) from the repetition (*l*) or continuance of the wrongful act or breach of contract complained of, (*m*) or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; (*n*) and such Writ may be granted or denied by the Court or Judge upon such terms as to the duration of the Writ—keeping an account—giving security—or otherwise, as to such Court or Judge seems reasonable and just; (*o*)

When Injunction may be had after action brought.

(*h*) The action intended is one for "a breach of contract or other injury:" section 9; which admits of a "repetition" or "continuance."

(*i*) This section appears to apply to interlocutory injunctions: *Fraser* v. *Robins*, 3 U. C. L. J. 112. The object of the interference of the court by interlocutory injunction between two parties who are at issue upon a legal right is solely the protection of the property in dispute, until the legal right shall be ascertained: *Harman* v. *Jones*, 1 Cr. & Ph. 299. Upon motion of a plaintiff stating that unless the court granted the writ he would sustain considerable loss before the action was tried, the court granted a writ upon the terms that the plaintiff would speed the action, and if the jury found for the defendant, would, if the court so ordered, pay to the defendant any sum which the jury should award to him as compensation for the damages sustained by reason of the interference of the court in granting the writ: *Longfield* v. *Cashman*, 11 Ir. C. L. R. App. xxiii. The interference of the court by interlocutory injunction may be invoked under this section in cases of infringements of patents and copyrights, but with respect to these, courts of equity are disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title: *McNeill* v. *Williams*, 11 Jur. 344. It is necessary to give great weight to the question which side is more likely to suffer by an erroneous or hasty judgment, and also to consider the prejudicial effect the injunction may have on the trial of the action: *Ib.*

(*j*) The rule for the injunction must be *nisi* in the first instance: *Gittens* v. *Symes*, 15 C. B. 362; *Warren* v. *Munroe*, 2 U. C. L. J. 209.

(*k*) *Such action:* see note *h* to section 12.

(*l*) See note *q* to section 9.

(*m*) See note *r* to section 9.

(*n*) See note *s* to section 9.

(*o*) Upon the invasion of a patent right the party complaining has in equity a right to the protection of an injunction, although the other party may promise to commit no further infringement and may offer to pay the costs of preparing the bill: *Geary* v. *Norton*, 1 DeG. & S. 9. An injunction being applied for, it is not sufficient for the defendant to admit the infringement and promise, not to repeat it: *Losh* v. *Hague*, Web. Pat. Cas. 200. And if infringement be shown, proof of enjoyment for twelve years establishes a *prima facie* case for an injunction: *Neilson et al* v. *Thompson et al*, Web. Pat. Cas. 277. Where a patent is new the court of equity considers the proof of the title in the patentee to be wanting, inasmuch as

and in case of disobedience, such Writ may be enforced by

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the public have had no opportunity of contesting the validity thereof, and therefore in such a case refuses to interfere by injunction until the title is established at law: *Caldwell* v. *Van Vlissengen*, 9 Hare, 415. Plaintiffs licensed defendant to use a patent at the annual rent of £2000, reserving the power of determining the lease in default of payment. The defendant failed to pay the entire rent, but the plaintiffs allowed him for several years to use the patent, and received payments on the footing of a reduced rent: *Held* that by so doing the plaintiffs had elected not to treat the previous breach as a forfeiture of the license, and that consequently they were not entitled to an injunction restraining defendant from using the patent: *Warwick* v. *Hooper*, 3 Mac. & G. 60. On an application for an injunction to restrain the infringement of a patent, the party applying must swear that, at the time of making the application, he believes that at the date of the patent the invention was new, or had not been previously known or used in the Province: *Sturz* v. *De la Rue*, 5 Russ. 322. A court of equity will not interfere upon the application of an author to restrain the publication of a work which is of such a nature that an action could not be maintained for damages: *Southey* v. *Sherwood et al*, 2 Meriv. 435.

Courts of law must, under the injunction clauses of this act, do as nearly as possible as courts of equity would do in similar cases: *Gittins* v. *Symes*, 15 C. B. 363, *per* Jervis, C. J.; see *Bridson* v. *Benecke*, 12 Beav. 1; *McCrea* v. *Holdsworth*, 12 Jur. 820; *Bridson* v. *McAlpine*, 8 Beav. 229; *Dickens* v. *Lee*, 8 Jur. 183; *Kelly* v. *Hooper*, 1 Y. & C. Cy. C. 197; *Sweet* v. *Cater*, 11 Sim. 572; *Bacon* v. *Jones*, 4 M. & C. 433; *Collard* v. *Allison*, *Ib.* 487; *Sweet* v. *Maugham*, 11 Sim. 51; *Saunders et al* v. *Smith et al*, 3 M. & C. 711; *Curtis* v. *Cutts*, 8 L. J. N.S. Cy. 184; *Lewis* v. *Fullarton*, 2 Beav. 6; *Motley* v. *Downman*, 3 M. & C. 1; *Martin* v. *Wright*, 6 Sim. 297; *Baily* v. *Taylor*, 1 Russ. & M. 73; *Young* v. *White*, *Ib.* 532. A court of equity, where justice requires it, will grant an injunction to restrain a piracy, on the application of a person having only an equitable title: *Chappell* v. *Purday*, 4 Y. & C. Cy. C. 485; *Hodges et al* v. *Welsh*, 2 Ir. Eq. R. 266; *Mawman* v. *Tegg*, 2 Russ. 385. But courts of equity are averse to the practice of their time being occupied by applications for injunctions to restrain infringements of copyright in cases in which it is difficult, if not impossible, to take an account of the loss of which complaint is made: *Bell et al* v. *Whitehead*, 8 L. J. N.S. Ch. 141; s. c. 3 Jur. 68. The English Patent Law Amendment Act, 15 & 16 Vic. cap. 83, s. 42, was held to vest in any English court of common law in which an action for the infringement of a patent is pending, the powers before exclusively exercised by courts of equity; and to enable courts of common law to grant either by interlocutory order an account of all patent articles sold during the suit, or after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. But that no court of common law has power, where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the action, the damages assessed by the jury being considered as the compensation for the loss of such profits: *Holland* v. *Fox*, 3 El. & B. 977. Where an action is brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not in general be granted before judgment: *Vidi* v. *Smith et al*, 3 El. & B. 969. Upon reasonable evidence of the existence of a valid patent, and of its infringement by the defendant, and of the defendant's making a profit thereby, defendant may be ordered to keep an account of all sales to be made of the article alleged to be an infringement, and of the profits thereon, until further order of the court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favour of defendant, to pay the expense of

attachment by the Court, (*p*) or when such Court is not sitting, by a Judge. (*q*)

Writs and orders for Writs to be under the control of the Court.

13. (*r*) Any order for a Writ of Injunction made by a Judge, or any Writ issued by virtue thereof, may be discharged, varied or set aside by the Court on application made thereto by any party dissatisfied with such order. (*s*) 19 Vic. c. 43, s. 286.

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keeping such an account. The court, under the 15 & 16 Vic. cap. 83, s. 42, will only direct an account to be taken of the profits which had been actually made by the defendant, and not of the loss which the plaintiff has sustained by the infringement: *Elwood et al* v. *Christy et al*, 18 C. B. N.S. 494; and in the case of an assignee a patent the account will be taken only from the date of the registration of the assignment under section 35 of that act: *Ib.* But the act here annotated does not go so far even in this respect as the Eng. Stat. 15 & 16 Vic. cap. 83, s. 42. The section, it will be observed, though empowering the court to grant an injunction ordering defendant to keep an account or otherwise, does not, it seems, give power to the court of common law to order an account to be taken of the profits or to order the defendant to pay: *Huntington* v. *Lutz et al*, 13 U.C.C.P. 168. A plaintiff having obtained an *ex parte* injunction pending an action for a nuisance, and afterwards neglecting to proceed with the action as promptly as he might, the court held that such neglect was a sufficient ground for dissolving the injunction: *Dunn* v. *Naylor*, 30 L. T. Rep. 285. An injunction had been obtained restraining the defendants from carrying on certain works, and upon motion for costs of a rule for attachment for breach of it, the court held that the injunction was a continuing one: *De LaRue et al* v. *Fortescue et al*, 2 H. & N. 324; see further as to this section the observations of Stuart, V. C. in *Edwards-Wood* v. *Baldwin*, 9 L. T. N.S. 474, and the observations of the lords justices in *Swayne* v. *The Great Northern Railway Co.* 9 L. T. N.S. 745; and as to practice in Chancery in patent cases, see *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.* 4 K. & J. 727.

(*p*) See note *e* to section 11.

(*q*) See none *f* to section 11.

(*r*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 82.

(*s*) Immediately after the delivery of declaration in an action for nuisance by boiling carrion for a dog kennel near plaintiff's residence, an injunction restraining defendant from continuing the nuisance was granted *ex parte* at chambers, the order of the judge imposing no terms and making no mention of costs. The writ contained an order on defendant to pay the costs of the application, the order and the writ, which costs were taxed against defendant. The trial of the action having been postponed on plaintiff's countermand from the spring assizes to the summer assizes, defendant in the meantime obtained a rule calling on the plaintiff to show why all further proceedings on the writ of injunction should not be stayed until after the trial of the cause, and on the argument the court declined to make the rule absolute in the terms in which it was moved, as that would be practically setting the injunction aside, and the nuisance might be recommenced immediately; but as it was unjust that defendant should pay the costs of the injunction when it might turn out he had committed no nuisance at all, they made the rule absolute to stay all proceedings in respect of the costs until after the trial of the action: *Grindley* v. *Booth*, 12 L. T. N. S. 469. When an injunction has been granted continues to exist until discharged, and the plaintiff may at any time apply for an attachment in case of disobedience: *De LaRue et al* v. *Fortescue et al*, 2 H. & N. 324.

ABSCONDING DEBTORS.

CON. STAT. U. C., CAP. 25.

An Act respecting Absconding Debtors. (a)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

WHO IS AN ABSCONDING DEBTOR.

1. (b) If any person resident in Upper Canada (c) in-

(a) The laws as to absconding debtors have for a long time been peculiar to this P ovince, and the provisions are original, not having been directly copied from ae statute book of any foreign state. In this Province the lead has been take' even of England. The first English act upon this subject was 14 & 15 Vic. cap. 22, passed 1st August, 1851. It falls far short of the completeness of ours. The object of these laws is to secure the property and effects of an absconding debtor, and indirectly to force him to put in special bail. The law of arrest is designed to attain the same end by different means. For a very full and interesting review of all our laws upon the subject of absconding debtors, and a comparison of remedies given in division courts with those in the superior courts, see *Francis* v. *Brown et al*, 11 U. C. Q.B. 558. This act, which was originally a part of the C. L. P. Act, 1856, has not, since the bankruptcy act of 1864, been as much in use as when we had no bankruptcy law of any kind; but it is not obsolete; cases occasionally arise under it, and for this reason the editor has thought it better to reproduce it with notes.

(b) This section in some respects resembles the old acts 2 Wm. IV. cap. 5, s. 1, and 14 & 15 Vic. cap. 10, s. 1.

(c) "*If any person resident*," &c. The old act, 2 Wm. IV. c. 5, s. 1, did not thus describe defendant. It was simply as follows: "If any person being indebted, &c. shall, &c." And there was much difference of opinion as to whether the legislature really did not intend to restrict the act to defendants absconding who had been formerly residents. The several opinions of Robinson, C. J. Sherwood, J. and Macaulay, J. upon this question, will be found in *Ford* v. *Lusher*, 3 O.S. 428. The Absent Defendants' Act, 14 & 15 Vic. cap. 10, s. 1, was express upon the point, so far as concerned proceedings taken under that statute, *i. e.*: "Proceedings may be commenced, &c. against any person *who*, *having resided* in Upper Canada, is absent therefrom," &c. What is the scope of the term "resident," as used in this section, and under what circumstances can defendant be said to be a

debted (*d*) to any other person, (*e*) departs from Upper Canada with intent to defraud his creditors, (*f*) and at the time of his so departing, is possessed to his own use and benefit, of any real or personal property, credits or effects therein, (*g*) he shall be deemed an absconding debtor, (*h*) and his property, credits and effects aforesaid, may be seized and taken for the satisfying of his debts by a Writ of Attachment. (*i*) 19 Vic. c. 43, s. 43.

Who to be regarded as an absconding debtor.

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resident? Persons whose usual and accustomed home is in a foreign country, but who come to Canada occasionally on business, cannot by any latitude of construction be described as residents of Canada: see *Ford* v. *Lusher*, 3 O.S. 428, and *Taylor* v. *Nicholl*, 1 U. C. Q. B. 416. If a defendant seek to set aside an attachment issued against him as an absconding debtor, on the ground that "he never lived or was in Upper Canada for such time or purpose as to bring him within the meaning of this act," he must show these facts clearly to the court: *The Niagara Harbour and Dock Co.* v. *Smith*, M. T. 7 Vic. *MS.* R. & H. Dig. "Absconding Debtor," 22. Where a person usually residing in Scotland came to this Province to settle some affairs, and while here referred disputes concerning them to arbitration, upon which an award was made against him, but not payable for two years. Before the expiration of the two years he left the Province. *Held* that he was neither a "debtor" nor an "absconding debtor" within the meaning of 2 Wm. IV. cap. 5; *Taylor* v. *Nicholl*, 1 U. C. Q. B. 416.

(*d*) The word "indebted" as used in this section would seem to exclude the presumption that an attachment can be granted for an unliquidated demand, unless the demand be of such a nature that plaintiff can make oath to the amount thereof as in ordinary affidavits to hold to bail. Such, for example, as demands for work and labour, goods sold and delivered, &c. where no specific price has been agreed upon and the amount of indebtedness depends upon the *quantum meruit* or *quantum valebat:* see *Clark* v. *Ashfield*, E. T. 7 Wm. IV. *MS.* R. & H. Dig. "Absconding Debtor," 17; see further C. L. P. Act, section 288, note *j*.

(*e*) The old restriction as to the party being indebted to "an inhabitant of this Province," 2 Wm. IV. cap. 5, s. 1, in order to warrant proceedings has been abandoned. Indeed, it was repealed as early as 5 Wm. IV. cap. 5, s. 2, of that year and reign. Where defendant being sued as an absconding debtor under the old practice, moved to set aside the attachment and subsequent proceedings several months after the last proceeding was had, on the ground that plaintiff was not an inhabitant of this Province, but did not in his affidavit negative indebtedness to any inhabitant of this Province, his application was refused: *Fisher et al* v. *Beach*, 4 O.S. 118.

(*f*) As to question of intent generally under analogous provisions, see *Gottwalls* v. *Mulholland*, 15 U. C. C. P. 62; *Bank of Toronto* v. *McDougall*, *Ib.* 475; *Tuer* v. *Harrison*, 14 U. C. C. P. 449; *Spirett* v. *Willows*, 11 L. T. N.S. 614.

(*g*) The fact of possession of land is *prima facie* evidence of a seisin in fee. A person in possession of land without other title has a devisable interest: *Asher et ux.* v. *Whitlock*, L. R. 1 Q. B. 1.

(*h*) As to the ordinary proceedings against defendants, whether British subjects or foreigners, out of the jurisdiction of the court: see ss. 43, 44, 45.

(*i*) The writ should be issued by the clerk of the process: *Wakefield et al* v *Bruce*, 5 Prac. R. 77.

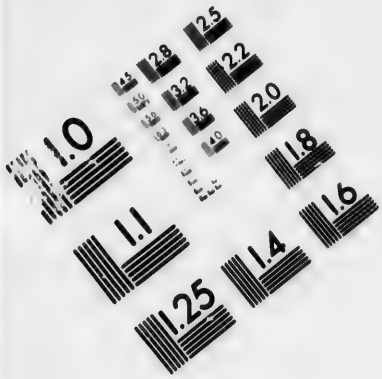
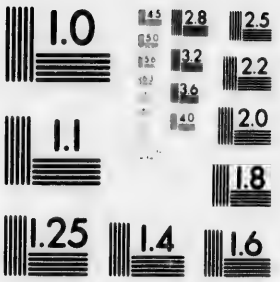
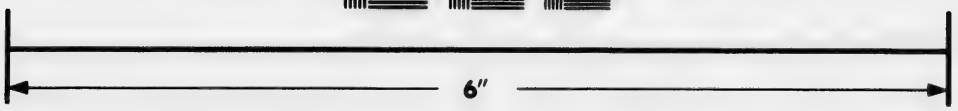
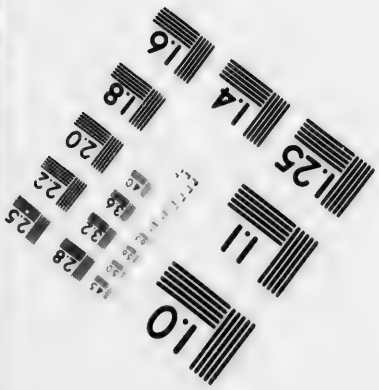


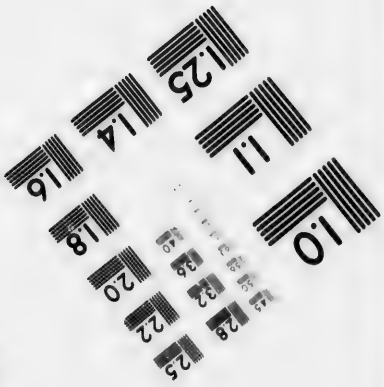


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AFFIDAVIT TO OBTAIN ORDER FOR ATTACHMENT.

1.—In the Superior Courts.

Proceedings upon affidavit that the defendant hath absconded, &c.

2. (*k*) Upon affidavit made by any Plaintiff, his servant or agent, (*l*) that any person so departing is indebted to such Plaintiff in a sum exceeding one hundred dollars, (*m*) and stating the cause of action, (*n*) and that the Deponent hath good reason to believe and doth verily believe that such person hath departed from Upper Canada and hath gone to (stating some place to which the absconding Debtor is believed to have fled or that the Deponent is unable to obtain any information as to what place he hath fled,) (*o*) with intent to defraud the Plaintiff of his just dues, (*p*) or to avoid being arrested or served with process, (*q*) and upon

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(*k*) Much resembles 5 Stat. U. C. 2 Wm. IV. cap. 5, s. 1.

(*l*) The safest rule in framing these affidavits will be to follow, as closely as possible, those relating to common affidavits of debt: *Anon* 2 O.S. 292, *per* Robinson, C. J. The same certainty must be observed in affidavits for suing out attachments as in affidavits to hold to bail: the debt to be as certainly sworn to in the one case as in the other: *McKenzie* v. *Bussell*, 3 O. S. 345, *per* Robinson, C. J. To allow any unlimited degree of uncertainty in them would of course lead to abuse. An affidavit for an attachment in which the debt was sworn to as being for money lent and advanced to the defendant, without saying by whom, was held to be defective: *Ib.* An affidavit of a plaintiff stated that the defendant was indebted to the plaintiffs in the amount of certain promissory notes, which were described, showing them to be overdue and held by the plaintiffs, and that defendant had departed, &c. with intent to defraud plaintiffs, *held* sufficient: *Wakefield et al* v *Bruce*, 5 Prac. R. 77. It is not necessary that the plaintiff should swear that the debtor was residing in this Province if that fact be sworn to by other persons: *Ib.* It is sufficient to show that the debtor intended to defraud the plaintiffs without showing an intention to defraud creditors generally: *Ib.* The affidavits should not be intitled in any cause before the issue of the writ, but are not thereby vitiated: *Ib.* Where a warrant of attachment had been issued against an absconding debtor under the practice that prevailed previous to this act, and the notice thereby required had been duly given, a writ of attachment was granted under this act without a new affidavit: *Ross et al* v. *Cook*, 8 U. C. L. J. 48; *Buchanan* v. *Ferris*, 8 U. C. L. J. 48.

(*m*) The former minimum limit was five pounds: 2 Wm. IV. cap. 5, s. 1. The minimum is here stated to be $100, obviously with reference to the Division Courts Act, which gives a remedy by attachment in those courts for any sum not exceeding $100, nor less than twenty shillings. At the time when the former acts were passed, fixing the minimum at £5, the inferior courts had not the jurisdiction just mentioned.

(*n*) Which must be a debt of some kind: see note *d* to section 1 of this act.

(*o*) "Hath departed this Province, or is concealed within the same," were the material words of the old act: 2 Wm. IV. cap. 5, s. 1.

(*p*) As to when there is a debt: see note *d* to section 1.

(*q*) These words are exactly the same as those used in repealed Stat. 2 Wm. IV. cap. 5, s. 1.

the further affidavit of two other credible persons, (*r*) that they are well acquainted with the Debtor mentioned in the first-named affidavit, and have good reason to believe and do believe (*s*) that such Debtor hath departed from Upper Canada with intent to defraud the said Plaintiff, or to avoid being arrested or served with process, (*t*) either of the Superior Courts of Common Law or any Judge thereof, or the Judge of any County Court, may, by rule or order, direct a Writ of Attachment to issue from either of such Superior Courts, (*u*) and may in such rule or order appoint the time for the Defendant's putting in Special Bail, which time shall be regulated by the distance from Upper Canada of the place to which the absconding Debtor is supposed to have fled, having due regard to the means of and necessary time for postal or other communication. (*v*) 19 Vic. c. 43, s. 44.

Further affidavit.

Writ of Attachment to issue.

3. Repealed by Stat. 23 Vic. cap. 42, s. 1.

2.—In County Courts.

4. (*b*) In case the sum claimed be within the Jurisdiction of the County Courts, (*c*) any such Court or the Judge or

In cases in County Courts.

(*r*) *Qu.* Are witnesses "credible" if pecuniarily interested? No person can now be excluded by reason of incapacity, crime or *interest*, from giving evidence either in person or by deposition on the trial of any issue joined, &c.: 33 Vic. c. 13, s. 2. Besides, the parties themselves with few exceptions are made admissible witnesses: *Ib.* s. 4.

(*s*) The persons deposing as to the absconding of a debtor should state the grounds of their belief where they live at a considerable distance from the debtor's late residence: *The Bank of Upper Canada* v. *Spafford*, 2 O.S. 373. Where the debtor resided at Brockville, and the persons making the affidavit in the town of York (now Toronto), an attachment was refused, the grounds of belief not having been stated: *Ib.*

(*t*) For sufficiency of statement by two credible witnesses under the old law: see *Totten* v. *Fletcher*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. "Absconding Debtor," 20.

(*u*) Under the act of 2 Wm. IV. cap. 5, it was *held* (Macaulay, J. *dissentiente*) that a writ of attachment could be regularly issued against an absconding debtor, though he had been previously held to bail for the same cause of action and the bail discharged by a reference to arbitration: *Mosier* v. *McCan*, 3 O.S. 77.

(*v*) The same words as used in s. 43, of C. L. P. Act, allowing service of process on defendants without the jurisdiction of the courts. The writ should, like all other original writs, be issued by the clerk of process: *Wakefield et al* v. *Bruce*, 5 Prac. R. 77.

(*b*) Much resembles repealed Stat. U. C. 2 Wm. IV. cap. 5, s. 1.

(*c*) *i. e.* In all personal actions where the debt or damages claimed do not exceed $200, and in all causes and suits relating to debt, covenant and contract

Judges to order Writs to issue.

acting Judge thereof, (*d*) may in like manner by rule or order direct a Writ of Attachment to issue from such Court, and the proceedings thereon shall be the same as in this Act provided. (*e*) 19 Vic. c. 43, s. 44; 19 Vic. c. 90, s. 2.

WRIT OF ATTACHMENT AND SUMMONS.

Contents of.

5. (*f*) The Writ of Attachment shall also contain a Summons to the Absconding Debtor, (*g*) and shall be in the form following: (*h*) 19 Vic. c. 43, s. 43.

Upper Canada, } VICTORIA, &c.
County of } To the Sheriff of, &c.

(Seal)

Form of Writ and Summons.

We command you, that you attach, seize and safely keep all the real and personal property, credits and effects, together with all evidences of title or debts, books of account, vouchers and papers belonging thereto, of C. D., to secure and satisfy A. B., a certain debt (*or* demand) of $ (*or* £) (*the sum sworn to*) with his costs of suit, and to satisfy the debt and demand of such other creditors of the said C. D., as shall duly place their Writs of Attachment in your hands or otherwise lawfully notify you of their claim, and duly prosecute the same. And we also command the said C. D., that within

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to $400, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant: Con. Stat. U. C. c. 15, s. 17; sub-ss. 1, 2. To any amount on bail bonds given to the sheriff in any case in a county court, whatever may be the penalty: *Ib.* sub-s. 3. On recognizances of bail taken in a county court, whatever may be the amount recovered or for which the bail therein may be liable: *Ib.* sub-s. 4.

(*d*) *Relative powers:* see note *w* to section 48 C. L. P. Act.

(*e*) See sections 1, 2, of this act.

(*f*) Resembles what was required in the form of the warrant of attachment under the repealed Stat. U. C. 2 Wm. IV. cap. 5, s. 1.

(*g*) The attachment under the old law did not contain any form of summons to the absconding debtor: see form in *Meighan et al* v. *Pinder*, 2 O.S. 292. It merely directed the sheriff to "seize and safely keep" all defendant's "estate, as well real as personal." It was a proceeding incidental to the suit, and did not interfere with the summons or other ordinary steps in the cause. The form given to this section requires the absconding debtor to put in special bail, and informs him of the seizure of his property. The writ of attachment is now the commencement of the action. Consult the form in schedule as to the indorsements necessary.

(*h*) Not "or to the like effect."

(*the time named in the Judge's order or rule of Court,*) days after the service of this Writ on him, inclusive of the day of such service, he do cause special bail to be entered for him in our Court (or County Court) of , in an action to recover $ (*or* £) (*the sum sworn to*) at the suit of the said A. B.; And we require the said C. D. to take notice, that his real and personal property, credits and effects in Upper Canada have been attached at the suit of the said A. B., and that in default of his putting in special bail as aforesaid, the said A. B. may, by leave of the Court or a Judge, proceed therein to judgment and execution, and may sell the property so attached; And we command you, the said Sheriff, that as soon as you have executed this Writ, you return the same with the inventory and appraisement of what you have attached thereunder.

Witness, &c.

In the margin.

Issued from the Office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas (*or* of the Clerk of the County Court) in the County of .

(Signed)

J. H., Clerk, *or* Deputy Clerk, *or* Clerk of the County Court.

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six months from the date thereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before service thereof.

This Writ may be served out of Upper Canada, and was issued by E. F., of , Attorney, &c., (*as on a Writ of Summons, under the Common Law Procedure Act.*)

6. Every such Writ shall be dated on the day on which it is issued, (*j*) and shall be in force for six months To be dated on day of issue and to

(*j*) *i. e.* In conformity with the practice enacted as to writs of summons and capias: see C. L. P. Act, s. 24.

be in force six months.

from its date, (*k*) and may be renewed for the purpose of effecting service on the Defendant, in like manner as a Writ of Summons may be renewed under the Common Law Procedure Act. (*l*) 19 Vic. c. 43, s. 43.

Writ of Attachment to issue in duplicate.

7. (*m*) Every Writ of Attachment shall issue in duplicate, and shall be so marked by the officer issuing the same (the costs of suing out the same being allowed only as if a single Writ issued,) and one Writ shall be delivered to the Sheriff to whom the same is directed, and the other shall be used for the purpose of effecting service on the Defendant. (*n*) 19 Vic. c. 43, s. 44.

PROCEDURE.

Further proceedings after service, &c.

8. (*o*) In case it be shown by affidavit (*p*) to the Court or a Judge having jurisdiction in the case, (*q*) that a copy of the Writ was personally served on the Defendant, (*r*) or that reasonable efforts were made to effect such service, and that such Writ came to his knowledge, (*s*) or that the Defendant hath absconded in such a manner that after diligent inquiry no information can be obtained as to the place he hath fled to, (*t*) such Court or Judge, if the Defendant has not put in

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(*k*) Also in conformity with writs of summons: see C. L. P. Act, Schedule A, No. 1.

(*l*) *i. e.* Under C. L. P. Act, section 21, which see, together with notes thereto.

(*m*) Taken from the latter part of C. L. P. Act 1856, s. 44.

(*n*) This intends a personal service on defendant, if the same can be effected. It is a provision which was by the C. L. P. Act, 1856, enacted for the first time. Under the old law the attachment was issued for the guidance of the sheriff only. Process was served "by leaving a copy thereof at the last place of abode of such person within this Province," &c.: 2 Wm. IV. cap. 1. s. 6.

(*o*) Taken from C. L. P. Act, 1856, section 45, which was a new provision in that act.

(*p*) The affidavit may be sworn before commissioners appointed under 26 Vic. cap. 41.

(*q*) *Court or judge.* Relative powers: see note *w* to section 48 C. L. P. Act.

(*r*) As to what constitutes "personal service:" see note *v* to section 16 C. L. P. Act.

(*s*) As to "reasonable efforts" and "writ coming to defendant's knowledge:" see note *x* to section 16 C. L. P. Act.

(*t*) To make application under this section to the court or a judge, it must be shown on affidavit, either (1) that the writ was personally served on defendant, *or* (2) that reasonable efforts were made to effect the same, *and* that the writ

Special Bail may, either require some further attempt to effect service or may appoint some act to be done which shall be deemed good service, (*u*) and thereupon, (or on the first application, if the Court or a Judge thinks fit) such Court or Judge may authorize the Plaintiff to proceed in the action in such manner and subject to such conditions as the Court or Judge may direct or impose. (*v*) 19 Vic. c. 43, s. 45.

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came to defendant's knowledge; *or* (3) that defendant absconded in such a manner that after diligent inquiry no information can be obtained as to the place to which he fled; *and* (4) that no special bail has been put in for him: see *Clark* v. *McIntosh*, 2 U. C. L. J. 231.

(*u*) "*Or to appoint some act to be done which shall be deemed good service.*" Words of similar import were used in Stat. U. C. 3 Wm. IV. c. 7, which is the old law regulating the service of process on corporations. In a case under that act against a corporation resident in Lower Canada, application was made "that service by affixing a copy of process in the crown office should be deemed good service on defendants. As to directing that the copy of process put up in the crown office should be deemed a valid service, I think no such order can be made in this case more than in any other case. When a party has been duly served with the first process issued in a suit, and upon which he is brought into court, it is competent under particular circumstances to direct that putting up copies of subsequent proceedings in the crown office shall be deemed good service but, as I apprehend, in no other instance." *Sherwood et al* v. *The Board of Works*, 1 U. C. Q. B. 517, *per* Hagerman, J. Where before this act came into force a writ of attachment had been sued out and executed, and notice of the attachment inserted in the *Gazette* according to the old practice, and upon application by plaintiff, after this act came in force, to be allowed to proceed with the service of his declaration under the old practice, the following order was made: "That the plaintiff be allowed to proceed in this action by filing the declaration and notice to plead in the office of the deputy clerk of the crown at H. and that such filing shall be deemed good service;" also "that filing notice of assessment to the defendant shall be good service according to the practice in force before the Common Law Procedure Act, 1856:" *Re Kekendall et al* v. *McKrimmon*, 2 U. C. L. J. 184; see also *Kerr et al* v. *Wilson et al*, 3 U. C. L. J. 13. Service on the wife allowed as good service: *McDougall* v. *Gilchrist*, *Ib.* 28. Service on nearest friends and placing up copy in crown office: *Baxter et al* v. *Dennie*, *Ib.* 69. So service of the writ on some relative at his last place of abode: *Ross et al* v. *Cook*, *Ib.* 48; *Buchanan* v. *Ferres*, *Ib.* 48; *Kerr et al* v. *Smith et al*, *Ib.* 108. Service by mailing to his address: *Lyman et al* v. *Smith*, *Ib.* 107. Advertising for in Chancery: see *Stimson* v. *Stimson*, 6 Grant, 379; *Gilmour* v. *Matthews*, 4 Grant, 376.

Affidavits for leave to proceed under this section should show—

1. Where the defendant resided and what was his business or occupation when in the Province;
2. What property he has (if any), and in whose hands it is;
3. Whether he has any (and if any, what) friends or relations residing in this Province or elsewhere;
4. That defendant has not put in special bail to the action;
5. What specific efforts have been made to effect personal service on the defendant and to discover his whereabouts: *Stephen et al* v. *Dennie*, 3 U. C. L. J. 69.

(*v*) The old enactment 2 Wm. IV. cap. 5, s. 5, made it necessary for plaintiff to

Plaintiff must prove his claim, &c.

9. (*a*) **Before the Plaintiff obtains Judgment he shall prove the amount of the debt or damages claimed by him in such action either before a Jury on an assessment, or by reference as provided in the Common Law Procedure Act, according to the nature of the case,** (*b*) **and no execution shall issue until the Plaintiff, his Attorney or Agent, has made and filed an affidavit of the sum justly due to the Plaintiff by the absconding Debtor, after giving him credit for all payments and claims which might be set off or lawfully claimed by the Debtor at the time of making such last mentioned affidavit,** (*c*) **and the execution shall be indorsed to levy the sum so sworn to with the taxed costs of suit, or the amount of the Judgment including the costs, whichever is the smaller sum of the two.** (*d*) 19 Vic. c. 43, s. 45.

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wait three months after notice of the attachment published in the *Gazette* before taking further proceedings. The advertisement in the *Gazette* is no longer required; nor is it requisite that plaintiff should await the expiration of three months before proceeding with his suit. Proceedings by attachment are much assimilated to proceedings against defendants "resident abroad:" C. L. P. Act, ss. 43, 44, 45.

(*a*) Taken from C. L. P. Act, 1856, section 45, which was a new provision in that act.

(*b*) The Stat. 2 Wm. IV. cap. 5, s. 7, made it incumbent on plaintiff "to prove his *cause of action* in the same manner as if the general issue had been pleaded," &c. Under this act it would seem that when the defendant does not appear, the cause of action, whether sounding in debt or damages, is taken *pro confesso* against him, rendering it only necessary to prove the *amount* of such debt or damages: see *Robertson* v. *Ross*, 2 U. C. C. P. 193. The court under the old practice felt themselves bound, in an action against an absconding debtor, to see that sufficient was stated and proved to warrant a recovery against him: *Sifton* v. *Anderson et al*, 5 U. C. Q. B. 305. And since C. L. P. Act, 1856, it was held that a judge at nisi prius had the power of allowing counsel for another creditor to cross-examine plaintiff's witnesses and to address the jury against plaintiff's case: *Lavis* v. *Baker*, 13 U. C. C. P. 506. So in same case the court, notwithstanding a verdict for plaintiff on affidavits showing fraud and collusion, granted a new trial on payment of costs: *Ib.* But the creditor having refused the rule on these terms, the court afterwards held they had no power to make him pay costs: s. c. 14 U. C. C. P. 336. Where the claim is substantially a matter of calculation, there may be a reference to the master under C. L. P. Act, section 161: *Chapman* v. *DeLorme*, 5 U. C. L. J. 138.

(*c*) Substantially the same as repealed Stat. 5 Wm. IV. cap. 5, s. 7.

(*d*) Plaintiff is not called upon to swear now as formerly "that the sum allowed to him by the jury is justly and truly due to him by the defendant." He is to make oath of the sum justly due to him by the defendant, irrespective of any verdict, and after having allowed to defendant all necessary and legal credits. If the sum so sworn to, with costs of suit, be less than the verdict rendered by the jury, together with costs, or *vice versa*, then the execution must be indorsed for the lesser of these two sums.

10. (*e*) **The Plaintiff may at any time within six months from the date of the original Writ of Attachment,** (*f*) **without further order from the Court or a Judge, issue from the office whence the original Writ issued, one or more Concurrent Writ or Writs of Attachment, to bear teste on the same day as the original Writ,** (*g*) **and to be marked by the Officer issuing the same with the word "Concurrent" in the margin,** (*h*) **which Concurrent Writ or Writs of Attachment may be directed to any Sheriff other than the Sheriff to whom the original Writ was issued,** (*i*) **and need not be sued out in duplicate or be served on the Defendant,** (*j*) **but shall operate merely for the attachment of his real or personal property, credits and effects in aid of the original Writ.** (*k*) 19 Vic. c. 43, s. 46.

Plaintiff may obtain Concurrent Writs to other Sheriffs.

For attaching property.

11. (*l*) **The Court or a Judge** (*m*) **at any time before or after final Judgment,** (*n*) **but before execution executed,** (*o*) **Court may allow Defendant to**

(*e*) Taken from C. L. P. Act, 1856, section 46, which in that act was a new provision prepared in conformity with section 20 of C. L. P. Act.

(*f*) As to computation of time, &c.: see section 342 C. L. P. Act, and notes thereto.

(*g*) The concurrent writs *may* issue at any time within six months from the date of the original, but *must* be tested on the same day as that writ.

(*h*) A further memorandum as to the *place of issue*, required by section 6 C. L. P. Act, has been expressly made necessary in the case of concurrent writs of summons issued under section 20 C. L. P. Act. No such express declaration is here made as regards concurrent writs of attachment. It will be prudent, though not expressly required by this section, for the clerk issuing a concurrent writ of attachment to mark this memorandum in the margin, more especially as the section under consideration enacts that such writ shall "issue from the office whence the original writ issued."

(*i*) The object of this provision is to enable plaintiff to attach property of the debtor discovered to be in a county other than that to which the first writ of attachment was sent.

(*j*) Both of which requirements are made necessary with respect to the original writ issuable under section 8 of this act.

(*k*) And will, it is presumed, be in force only for the period during which the original writ shall be in force, viz. six months from the date thereof: see section 20 C. L. P. Act. As the concurrent writ must bear teste on the same day as the original writ, it must, if this assumption be correct, expire at the same time as the original.

(*l*) In principle a re-enactment of Stat. 2 Wm. IV. cap. 5, s. 14.

(*m*) Court or a judge, relative powers: see note *w* to section 48 C. L. P. Act.

(*n*) Old practice, "at any time within one year after the rendering of judgment."

(*o*) *Qu.* When shall execution be said to be "executed?" Probably after but

put in special bail.

upon an application supported by satisfactory affidavits, (*p*) accounting for the defendant's delay and default and disclosing a good defence on the merits, (*q*) may, (*r*) having regard to the time of the application and other circumstances, let in the Defendant to put in Special Bail and to defend the action, (*s*) or may reject the application. 19 Vic. c. 43, s. 47.

BAIL.

Defendant's property to be restored on his putting in special bail.

12. (*a*) The special Bail (whether put in within the time limited by the Writ (*b*) or within such time as the Court or a Judge directs,) (*c*) shall be put in and perfected in like manner as if the Defendant had been arrested on a Writ of Capias for the amount sworn to on obtaining the attachment; and after being so put in and perfected the Defendant shall be let in to plead, and the action shall proceed as in ordinary cases begun by Writ of Capias. (*d*) 19 Vic. c. 43, s. 48.

Or proceeds if sold.

13. (*e*) Upon the Defendant so putting in and perfecting Special Bail, all his property, credits and effects attached in that suit, (except any which may have been disposed of as perishable, and then the net proceeds of the goods so disposed of,) shall be restored and paid to him unless there be some

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not before the sale of defendant's effects: see C. L. P. Act, ss. 270, 271, and notes thereto. As to inception of execution: see C. L. P. Act, s. 268, notes *t* and *v*.

(*p*) Defendant formerly was bound to apply "within one year after the rendering of judgment: Stat. 2 Wm. IV. cap. 5, s. 14.

(*q*) Disclosing a good defence, &c.: see note *t* to section 55 C. L. P. Act.

(*r*) Defendant formerly was allowed a re-hearing as a matter of right: *Robertson et al* v. *Burk*, 5 O. S. 75.

(*s*) Before he was allowed this privilege under the old practice he was required to give security for costs.

(*a*) Taken from C. L. P. Act 1856, s. 48, which in that act was an original provision.

(*b*) See section 5.

(*c*) Court or judge, relative powers: see note *w* to section 48 C. L. P. Act.

(*d*) See section 32 *et seq.* C. L. P. Act.

(*e*) Taken from C. L. P. Act 1856, s. 48, which in that act was an original provision, but substantially a re-enactment of 2 Wm. IV. cap. 5, s. 4, in so far as concerns the restoration of defendant's property. That section, taken in connection with section 3 of 5 Wm. IV. cap. 5, made it necessary for defendant to enter into certain bonds, upon the delivery of which it was enacted "that all and singular the property which may have been attached shall be restored."

other lawful ground for the Sheriff to withhold or detain the same. (*f*) 19 Vic. c. 43, s. 48.

WHAT PROPERTY MAY BE ATTACHED.

Sheriff to attach all the property and credits of defendant.

14. (*g*) **All the property, credits and effects, including all rights and shares in any Association or Corporation, of an absconding Debtor, (*gg*) may be attached in the same manner as they might be seized in execution; (*h*) and the Sheriff to whom any Writ of Attachment is directed shall forthwith take into his charge or keeping all such property and effects according to the exigency of the Writ, and shall be allowed all necessary disbursements for keeping the same, and he shall immediately call to his assistance two substantial freeholders of his County, and with their aid he shall make a just and true inventory of all the personal property, credits and effects, evidence of title or debt, books of account, vouchers and papers that he has attached, (*i*) and shall return such inventory signed by himself and the said freeholders, together with the Writ of Attachment. 19 Vic. c. 43, s. 49.**

Inventory to be made.

(*f*) The duty of the sheriff under this section is imperative, and in the event of non-performance, it is apprehended an application might be made by the aggrieved party to the court or a judge for summary relief.

(*g*) Taken from C. L. P. Act, 1856, section 49. Substantially a re-enactment of the old law.

(*gg*) The words of the statute require that the property attached should belong to the absconding debtor, and imply an actual and not merely a constructive ownership in him: see *Wilson, et al* v. *Traill*, 21 L. T. N.S. 510.

(*h*) A re-enactment of Stat. U.C. 2 Wm. IV. cap. 5, s. 3. It was held under that act that where real estate was attached, the sheriff must enter and keep possession to give operation to the attachment as against strangers: *Doe d. Crew* v. *Clarke*, M. T. 4 Vic. *MS* R. & H. Dig. "Absconding Debtor," 21. As to what property, credits and effects are subject to execution: see C. L. P. Act, ss. 252, 255, 257, 260, and 261.

(*i*) An inventory was not expressly declared to be necessary under the former Absconding Debtors Acts, though subsequently made necessary in the case of attachments issued from division courts: 13 & 14 Vic. cap. 53, s. 64. To the word "inventory" the idea of an appraisement does not necessarily attach; but an inventory, especially of perishable goods, would seem to be incomplete without appraisement. The inventory when made is to be returned by the sheriff, together with the writ of attachment. Such a return will be useful information, not only for all creditors of the absconding debtor desirous of prosecuting their claims, but even for the absconding debtor himself. Should he apply for a restoration of his property and effects, he will be the better able to ascertain with certainty what has in fact been attached and seized. The practice is, in one respect at least, much like that of a distress for rent. An inventory in the case of a distress is necessary, because "it is proper that the tenant should know what

PERISHABLE PROPERTY.

How perishable goods shall be dealt with.

15. (*k*) **In case any horses, cattle, sheep, pigs or any perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, be taken under any Writ of Attachment,** (*l*) **the Sheriff who attached the same shall have them appraised and valued, on oath, by two competent persons;** (*m*) **and in case the Plaintiff desires it and deposits with the Sheriff a Bond to the Defendant executed by two freeholders (whose sufficiency shall be approved of by the Sheriff,)** (*n*) **in double the**

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goods the landlord intends to comprise within the distress, *and that he may know what he will be obliged to replevy:*" Bradby on Distress, 2 ed. 151.

(*k*) Taken from C. L. P. Act 1856, s. 50, substantially a re-enactment of 2 Wm. IV. cap. 5, s. 8.

(*l*) The old enactment was to the effect that when the sheriff should seize and take any perishable goods or chattels, &c., it should be lawful for him, &c. No attempt was made to define the goods. The express language here used will be a great relief to the sheriff in the discharge of his duties under this section; still there is a wide discretion vested in that officer. It is for him to decide what are "perishable goods or chattels," or what from their nature (as timber or staves) cannot be conveniently kept.

When framing this section, it would appear that the legislature had in view three kinds of property:

First—Live chattels, such as horses, &c., that might in a short time "eat up themselves."

Second—Goods properly called perishable, such as butter, pork, &c.

Third—Property that could not be safely kept or conveniently taken care of, such as timber, staves, cordwood and the like, perhaps also growing crops.

The plain object of the legislature is to convert into money all property liable to be deteriorated in value by being kept, or of which the keep and care would cause considerable expense. The sheriff should therefore in every case consider whether it would be more to the advantage of the creditors as well as the debtor to sell "forthwith" or to wait for the execution, and act so as to make the most of the property in his hands.

Formerly it was not compulsory upon sheriffs either to "*seize* or sell" perishable goods until the giving of a certain bond: 2 Wm. IV. c. 5, s. 8. That enactment having been repealed, and no corresponding provision having been substituted, it is open to inference that the sheriff must now seize perishable in the same manner as any other goods belonging to the debtor.

(*m*) The valuation "*upon oath*" is a feature introduced into the C.L. P. Act 1856 for the first time.

(*n*) The approval of sureties by the sheriff was also a new feature of the C. L. P. Act 1856. In a case under the old law, where the sufficiency of sureties was a question for the court, it was held that sureties resident in Lower Canada were not "sufficient sureties:" *Bradbury* v. *Lowry*, 3 O. S. 439. In order to form an opinion as to the sufficiency of the sureties, the sheriff might reasonably require that they should justify by affidavit whenever he himself is not personally cognizant of their ability.

amount of the appraised value of such articles, (*o*) conditioned for the payment of such appraised value to the Defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case Judgment be not obtained by the Plaintiff against the Defendant, (*p*) then the Sheriff shall proceed to sell all or any of such enumerated articles at public auction, to the highest bidder, giving not less than six days' notice of such sale, (*pp*) unless any of the articles are of such a nature as not to allow of that delay, in which case the Sheriff may sell such articles last mentioned forthwith; and the Sheriff shall hold the proceeds of such sale for the same purposes as he would hold any property seized under the attachment. (*q*) 19 Vic. c. 43, s. 50.

Sheriffs to hold proceeds.

16. (*r*) If the Plaintiff, after notice to himself or his Attorney of the seizure of any articles enumerated in the last preceding section, (*s*) neglects or refuses to deposit such a

Such goods to be restored if plaintiff fail to give

(*o*) The very words of Stat. U. C. 2 Wm. IV. cap. 5, s. 8. Under section 4 of the same act, where the words used were that a bond should be given "in double the amount *claimed*," a difficulty arose upon the construction of these words, where there were several claimants: *Heather et al* v. *Wallace*, 4 O. S. 131. This applied to a bond to be given by defendant. No such difficulty can arise under this section, for the bond here mentioned is to be given by plaintiff. The penal sum must be "double the amount of the *appraised* value of such articles."

(*p*) This is a condition similar to that formerly required: 2 Wm. IV. c. 5, s. 8.

(*pp*) *Not less than six days' notice of such sale*, &c., *i. e.* six clear days at least. The first and last days apparently excluded: see *Regina* v. *The Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster*, 9 Dowl. P. C. 527; *Liffin* v. *Pitcher*, 1 Dowl. N.S. 767. The notice formerly was at least "*eight* days' notice:" 2 Wm. IV. c. 5, s. 8. See C. L. P. Act, s. 342, and notes thereto.

(*q*) When formerly the articles were not of such a nature as to admit of at least eight days' notice of sale, the sheriff was empowered to sell the same "at such time as in his discretion may seem meet." Now it is "forthwith." Ordinary prudence may suggest the propriety of the sheriff in his discretion even under the present practice giving *some* notice of sale. If he cannot give six days' notice, he should give as long a notice as the circumstances of the case will admit. The word "forthwith," as used in this statute, is not to receive a strict construction like the word "immediately," so that whatever follows *must* be done immediately after that which has been done before: see *Regina* v. *The Justices of Worcester*, 7 Dowl. P.C. 790, *per* Coleridge, J. As to the word "immediately," see note *u* to section 324 and note *k* to section 328 C. L. P. Act.

(*r*) Taken from C. L. P. Act 1856, s. 51, and in that act was a new provision.

(*s*) The word "enumerated" cannot be taken literally. The design of the enactment is to embrace all things coming within the meaning of the previous

sufficient security.

Bond, or only offers a Bond with sureties insufficient in the judgment of the Sheriff, (*t*) then, after the lapse of four days next after such notice, (*u*) the Sheriff shall be relieved from

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section as "perishable property." Since the sheriff is now bound to seize perishable in the same manner as any other goods, he ought immediately after the seizure to notify the plaintiff or his attorney of such seizure. He will then be in a position to avail himself of the provision in this section contained.

(*t*) There seems to be every reasonable latitude given to the sheriff, who, in the exercise of a sound discretion, ought either to take or refuse the bond offered. The word "judgment," as here used, cannot mean that the sheriff may exercise an *arbitrary* judgment. The word in itself implies a *fair* examination by the sheriff into the facts laid before him, and a *proper* decision thereon. The "judgment" meant must therefore be a reasonable judgment. The sureties need not necessarily be residents in his county.

(*u*) From this it would appear that the plaintiff or his attorney, when notified by the sheriff, should within four days tender to the sheriff the requisite bond. If no bond be deposited with the sheriff within that time, or if the bond tendered is in his judgment insufficient, then "*after the lapse of four days next after such notice*" the sheriff shall be relieved, &c. The chief point for consideration is the computation of time. It may be a question whether in computing the four days the day on which the notice was given should be included or excluded. It is apprehended that the latter would be the correct mode. The sheriff is to be relieved after the lapse of four days next after the notice. The day of notice is not to be included, because the courts, as a rule, never take the fraction of a day into account without a clear necessity for so doing. The authorities are not by any means consistent and until lately have been fluctuating. The old rule, now exploded, was that when time was to be reckoned from an *act done* and not from the *time thereof*, the day on which the act was done was taken to be inclusive: *Castle et al* v. *Burditt et al*, 3 T. R. 623; *Boulton* v. *Ruttan*, 2 O. S. 362. If the time mentioned were *one* day *after* an act done, would it not be absurd to hold that such day expired during the evening of the very day on which the act was done? Such a construction would be a contradiction in terms. When the question was in this light put before the courts, they reversed the practice. *Castle et al* v. *Burditt et al*, 3 T. R. 623, and other like cases, have been in consequence deliberately overruled: *Robinson* v. *Waddington*, 13 Q. B. 753. The words of the section under consideration resemble those of 2 W. & M. stat. 1, cap. 5, s. 2. The latter enacts that where any goods shall be distrained for rent, &c., and the tenant or owner of the goods so distrained, shall not within "five days next after such distress taken, &c.," replevy the same, the person distraining shall proceed to appraise and sell such goods. Here the days are to be reckoned from an act done, viz., "distress taken." Held that as the rule now stands the days must be counted exclusively of the day of taking: *Robinson* v. *Waddington*, 13 Q. B. 753. The practice since this case should be taken to be settled. The decision was given after the hearing of elaborate arguments by counsel. Many cases *pro* and *con* were cited and commented upon during the course of argument. The authorities overruling *Castle et al* v. *Burditt et al*, 3 T. R. 623, were ably pressed upon the court, and Denman, C. J., "Very reluctantly we are obliged to yield to the later authorities which have introduced a revolution in the law on this point." Patteson, J., "It is unnecessary to express any opinion on the other points, for on the last, the modern authorities seem uniform." Coleridge, J., and Erle, J., concurred: *Ib.* 756. The true construction of section 51 therefore appears to be to read it as if expressed in the following words: "Then after the lapse of four days next after [the day of] such notice." See further section 342 of C. L. P. Act, and notes thereto.

all liability to such Plaintiff in respect to the articles so seized, and the said Sheriff shall forthwith restore the same, to the person from whose possession he took such articles. (*v*) 19 Vic. c. 43, s. 51.

WHEN DIVISION COURT ATTACHMENTS SUPERSEDED.

Proceeding if the Sheriff find property in the hands of a Bailiff or Clerk of a Division Court.

17. (*a*) If any Sheriff to whom a Writ of Attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable, belonging to the absconding Debtor named in such Writ of Attachment, in the hands, or in the custody and keeping of any Constable or of any Bailiff or Clerk of a Division Court by virtue of any Warrant or Warrants of Attachment issued under the Division Courts Act, such Sheriff shall demand and take from such Constable, Bailiff or Clerk, all such property or effects, or the proceeds of any part thereof as aforesaid, and such Constable, Bailiff or Clerk, on demand by such Sheriff and notice of the Writ of Attachment, shall forthwith deliver all such property, effects and proceeds as aforesaid to the Sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by such Sheriff,

(*v*) Some goods described as perishable by this act, such as "horses, cattle, sheep, pigs," &c. will require to be at least fed while in the custody of the sheriff. Who is to pay the expense of feeding them? The sheriff is bound under the attachment to take into his charge or keeping all the property of the absconding debtor: section 14; and it is declared that "he shall be allowed all necessary disbursements for keeping the same:" *Ib.* But who is to reimburse him or advance to him these "necessary expenses," if the property be restored to the person from whose possession it was taken? By section 18 it is enacted "that the costs of the sheriff for seizing and *taking charge* of property," &c., shall be paid in the first instance by the plaintiff in the writ of attachment. The expression "first instance" is used in contradistinction to the determination of the suit. It is probable that the sheriff would be entitled to receive if not to demand from plaintiff in advance the costs of keeping perishable property as well as any other seized. If plaintiff of his own wrong—that is, neglect or refusal to give the necessary security—compel the sheriff to abandon the property seized, it may be proper that the loss of money expended upon it while in custody should fall upon him. In any event, the sheriff as against him would have a good right to retain the money, if advanced, and disbursed *bona fide* for the keep of the property restored. If the sheriff, having a right to demand the costs from plaintiff "in the first instance," neglect to do so, he is, it seems, still entitled to have them taxed and sue plaintiff for them in any court of this Province having jurisdiction for the amount: section 18.

(*a*) Taken from C. L. P Act, 1856, section 56, which was in that act a new provision, the object of which was to supply an omission in previously existing laws: see *Francis* v. *Brown et al*, 11 U. C. Q. B. 558.

with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property and effects of the absconding Debtor; (*b*) but the Creditor or Creditors who have duly sued out such Warrant or Warrants of Attachment may proceed to Judgment against the absconding Debtor in the Division Court, and, on obtaining Judgment, and serving a memorandum of the amount thereof, and of the costs to be certified under the hand of the Clerk of the Division Court, every such Creditor shall be entitled to satisfaction in like manner as, and in ratable proportion with, the other Creditors of the absconding Debtor who obtain Judgment as hereinafter mentioned. (*c*) 19 Vic. c 43, s. 56.

Creditor in Division Court may proceed to Judgment.

SHERIFF'S COSTS.

18. (*d*) The costs of the Sheriff for seizing and taking

(*b*) This section so far is confirmatory of the law as laid down by all of the judges of the Queen's Bench in *Francis* v. *Brown*, 11 U. C. Q. B. 558. *Qu.* Can the sheriff step in and take property under this act out of the custody of any constable, bailiff or clerk of a division court, when the attaching creditor in the division court has obtained judgment and issued execution? It is enacted that when the sheriff shall find any property or the proceeds of any property or effects, which have been sold as perishable, in the hands of an officer of the inferior court, *by virtue of a warrant of attachment*, &c. But after judgment and execution the property and effects would be considered in the hands of the officer by virtue of the warrant of execution. Clearly after *sale* under execution, the sheriff has no right to demand the proceeds, though not paid over to the execution creditor. He is only entitled to the proceeds of goods sold as perishable, which must be taken to mean goods sold from necessity shortly after seizure under warrant of attachment and before execution. Besides the latter part of this section seems to contemplate a demand by the sheriff *before* judgment, for it provides that the creditor who has sued out such writ of attachment may, notwithstanding the demand by the sheriff, proceed to judgment against the absconding debtor, &c. The marked difference between proceedings against absconding debtors in a court of record and in a division court is, that in the former the property is attached with the primary object of compelling the debtor to submit his person to the jurisdiction of the court. In the latter court the property is attached in order to subject it to execution as fast as judgment can be obtained: *Francis* v. *Brown et al*, 11 U. C. Q. B. 566, *per* Draper, J. From these considerations it is conceived that after judgment and execution in a division court at the suit of an attaching creditor against an absconding debtor, the sheriff has no power to make the demand authorised by this section.

(*c*) This is both a just and a necessary provision. It places attaching creditors in division courts upon an equal footing with the creditors in the superior courts, provided the proceedings of both sets of creditors are directed against the same defendant. The sheriff is intended to be the caretaker for the creditors of both superior and inferior courts; and he is in duty bound to distribute the common fund amongst all the creditors in ratable proportion to their respective claims: section 29.

(*d*) Taken from C. L. P. Act, 1856, section 54, which was substantially a re-enactment of Stat. U. C. 2 Wm. IV. cap. 5, s. 10.

charge of property, and effects under a Writ of Attachment, including the sums paid to any persons for assisting in taking an inventory, (*e*) and for appraising (*f*) (which shall be paid for at the rate of one dollar for each day actually required for and occupied in making such inventory or appraisement) (*g*) shall be paid in the first instance by the Plaintiff, and may, after having been taxed, be recovered by the Sheriff by action in any Court, having jurisdiction for the amount, (*h*) and such costs shall be taxed to the party who pays the same as part of the disbursements in the suit against the absconding Debtor, and be so recovered from him. (*i*) 19 Vic. c. 43, s. 54.

Sheriff's costs, and how paid.

APPRAISEMENT.

19. (*k*) The Sheriff having made an Inventory and Appraisement on the first Writ of Attachment against any absconding Debtor, shall not be required to make a new Inventory and Appraisement on a subsequent Writ of Attachment coming into his hands, (*l*) nor shall he be allowed any

New Writ not to make new Inventory requisite.

(*e*) The inventory made necessary by section 14.

(*f*) Appraisements made necessary by section 15.

(*g*) Five shillings *per diem* was the remuneration allowed to appraisers by 2 Wm. IV. cap. 5, s. 11.

(*h*) Actions for any amount, great or small, may be brought in the superior courts. Their jurisdiction cannot be taken away unless by express enactment or necessary implication: *Rex* v. *The Rochdale Co.* 14 Q. B. 138, *per* Parke, B. If the legislature confer upon an inferior court *exclusive* jurisdiction over a subject matter of complaint, then the superior courts are ousted by necessary implication. It may be observed that theoretically our county and division courts have not ousted the superior courts of any jurisdiction, but for all practical purposes the contrary is the case: see section 328 C. L. P. Act, and notes thereto. Superior courts in England have more than once stayed proceedings where actions were brought therein for trifling sums—*ex. gr.* twenty shillings or forty shillings: see *Kennard* v. *Jones*, 4 T. R. 495; *Wellington* v. *Arters*, 5 T. R. 64; *Oulton* v. *Perry*, 3 Burr. 1592; *Melton* v. *Garment*, 2 B. & P. N. R. 84; see further *Lowe* v. *Lowe*, 1 Bing. 270; *Dowling* v. *Powell*, 2 Dowl. N.S. 1025; *Stutton* v. *Bament*, 6 D. & L. 632.

(*i*) *Qu.* If the money disbursed has been expended in the keeping of live stock, which through the neglect or default of plaintiff is restored by the sheriff, would plaintiff be entitled to charge the money so disbursed against the absconding debtor? See note *v* to section 16.

(*k*) Taken from latter part of section 54 of C. L. P. Act, 1856.

(*l*) This provision is analogous to that doctrine of law which holds that where goods are already in the custody of the law an execution at once attaches upon them without an actual seizure: see *Beckman* v. *Jarvis*, 8 U. C. Q. B. 280. Goods

charge for an Inventory or Appraisement except upon the first Writ. (*m*) 19 Vic. c. 43, s. 54.

COSTS IN CASE OF ATTACHMENTS NOT WARRANTED.

When Defendant to recover costs of defence.

20. (*n*) If at any time before execution issues, it appears to the Court upon motion and upon hearing the parties by affidavit, (*o*) that the Defendant was not an absconding Debtor within the true meaning of this Act, at the time of the suing out of the Writ of Attachment against him, (*p*) such Defendant shall recover his costs of defence, (*q*) and the Plaintiff shall, by rule of Court, be disabled from taking out any Writ of Execution for the amount of the verdict rendered or ascertained upon reference or otherwise recovered in such action, unless the same exceeds, and then for such sum only as the same exceeds, the amount of the taxed costs of the Defendant, (*r*) and in case the sum so recovered is less than the taxed costs of the Defendant, then the Defendant shall be entitled, after deducting the amount of the sum recovered from the amount of such taxed costs, to take out execution for the balance in like manner as a Defendant may now by law have execution for costs in ordinary cases. (*s*) 19 Vic. c. 43, s. 48.

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when attached, enumerated and appraised, continue to be so, as much under each subsequent attachment as under the first. So one attaching creditor, where there are several, is not entitled to priority over the others; all share ratably: see section 29. The property of an absconding debtor, when taken into custody by the sheriff under an attachment, is not to be looked upon so much as taken into custody for the satisfaction of the claim of the first attaching creditor as for safe-keeping, and for the benefit of all creditors who shall come in within six months from the first attachment: section 31.

(*m*) None being necessary, it follows that none should be charged for by the sheriff.

(*n*) Taken from C. L. P. Act, 1856, section 48, which in that act was an original provision compiled from the then existing law.

(*o*) The motion being to the court can only be in term time, and may be "at *any* time before execution issues."

(*p*) See section 1 and notes thereto.

(*q*) A re-enactment of the latter part of section 4 of 2 Wm. IV. cap. 5. See also the first part of section 1 of 49 Geo. III. cap. 4.

(*r*) The precise words used in section 322 of C. L. P. Act. See that section, and particularly note *g* thereto.

(*s*) See note *h* to section 322 of C. L. P. Act.

PENDING SUITS TO CONTINUE.

Persons having previously commenced suits against the same Defendant, may proceed to judgment, &c.

21. (*t*) Any person who has commenced a suit in any Court of Record of Upper Canada, (*u*) the process wherein was served or executed before the suing out of a Writ of Attachment against the same Defendant as an absconding Debtor, may, notwithstanding the suing out of the Writ of Attachment, proceed to Judgment and Execution in his suit in the usual manner; (*v*) and if he obtains execution before

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(*t*) Taken from C. L. P. Act, 1856, section 55, which was almost verbatim a re-enactment of 5 Wm. IV. cap. 5, s. 4.

(*u*) This section is confined in its operation to courts of "record," and as division courts are not courts of record, no suitor in a division court can be entitled to the privileges by this enactment conferred upon suitors who have *bona fide* sued out and served or executed a summons or *capias* before attachment.

(*v*) The general principle is that goods which are *in custodia legis* are not the subject of execution: *Humphrey* v. *Burns*, Cro. Eliz. 691; *Gamble et al* v. *Jarvis*, 5 O S. 272. The provision here enacted, which is a re-enactment of 5 Wm. IV. cap. 5, s. 4, shows that the legislature, when they passed the latter statute, considered it illegal to take goods in execution which had been previously attached: *Gamble et al* v. *Jarvis*, 5 O.S. 274, *per* Robinson, C. J. A debtor absconded on 19th May. Various executions were about that time issued against his property, real and personal. On 2nd March, 1843, some time before he absconded, he executed a warrant to confess judgment in favour of A. B.; but A. B. neither entered up judgment nor issued execution on this warrant till 15th June, 1843, at which time the debtor had absconded, and writs of attachment were in the sheriff's hands. It will be noticed that as no process was issued by A. B. before the execution of the warrant, none could have been "received before the suing out of the attachments." On 25th March, 1843, after the giving of the warrant, but before the debtor had absconded, and therefore before attachment issued the debtor was served with process at the suit of C. D. Judgment was entered and execution issued in this suit on 16th July, 1843—some time, it will be seen, after the execution of A. B. *Held* that C. D. having sued out process and served it on the debtor before he absconded, was entitled to proceed before the attaching creditors. If the only question were one as between A. B. and C. D. c/early as the former obtained judgment and issued execution first, he would have a claim to be first satisfied. But as between A. B. and the attaching creditors, he not having sued out and served process upon the debtor before he absconded, could not be satisfied until after the attaching creditors. This repugnancy to r eason therefore appears to arise—C. D. has a prior right over all attaching creditors, and yet has not priority over A. B. who is postponed till after the attaching creditors. *Held* that as between A. B. and C. D. no decision ought to take place until such time as the suits against the absconding debtors were carried to judgment: *The Bank of British North America* v. *Jarvis*, 1 U. C. Q. B. 182. From this case it would appear that the most speedy is not always the most available proceeding, and that in one case at least the maxim "*Qui prior est in tempore, potior est in jure,*" is reversed. It is clear law that creditors having commenced proceedings against an absconding debtor, *but not having served process upon him*, are not privileged as against attaching creditors. Wherever cognovits or warrants of attorney are taken without process this law will apply: *Bird et al* v. *Folger et al*, 17 U. C. Q. B. 536. To entitle a judgment creditor to priority he must show that his writ was served before the attachment issued: *Daniel* v.

the Plaintiff in any such Writ of Attachment, he shall have the full advantage of his priority of execution, in the same manner as if the property and effects of such absconding Debtor still remained in in his own hands and possession, but if the Court or a Judge so orders subject to the prior satisfaction of all costs of suing out and executing the Attachment. (*w*) 19 Vic. c. 43, s. 55.

FRAUDULENT JUDGMENTS.

If such suit be fraudulent or collusive.

22. (*a*) In case it appears to the Court in which any such prior action has been brought or to a Judge thereof, (*b*) that such judgment is fraudulent, or that such action has been brought in collusion with the absconding debtor, or for the fraudulent purpose of defeating the just claims of his other creditors, (*c*) such Court or Judge may, on the applica-

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Fitzell et al, 17 U. C. Q. B. 365. Where the writ had been served and attachment issued on the same day, and no evidence given to show at what time of day either event took place, it was held that the attaching creditor must prevail: . . ; see also *Caird et al* v. *Fetzell*, 2 Prac. R. 262.

(*w*) This is an equitable provision, which has existed ever since the passing of 5 Wm. IV. cap. 5, s. 4. A discretion is vested in the judge, and is to be exercised by him in reference to the circumstance of each particular case that may be before him.

(*a*) Taken from the latter part of C. L. P. Act 1856, s. 55, which was almost verbatim a re-enactment of 5 Wm. IV. cap. 5, s. 4.

(*b*) *Court or a judge.* Relative powers: see note *w* to section 48 C. L. P. Act. Here the power is restricted to the "judge *thereof*," i. e. of the court in which the prior action has been brought.

(*c*) If made to appear—

1. That such prior judgment is fraudulent.
2. *Or* that such action has been brought in collusion with the absconding debtor.
3. *Or* for the fraudulent purpose of defeating the just claims of his other creditors.

The court or judge may set aside such judgment and execution, &c.

It is not necessary to the success of the application under this section that the claim set up by the judgment creditor should necessarily be unfounded or fraudulent. A *bona fide* debt may be sued for, and yet the action be brought "in collusion" or for "the fraudulent purpose of defeating the just claims of other creditors." Collusion has been defined as a deceitful agreement or contract between two or more persons, for the one to bring an action against the other to some evil purpose, as to defraud a third person of his right, &c., or as a secret understanding between two parties who plead or proceed fraudulently against each other to the prejudice of a third person. It is not necessary to show that the collusion existed before the commencement of the suit. On the contrary, steps collusively taken to expedite the obtaining judgment and thereby gain priority of execution and thus to defeat a ratable distribution would be within the mischief contemplated, and ought to be held within the remedy given: *White* v. *Lord*,

tion of the plaintiff on any Writ of Attachment, (*d*) set aside such judgment and any execution issued thereon or stay proceedings therein. (*e*) 19 Vic. c. 43, s. 55.

HOW DEBTS ATTACHED AND LIABILITY OF DEBTOR.

Proceedings after notice of the seizure.

23. (*f*) In case notice in writing of the Writ of Attachment has by the Sheriff, or by or on behalf of the plaintiff in such Writ, been duly served upon any person owing any debt or demand to, (*g*) or who has the custody or possession of any property or effects of, an absconding debtor, (*h*) and in case such person after such notice (*i*) pays any such debt or

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13 U. C. C. P. 292, *per* Draper, C. J. See also *Bevan* v. *Wheat*, 14 U. C. C. P. 51; *Dickson* v. *McMahon*, *Ib.* 521; and contra, *Caird et al* v. *Fitzell*, 2 Prac. R. 262.

(*d*) Attaching creditors in a division court will not under this section be admitted to take exception to the prior judgment: *Fisher* v. *Sulley*, 3 U.C. L.J. 89.

(*e*) In a case where the debtor before he absconded gave a confession to a person to whom he was not indebted, and that person entered up judgment and issued execution, the court ordered the sheriff to retain the proceeds and divide them amongst all the attachment creditors who had executions in their hands: *Bergin* v. *Pindar*, 3 O. S. 574.

(*f*) Taken from C. L. P. Act 1856, s. 52, which was substantially a re-enactment of Stat. U. C. 2 Wm. IV. cap. 5, s. 9.

(*g*) The expression "owing any debt or demand to," it is believed, should not be here taken to mean only a demand for a liquidated sum of money, but appears to be used in a more general sense. If in construing the word as used in this section we call to our aid another part of the statute (section 25) it would seem that the words include demands other than debts certain. Section 25 and the one under consideration are *in pari materia*. The former enacts that the sheriff may sue for and recover from any person "*indebted* to such absconding debtor" the "*debt, claim, property, or right of action*," attachable under this act. It is perfectly legitimate to call in this section to aid in the construction of the one under consideration. When we do so, we find that the word "owing" may extend to "claims" or rights of action. The word is unquestionably used in its largest sense.

(*h*) In a case decided under the old law, the court granted a rule against a party who had property of the debtor in his possession, ordering him to deliver it up to the sheriff: *Mullens* v. *Armstrong*, M. T. 2 Vic. *MS.* R. & H. Dig. "Absconding Debtor," 18. Also where a debtor who had absconded from the province, before his departure gave his cognovit for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the sheriff, and some paid to plaintiff's attorney, the court ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the attaching creditors who had executions in his hands: *Bergin* v. *Pindar*, 3 O. S. 574; see also *Thompson* v. *Farr*, 6 U. C. Q. B. 387.

(*i*) There does not appear to be any necessity for personal service of the notice. The point was never raised for express adjudication; but in one case, under the old law, where the service was upon an agent, no objection was made: *Clarke* v. *Proudfoot et al*, 9 U. C. Q. B. 290.

demand (*j*) or delivery any such property or effects to such absconding debtor, or to any person for the individual use and benefit of such absconding Debtor, (*k*) he shall be deemed to have done so fraudulently, (*l*) and if the Plaintiff recovers Judgment against the absconding Debtor, and the property and effects seized by the Sheriff are insufficient to satisfy such Judgment, such person shall be liable for the amount of such debt or demand, (*m*) and for such property and effects or the value thereof. (*n*) 19 Vic. c. 43, s. 52.

(*j*) "Debt or *demand*." *Qu.* Does the word demand include a claim for unliquidated damages? It will not be safe, in deciding the question, to follow the English decisions upon analogous enactments too closely. If we were to do so, we should at once and without doubt arrive at the conclusion that "debt or demand" meant only a claim for money certain in amount. Most of the English cases decided upon the construction of these words have arisen under Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 17. It enacts "that in any action depending in any of the superior courts for *any* debt or *demand* in which the *sum* sought to be recovered *and endorsed on the writ of summons* shall not exceed £20," the court or a judge may refer the case for trial to the sheriff, &c. The cases clearly restrict the words "debt and demand" to a demand of a liquidated nature: *Jacques* v. *Bower*, 7 Dowl. P. C. 331; *Roffey* v. *Shoobridge*, 9 Dowl. P. C. 957; *Price* v. *Morgan*, 2 M. & W. 53; *Allen* v. *Pink*, 4 M. & W. 140; *Watson* v. *Abbott*, 2 Dowl. P. C. 215; *Smith* v. *Brown*, 2 M. & W. 851; *Lawrence* v. *Wilcock*, 8 Dowl. P. C. 681; *Collis* v. *Groom*, 1 Dowl. N. S. 496; *Lismore* v. *Beadle*, *Ib.* 566; *Hatton* v. *Macready*, 2 D. & L. 5; *Walther* v. *Mess*, 7 Q. B. 189. It is unsafe to rely too much upon these cases, because the true meaning of "debt and demand," wherever placed in a sentence, must depend much upon the context. What is the context in the above statute? That the debt or demand shall be "a sum indorsed on the writ or summons," by which is meant a sum that may be properly computed and then indorsed. The meaning of the word "demand" is thereby made specific. But are there in the section here annotated any words that can as a context be taken as narrowing the meaning of the word "demand." The word itself, if alone, has a very comprehensive meaning. If not curtailed or restricted by the context, it is presumed that it will retain its general meaning. The object of this enactment is not to place simple issues before a sheriff for trial, but to make available for the payment of the debts of an absconding debtor his property and his claims for property or money as against others. If the word "demand" does not include claims for unliquidated damages, it must at least have a wider meaning as here used than in the English statute just mentioned. If the claim be one *ejusdem generis* with a debt, it is apprehended that the act will apply: see *Walker* v. *Needham*, 1 Dowl. N. S. 220.

(*k*) Where the debtor before he absconded and before attachment issued, made an assignment to A. B. of all his (the debtor's) interest in a building contract and all moneys due or to grow due thereon: *held* that the old act did not apply so as to justify the party liable to pay the money in withholding it from A. B.: *Clarke* v. *Proudfoot et al*, 9 U. C. Q. B. 290.

(*l*) See note *c* to section 22.

(*m*) *i. e.* The debt or demand of the absconding debtor against him, not the demand of the plaintiff against the absconding debtor.

(*n*) *i. e.* The property and effects after notice delivered by him to the absconding debtor or to some person for the individual use and benefit of the absconding debtor.

Defendant's debtor sued by him after the seizure, may obtain stay of proceedings.

24. (*o*) If after notice as aforesaid of a Writ of Attachment, (*p*) any person indebted to the absconding Debtor, or having custody of his property as aforesaid, be sued for such debt, demand or property by the absconding Debtor, or by any person to whom the absconding Debtor has assigned such debt or property since the date of the Writ of Attachment, (*q*) he may, on affidavit, apply to the Court or a Judge, to stay proceedings in the action against himself, until it be known whether the property and effects so seized by the Sheriff be sufficient to discharge the sum or sums recovered against the absconding Debtor, (*r*) and the Court or Judge may make such rule or order in the matter as the Court or Judge thinks fit, and if necessary may direct an issue to try any disputed question of fact. (*s*) 19 Vic. c. 43, s. 52.

WHEN SHERIFF MAY SUE FOR OUTSTANDING DEBTS.

Debtor of Defendant may be sued if Defendant's property seized be not sufficient to satisfy Plaintiff.

25. (*t*) If the real and personal property, credits and effects of any absconding Debtor attached by any Writ of Attachment as aforesaid, prove insufficient to satisfy the executions obtained in the suit thereon against such absconding Debtor, (*u*) the Sheriff having the execution thereof may, by rule or order of the Court or a Judge, to be granted on the

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(*o*) Taken from the latter part of C. L. P. Act 1856, s. 52, which was founded upon Stat. U. C. 2 Wm. IV. cap. 5, s. 9.

(*p*) See section 23.

(*q*) The date of the writ of attachment must be the day on which it was issued: section 6.

(*r*) Under the old law a defendant thus circumstanced was allowed to plead the general issue and give the special matter in evidence. The provision of this act is much to be preferred, because it prevents the necessity of conducting two suits to issue. One will be stayed till the other is determined.

(*s*) See Interpleader Act: Con. Stat. U. C. cap. 30.

(*t*) Taken from C. L. P. Act, 1856, section 53, which was substantially a re-enactment of 2 Wm. IV. cap. 5, s. 12.

(*u*) Before proceedings can be had under this section, it will be necessary for the creditors to have entered judgment and issued execution. Should there be several executions, it is for the sheriff to calculate the gross amount of the claims. If the property and effects seized prove insufficient to satisfy the executions, this enactment will come to his aid. The repealed section was clear upon this point. The commencement of it was as follows: "If *after* judgment *and* execution by any plaintiff," &c.

application of the Plaintiff, in any such case, (*v*) sue for and recover from any person indebted to such absconding Debtor, the debt, claim, property or right of action attachable under this Act and owing to or recoverable by such absconding Debtor, (*w*) with costs of suit, (*x*) in which suit the Defendant shall be allowed to set up any defence which would have availed him against the absconding Debtor at the date

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(*v*) The order may be had *ex parte* upon an affidavit which shows clearly plaintiff's right to make the application: *Cleaver* v. *Fraser*, 3 U. C. L. J. 107. The affidavits on which the application was made in this case were that of the sheriff, stating that the real and personal property and effects of the defendant were insufficient to satisfy plaintiff's judgment, and that of plaintiff stating the issue of the writ of attachment, the recovery of judgment, that it was partially unsatisfied, that all the real and personal property of defendant was exhausted and insufficient to satisfy the judgment, and that several persons within the jurisdiction of the court were indebted to defendant: *Ib.*

(*w*) *The debt, claim, property, or right of action, &c.* These words embrace much more than the term used in the old act, "the amount of the *debt* so *owing*." The sheriff is now empowered to sue, not only for debts owing, but for claims, property and rights of action attachable under this act, and "recoverable" by the absconding debtor. Clearly more is meant than simple debts or claims for ascertained amounts. "Rights of action" may possibly extend to an agreement by defendant to convey land to the debtor, or to many other such demands of an unliquidated nature. The intention of the legislature is, in the absence of the debtor, to attach his property (including his available rights), for the satisfaction of his debts.

(*x*) The sheriff, it is presumed, must bring his suit within the proper jurisdiction, or be liable to the same consequences as other suitors. If he bring an action in the Queen's Bench for a cause of action within the jurisdiction of an inferior court and properly cognisable therein, he would probably be restricted to inferior court costs: C. L. P. Act, section 328. It may be doubtful whether the extra costs of defendant in such a case might be set off against plaintiff's verdict. The verdict of the sheriff is not his verdict. The amount recovered is not his money, but the money belonging to the estate of the absconding debtor. If a deduction were allowed from the sheriff's verdict, the loss would be that of the creditors and not of the sheriff. The estate in the sheriff's hands, which he is in duty bound to protect and make available for payment of the executions, would be by his misconduct diminished. This the law will never suffer. On the other hand, it may be argued that if this be the true construction, then defendant, who was improperly sued into the superior courts, will be the loser. Such a construction, it may be said, would perhaps be just towards the estate, but would be most unjust towards the innocent defendant. To this objection it can only be replied, that the defendant, though bound, perhaps, to defend the suit instead of compromising it, need not necessarily be the loser. The sheriff, it must be borne in mind, is an officer of the courts. If he act improperly, whether wilfully or not, in the conduct of his office, so as to prejudice the rights of suitors, he is amenable to the courts. Besides, whether his misconduct be designed or inadvertent, if suitors are thereby in fact made to suffer, there is in general a remedy by action against him and his sureties. Whether such remedy would extend to the case supposed has not yet been decided.

of the Writ of Attachment, (*y*) and a recovery in such suit by the Sheriff shall operate as a discharge as against such absconding Debtor; (*z*) and such Sheriff shall hold the moneys recovered by him as part of the assets of such absconding Debtor, and shall apply them accordingly. (*zz*) 19 Vic. c. 43, s. 53.

FORM OF DECLARATION.

Averment to be inserted in Sheriff's declaration.

26. (*a*) The declaration in any such action by the Sheriff shall contain an introductory averment to the effect following: (*b*)

A. B., Sheriff of, (&c.) who sues under the provisions of the law respecting absconding Debtors, in order to recover from C. D., Debtor to E. F., an absconding Debtor, the debt due (*or other claim, according to the facts*) (*c*) by the said

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(*y*) Where the action was upon a promissory note made to the absconding debtor before he fled from the Province, and defendant filed several pleas which at best only set up a partial failure of consideration, the court seemed to think that the defence was not a good one: *Thompson* v. *Furr*, 6 U. C. Q. B. 387. The test is this: Would the defence now set up by defendant as against the sheriff, avail defendant if he were sued by the absconding debtor himself? In the case above mentioned, it is clear that in the absence of fraud, the defence set up could not have been maintained as against the absconding debtor, if he were plaintiff: see *Dalton* v. *Lake*, M. T. 5 Wm. IV. *MS.* R. & H. Dig. "Bills of Exchange," &c. vi. 13; and *Trickey* v. *Larne*, 6 M. & W. 278; *Dixon* v. *Paul et al*, 4 O.S. 327. Mere partial failure of consideration when the *quantum* to be deducted is matter not of definite computation but of unliquidated damages, is not a good defence to an action on a promissory note: *Kellogg et al* v. *Hyatt*, 1 U. C. Q. B 445; *Coulter* v. *Lee*, 5 U. C. C. P. 350. If the suit were in a division court, where equitable considerations are allowed to prevail, it might probably be otherwise.

(*z*) Defendant, if afterwards sued, may set up the *jus tertii* by pleading the right of the sheriff to recover against him under this section. The plea, it seems, should be special, as there is no provision made to the effect that defendant may plead the general issue and give this act in evidence.

(*zz*) Where the sheriff sues for and obtains payment of a sum of money due to an absconding debtor, it is not, when collected, liable to prior writs of execution in his hands: *Cann* v. *Thomas*, 17 U. C. Q. B. 9.

(*a*) Taken from the latter part of section 53 of C. L. P. Act, 1856, which was substantially a re-enactment of 2 Wm. IV. cap. 5, s. 12.

(*b*) *Shall contain*, &c. An irregularity, it is apprehended, if averment omitted.

(*c*) This is similar to that contained in the repealed enactment section 12 of 2 Wm. IV. cap. 5. But, as one might expect to find, the legislature have, in the form here given, carried out the extended meaning of the words "debt" and "indebted." The old form was prefaced with a recital that the plaintiff sued "in order to recover such *sum* as C. D. (the defendant) may *owe* to the said E. F. an absconding debtor." In the new form, "in order to recover the *debt* due (*or other claim according to the facts*)." From this comparison of the old with

C. D., to the said E. F., complains, &c. (*d*) 19 Vic. c. 43, s. 53.

SHERIFF'S INDEMNITY.

Sheriff not bound to sue until creditor gives bond to indemnify him.

27. (*e*) The Sheriff shall not be bound to sue any party as aforesaid until the attaching creditor gives his bond with two sufficient sureties, (*f*) payable to such Sheriff by his name of office (*g*) in double the amount or value of the debt

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the new provisions, the intention of the legislature to enlarge the meaning of the word "debt" is manifest.

(*d*) If the declaration give, by way of introduction to the action, the explanation which the statute makes necessary, the court has no authority to exact more. In doing so it would be contravening the statute: *Thompson* v. *Farr*, 6 U. C. Q. B. 390, *per* Robinson, C. J. For a form of a declaration on a promissory note, disclosing, in the opinion of the court, as much as was necessary to entitle plaintiff to sue on the note: see *Ib.* p. 387. The old practice permitted each individual creditor to sue for himself in his own name. He was declared to be entitled to recover the amount owing by defendant to the absconding debtor, "or so much thereof as may be necessary to satisfy his claim." Where plaintiff was entitled to £50 19s. 3d. only, but sued defendant for £140, being the whole amount due by defendant to the absconding debtor, the declaration was under this enactment held to be clearly wrong: *Ib. Qu.* Is the sheriff, who now sues on behalf of all creditors, restricted in the same manner as each plaintiff was formerly? The sheriff can only sue where there is a deficiency in the ordinary estate or assets of the absconding debtor, but is not, it is presumed, bound to restrict himself to the amount coming to the creditors if the defendant really owe the absconding debtor a larger sum. There is nothing in the enactment to the contrary, and the law disavows multiplicity of suits, and the splitting up of claims. The legislature must be presumed to have had before them the old acts when framing this act. Indeed they have repealed, re-enacted, and amended as re-enacted all the old provisions; but they have dropped that provision, which, formerly restricted plaintiff suing debtors of an absconding debtor, to the actual claims of such plaintiff, against the debtor himself. The words of the old provision have been omitted, and it must be inferred that the omission was intentional and made for some good reason—a reason which it is only possible to conjecture. Supposing this conclusion to be right, it does not follow, the sheriff being plaintiff, that any bad consequence can arise. Should he sue for and recover a greater sum than is required to satisfy executions in his hands, he is nevertheless obliged to hand over the balance, after satisfying these executions, to the absconding debtor or his agent: see section 32.

(*e*) Taken from latter part of section 53 of C. L. P. Act, 1856.

(*f*) *Qu.* Who is to judge of the sufficiency of the sureties? The bond directed to be given to the sheriff for his protection under section 15 is left to the approval of himself. Probably the legislature intended the same with respect to the bond here directed to be given. Both sections are *in pari materia*, and may, according to a well-known rule, be brought to bear the one upon the other to aid in the construction of either.

(*g*) The sheriff of a county is made a *quasi* corporation sole. His successor in office may sue upon the bond to be given under this section. If the action have commenced in the name of the sheriff in office for the time being, and he afterwards die or otherwise vacate the office, the action does not in consequence abate. It may be continued by his successor in office.

or property sued for, conditioned to indemnify him from all costs, losses and expenses to be incurred in the prosecution of such action or to which he may become liable in consequence thereof. (*h*) 19 Vic. c. 43, s. 53.

Sheriff's successor may continue the action.

28. (*i*) In the event of the death, resignation or removal from office of any Sheriff after such action brought, the action shall not abate, but may be continued in the name of his successor to whom the benefit of the bond so given shall enure as if he had been named therein, (*j*) and a suggestion of the necessary facts as to the change of the Sheriff as plaintiff shall be entered of record. (*k*) 19 Vic. c. 43, s. 53.

WHEN DISTRIBUTION TO BE RATABLE.

Proceedings if several persons take out Writs against the same absconding Debtor.

29. (*l*) When several persons sue out Writs of Attachment against an absconding Debtor, the proceeds of the property and effects attached and in the Sheriff's hands, shall be ratably distributed among such of the Plaintiffs in such Writs as obtain Judgments and sue out execution, in proportion to the sums actually due upon such Judgments, (*m*) and the

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(*h*) Evidently refers to suits which may arise out of the action to be prosecuted pursuant to this section. The indemnity must be not only for costs, but for "losses and expenses"—words of very general signification.

(*i*) Taken from latter part of section 53 of C. L. P. Act, 1856.

(*j*) The conclusion of this section is the same in principle as the C. L. P. Act, section 131, "The death of a plaintiff or defendant shall not cause the action to abate;" and section 133, "In the case of the death of a sole plaintiff....the legal representative of such plaintiff....may enter a suggestion of the death,....and the action shall thereupon proceed."

(*k*) See note *z* to section 132 C. L. P. Act.

(*l*) Taken from C. L. P. Act, 1856, section 57, which was substantially a re-enactment of Stat. U. C. 5 Wm. IV. cap. 5, s. 6.

(*m*) Under the first Absconding Debtors Act (2 Wm. IV. cap. 5) it was considered that a first attaching creditor was entitled to priority over subsequent attaching creditors, and entitled to be paid his demand before they could have any claim whatever: see *Gamble et al* v. *Jarvis*, 5 O.S. 272. It was thought that much hardship might in consequence arise under that act in certain cases where all the creditors were held back until such time as the first attaching creditor should obtain satisfaction: *Ib.* 277, *per* Robinson, C. J. The legislature, to remedy this state of things, passed the Stat. U. C. 5 Wm. IV. cap. 5, s. 6, the principle of which is retained in this act. But even before the Stat. 5 Wm. IV. cap. 5, in a case where all the attaching creditors had agreed among themselves to share ratably the proceeds of defendant's property, the court carried out the agreement: *Bergin* v. *Pindar*, 3 O.S. 574.

Court or a Judge may delay the distribution, in order to give reasonable time for the obtaining of Judgment against such absconding Debtor. (*n*) 19 Vic. c. 43, s. 57.

WHEN JUDGMENT CREDITOR IN DIVISION COURT TO PARTICIPATE.

Creditors under Division Court judgments to share *pari passu.*

30. (*o*) Every Creditor who produces a certified memorandum from the Clerk of any Division Court, of his Judgment as aforesaid, (*p*) shall be considered a Plaintiff in a Writ of Attachment who has obtained Judgment and sued out execution, and shall be entitled to share accordingly. (*q*) 19 Vic. c. 43, s. 57.

Who to be entitled to share if the property proves insufficient to pay all.

31. (*r*) In case the property and effects of the absconding Debtor be insufficient to satisfy the sums due to such Plaintiffs, none shall be allowed to share, unless their Writs of Attachment were issued and placed in the hands of the Sheriff for execution within six months from the date of the first Writ of Attachment, (*s*) or in case of a Warrant of Attachment, unless the same was placed in the hands of the Constable or Bailiff before or within six months after the date of the first Writ of Attachment. (*t*) 19 Vic. c. 43, s. 57.

SURPLUS TO BE RESTORED.

When all the seizing creditors are satisfied, the remaining

32. (*u*) If after the period of one month next following the return of any execution against the property and effects of any absconding Debtor, (*v*) or after a period of one month

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(*n*) The inference from this provision is that an attaching creditor who, without good cause, delays for an unreasonable time to proceed to judgment, will lose all right to share in the proceeds of the debtor's estate: see *Gamble et al* v. *Jarvis*, 5 O.S. 277, *per* Robinson, C. J.

(*o*) Taken from section 57 of C. L. P. Act, 1856.

(*p*) *i. e.* According to section 17.

(*q*) Judgment creditors in a division court are not entitled to priority in respect of their judgments where suit commenced before the issue of writs of attachment: see note *u* to section 21.

(*r*) Taken from latter part of section 57 of C. L. P. Act, 1856.

(*s*) As to computation of time: see C. L. P. Act, section 342, and notes thereto.

(*t*) The latter part of this section has relation to division court process.

(*u*) Taken from C. L. P. Act, 1856, section 58, which was substantially a re-enactment of Stat. U. C. 2 Wm. IV. cap. 5, s. 17.

(*v*) This provision seems to contemplate the case of a sheriff having had only one execution in his hands, which he returned. "*If after the period of one*

property to be delivered up.

from a distribution under the order of the Court or a Judge, (*w*) whichever last happens, and after satisfying the several Plaintiffs entitled there be no other Writ of Attachment or execution against the same property and effects in the hands of the Sheriff, then, all the property and effects of the absconding Debtor, or unappropriated moneys the proceeds of any part of such property and effects, remaining in the hands of the Sheriff, together with all books of account, evidences of title or of debt, vouchers and papers whatsoever belonging thereto, shall be delivered to the absconding Debtor or to the person or persons in whose custody the same were found, or to the authorized agent of the absconding Debtor, and thereupon the responsibility of the Sheriff in respect thereto shall determine. 19 Vic. c. 43, s. 58.

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month next following the return," &c. "Month" means a calendar month: Con. Stat. U. C. cap. 2, s. 13. "After the period of one month," that is, the month must be fully expired. It will not begin to run until the day next after the return of the writ. It must then fully expire, the last day being inclusive: see C. L. P. Act, section 342, and notes thereto.

(*w*) This provision contemplates the case of a sheriff who has had several executions in his hands, to satisfy which a distribution has been made pursuant to section 29. "*After the period of one month from a distribution.*" As to "period" and "month:" see preceding note.

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EJECTMENT.

CON. STAT. U. C. CAP. 27.

An Act respecting Ejectment. (a)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

(a) Ejectment is that form of action by which a party having a right of entry upon land recovers its possession: see *Cleveland* v. *Boice et al*, 21 U. C. Q. B. 609. It is of the class described in treatises on pleading as "mixed." It is owing to its anomalous character usually treated as a separate and peculiar mode of proceeding. Unlike other forms of action general rules have been made for it alone, and rules extending to other forms of action have been held not to extend to it. The legislature in like manner has in this act made separate provision for the action of ejectment. Being for the recovery of land anciently, it was esteemed of too great solemnity to be proceeded with like actions for chattels or personal wrongs. Hence it was clogged with fictions which produced delay and was attended with great expense. Originally it was a mere action of trespass to recover the damages sustained by a lessee for years when ousted of his possession. Afterwards by a fiction this remedy was made use of for the recovery of all possessory rights to corporeal hereditaments. Since the fictions of the actions were in this province abolished by 14 & 15 Vic. cap. 114, it will serve no good purpose further to dwell upon them. Our statute of 1851 was in advance of legislation in England, and effected to some extent that which is here to a great extent accomplished, viz., the assimilation of ejectment to other forms of action. The origin of both seems to be the Irish Process and Procedure Act, 13 & 14 Vic. cap. 18. Our C. L. P. Act, as at first passed, included proceedings in ejectment as well as in many other matters which by the Consolidated Statutes are now placed in distinct statutes. It must be taken for granted that the legislature, by the fact of their having taken the ejectment proceeding out of the C. L. P. Act, meant that *all* the necessary provisions to carry out the practice in ejectment are contained in this act: *Leeson* v. *Higgins*, 4 Prac. R. 340, *per* Draper, C. J. But it seems desirable to have the powers of amendment apply to ejectment suits as well as others. The tendency of modern legislature has been to abolish as much as possible the distinction between ejectment and ordinary actions; and unless the courts are prevented by express legislation or some clearly established rule of law or practice from assimilating ejectment to other actions in relation to powers of amendment, the courts ought to do so: *Chadsey* v. *Ransom*, 17 U. C. C. P. 629. Formerly it was necessary to show that the party in possession was in fact holding as a trespasser, or a mere intruder or occupant without right, but according to the present proceeding, the sole question seems to be who is entitled to the possession, without any reference to the manner in which he may have entered: *Robinson* v. *Smith*, 17 U. C. Q. B. 218, *per* McLean, J.; see also *Prince* v. *Moore*, 14 U. C. C. P. 349. Possession is *prima facie* evidence of title: *Eccles et al* v. *Paterson et al*, 22 U. C. Q. B. 167; *Hunter* v. *Farr et al*, 23 U. C. Q. B.

1. (*b*) **The action of Ejectment shall be commenced by Writ,** (*c*) **directed to the person in possession by name,** (*d*) **and to all persons entitled to defend the possession of the** How action to be commenced.

324; *Henderson* v. *Morrison*, 18 U. C. C. P. 221. A person in possession of land without other title has a devisable interest: *Asher et ux.* v. *Whitlock*, L. R. 1 Q. B. 1. One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of lands adjacent to the land so occupied, does not thereby change the character of his possession: *Dixon* v. *Baby et al*, L. R. 1 Ex. 259. Offer to purchase held sufficient to support plaintiff's title against defendant: *Penlington* v. *Brownlee*, 28 U.C.Q.B. 189. There was at one time much doubt as to the right to try a question of boundary in ejectment, the Queen's Bench holding that there was the right: *Irwin* v. *Sager*, 21 U. C. Q. B. 373; s. c. 22 U. C. Q. B. 22; *Sexton* v. *Paxton*, 21 U. C. Q. B. 389; *Boules* v. *Tauguiney*, *Ib.* 391; and the Common Pleas the reverse: *Lund* v. *Savage*, 12 U. C. C.P. 143. But the view of the Queen's Bench has since been sustained by the court of Error and Appeal: *Sexton* v. *Paxton*, 9 U. C. L. J. 207; also *Hunter* v. *Baptie et al*, 23 U. C. Q. B. 43. Ejectment will not lie for pews in a church: *Ridout* v. *Harris*, 17 U. C. C. P. 881. County courts have jurisdiction in ejectment in certain cases: see Stat. 23 Vic. cap. 43.

(*b*) Taken from C. L. P. Act 1856, s. 220, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 168. Founded upon the first report of the Common Law Commissioners, s. 90. This section is prospective: *Doe d. Smith* v. *Roe*, 8 Ex. 127.

(*c*) An infant plaintiff may sue out a writ in his own name, but after appearance entered he cannot take any further step, such as giving notice of trial, without having a next friend appointed: *Campbell* v. *Mathewson*, 5 Prac. R. 91. A lessee may maintain ejectment before entry: *Cleveland* v. *Boice et al*, 21 U. C. Q. B. 609.

(*d*) Persons in *actual* possession are intended. Mere constructive possession, where the land is in truth vacant, will not suffice: *Doe d. White* v. *Roe*, 8 Dowl. P. C. 71. But where a party though removed from off the premises had left beer in the cellar of a house on the premises, he was considered in actual possession: *Savage* v. *Dent*, 2 Str. 1064. Not so, however, when he had locked up the house without leaving any property on the premises: *Doe d. Lord Darlington* v. *Cock et al*, 4 B. & C. 259. A house in fact untenantable and empty cannot be looked upon as being in the actual possession of any body: *Doe d. Schovell* v. *Roe*, 3 Dowl. P. C. 691. Nor land if the house thereon has been pulled down: *Doe d. Norman* v. *Roe*, 2 Dowl. P. C. 399–428. Where there are several houses on the premises, some occupied and others not, the court may give special directions as to the latter: *Doe d. Chippindale et al* v. *Roe*, 7 C. B. 125. But proceedings, as on a vacant possession, cannot be had unless it clearly appear that the premises are really vacant: *Doe d. Burrows* v. *Roe*, 7 Dowl. P. C. 326; *Doe d. Timothy* v. *Roe*, 8 Scott, 126. Service of a writ in the case of a vacant possession addressed to the assignees and personal representatives of S. B. deceased, by posting copies on the premises, held good: *Harrington* v. *Bytham*, 2 C. L. R. 1033. Ejectment may be maintained successfully against a railway company: *Doe d. Hutchinson* v. *The Manchester, Bury & Rossendale Railway Co.* 14 M. & W. 687: *Galt et al* v. *The Erie and Niagara Railway Co.* 19 U. C. C. P. 357; but not after arbitration as to the land taken, and payment or tender of the amount awarded: *Doe d. Armitstead* v. *The North Staffordshire Railway Co.* 16 Q. B. 526; *Doe d. Hudson* v. *The Leeds and Bradford Railway Co. Ib.* 796; *Rankin* v. *The Great Western Railway Co.* 4 U. C. C. P. 463; *Cotton* v. *The Hamilton and Toronto Railway Co.* 14 U. C. Q. B. 87; *Grimshawe* v. *The Grand Trunk Railway Co.* 19 U. C. Q. B. 493.

property claimed, (*e*) which property shall be described in the Writ with reasonable certainty. (*f*) 19 Vic. c. 43, s. 220.

If it can be shewn that the parties served were really in possession when served, slight errors in the names or other description will not vitiate the proceedings: *Doe d. Folkes* v. *Roe*, 2 Dowl. P. C. 567; *Doe d. Frost* v. *Roe*, 3 Dowl. P. C. 563; *Doe d. Peach* v. *Roe*, 6 Dowl. P. C. 62; *Doe d. Smith* v. *Roe*, *Ib.* 629. The court has power to strike out defences made by persons not in possession by themselves or their tenants: section 14.

When a person is made defendant who is not in possession and claims no right to the land, he is entitled on application to have his name struck out: *Hall* v. *Yuill et al*, 2 Prac. R. 242; or to have the writ set aside: *Wallace* v. *Acre*, 5 Prac. R. 142. But he should not enter an appearance: *Harper* v. *Lowndes*, 15 U. C. Q. B. 430. If he be not a sole defendant, and the remaining defendant enter an appearance, both will be liable for costs: *D'Arcy* v. *White et al*, 24 U. C. Q. B 570; but see *Kerr* v. *Waldie et al*, 4 Prac. R. 138. So each defendant, though only defending for part, is liable for the whole costs of the action: *Johnson et al* v. *Mills et al*, L. R. 3 C. P. 22.

(*e*) The present act changes the mode of procedure rather than the law for the recovery of land, and therefore the right which prevailed under the old practice to bring the action against all persons found in possession of land, without reference to the fact whether their possession is joint or several, still exists: *Bannerman* v. *Dewson et al*, 17 U.C. C.P. 257. A tenant served with a writ should notify his landlord of the service: section 50. Heretofore the courts have refused to set aside a judgment in ejectment against a tenant who concealed the proceedings from his landlord, there not being otherwise any evidence of collusion: *Goodtitle* v. *Badtitle*, 4 Taunt. 820. It was said to the landlord, "if your tenant has done you wrong, that is a matter between you and him:" *Ib.* If premises be let to A. and he sublet to B, C, and D, and these latter be in possession, the writ should be directed to them as well as to A: *Doe d. Lord Darlington* v. *Cock et al*, 4 B. & C. 259. Where the writ has not been directed to, but has been served on the tenant in possession, it is questionable whether the tenant can apply to set aside the writ as irregular: *Thompson* v. *Slade*, 25 L. J. Ex. 306. However, if instead of making application for that purpose he apply for particulars or for other information, and allow ten days to elapse, he will be deemed to have waived the irregularity, supposing it be such, and his application should then be not to set aside the writ but to be allowed to appear and defend according to section 9, which provides for an appearance of persons not named in the writ: *Ib.* It is enacted that the writ shall be directed to the "persons" in possession, &c Whether a mere servant in possession who claims neither estate nor interest in the premises can be made defendant, is not clear: see *Parsons* v. *Ferriby*, 26 U. C. Q. B. 380. But this much is clear, viz., that if the person served, though a servant, assent to the character of a tenant and appear to the action, that assent, coupled with the appearance, will be sufficient evidence to go to the jury: *Doe d. James et al* v. *Stanton*, 2 B. & Al. 371. "It is sufficient to subject a party to the action that he has a visible occupation of the premises, and it is not necessary that he should have such an interest as to enable him to maintain trespass. When a servant is served with a notice of ejectment, as tenant in possession, it is competent to him to explain his situation, and so to set the other party right or to mislead him. If he adopt the latter course it is very possible that a jury may think that he ought to be considered as the tenant in possession: *Ib. per* Bayley, J. Where there are several persons in possession there may be an action against all, or an action against each, but if the title of all be identical, plaintiff may be ordered to consolidate: *Grinstone* v. *Burgers et al d. Lord Gower et al*, Barnes, 176; *Thrustout d. Jones* v. *Shenton*, 10 B. & C. 110.

(*f*) A description sufficient to identify the land the subject of the action with

WRIT.

Contents of Writ.

2. (*g*) **The Writ shall state the names of all the persons in whom the title is alleged to be,** (*h*) **and shall command the persons to whom it is directed, to appear in the Court**

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the property described in the writ is all that is required. This is what is meant by reasonable certainty. The want of it will not nullify the writ, but only entitle the opposite party to apply for better particulars: *Doe d. Saunders* v. *Duke of Newcastle*, 7 T. R. 332, n; *Doe d. Saxton et al* v. *Turner*, 11 C. B. 896; also section 13. Though the sufficiency or insufficiency of the description in the declaration under the old practice will not be a satisfactory guide, yet being some guide a reference may be made to the principal cases: *Doe d. Marriott* v. *Edwards*, 6 C. & P. 208; *Doe d. Boys et al* v. *Carter*, 1 Y. & J. 492; *Doe d. Edwards et al* v. *Gunning et al*, 7 A. & E. 240.

(*g*) Taken from C. L. P. Act, 1856, s. 221; the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 169. Founded upon the first report of the Common Law Commissioners, section 91.

(*h*) These words correspond with section 195 of the Irish C. L. P. Act 16 & 17 Vic. cap. 113, under which it was held that a husband seized of lands in right of his wife might eject for non-payment of rent in his own name, and that the wife is not a necessary party to the record: *Holmes* v. *Hennegan*, 28 L. T. Rep. 25. And, *per* Monahan, C. J., "I believe for the last century no one has doubted but that the husband has such an estate in the lands of the wife as to enable him to make a lease of the wife's lands for the purpose of bringing an ejectment. The present statute does not alter the law, and therefore we must allow the cause shown with costs." But see Con. Stat. U. C. cap. 73, s. 13. It was held that a guardian appointed to an infant estate under our statute 8 Geo. IV. cap. 6, s. 2, may bring ejectment for the purpose of trying the infant's title: *Doe d. Atkinson* v. *McLeod*, 8 U. C. Q. B. 344. But he must proceed as guardian in the name of the ward: *Kinsey* v. *Newcombe*, 17 U. C. C. P. 99. Under the old law, when a doubt arose as to whether the title was in one of several parties, it was usual to insert several demises. There is nothing now to prevent title being alleged in several plaintiffs, "or some or one of them:" *Elliss* v. *Elliss*, E. B. & E. 81. But although not so alleged, it would seem from the peculiar wording of several sections of this act agreeing with sections of the repealed act 14 & 15 Vic. c. 114, that one of several plaintiffs may recover: *Butler et al* v. *Donaldson*, 10 U. C. Q. B. 643. By this section it is made necessary to name in the writ all the persons in whom "title is *alleged*," and under a subsequent section it is made necessary to attach to the writ a notice of the "*nature* of the title:" section 4. Where there are several plaintiffs claiming each an undivided interest, it is not necessary that they should prove a joint title, or any privity between them, but they may maintain the action in their joint names upon separate titles: *Butler et al* v. *Donaldson*, 10 U. C. Q. B. 643; *Young et al* v. *Scobie*, *Ib.* 372; *Bradley et al* v. *Terry*, 20 U. C. Q. B. 563. Where several plaintiffs claim jointly, but title is not proved in all of them, there will be a verdict for those plaintiffs who prove title and for defendant against the others: *Wilson* v. *Baird*, 19 U. C. C. P. 98. An amendment ought not to be allowed after entry of the record for trial, by striking out all the names in the summons in ejectment and substituting a new set therefor: *Robinson* v. *Bell*, 9 U. C. C. P. 21. But in ejectment by mortgagee of devisee against heir-at-law, in which the question was as to the competency of the testator to make a will, it appeared at the trial that the legal estate was in two trustees, the devisee having an equitable estate only; an amendment was allowed by the addition of the names of the two trustees, they being present in court and consenting to be parties: *Blake et al* v. *Done*, 7 H. & N. 465.

from which it is issued, (*j*) within sixteen days after service thereof, (*k*) to defend the possession of the property sued for, or such part thereof as they may think fit, (*l*) and it shall contain a notice that in default of appearance they will be turned out of possession. (*m*)

Teste, and out of what office to issue.

Duration and contents of.

3. (*n*) The Writ shall bear teste of the day on which it issues, (*o*) and shall be issued out of the proper office in the County wherein the lands lie, (*p*) and shall be in force for three months, (*q*) and shall be in the form No. 1, or to the like effect, (*r*) and the name and abode of the Attorney issuing the same (*s*) or (if no Attorney) the name and resi-

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(*j*) Mode of appearance: see section 8.

(*k*) In computing the sixteen days allowed to a defendant to appear, the day of service must be *excluded: Scott* v. *Dickson*, 1 Prac. R. 366; *Montgomery* v. *Brown et al*, 2 U. C. L. J. N.S. 72; *Stanton* v. *Brittle*, 1 F. & F. 468. No additional time is given by reason of the last of the sixteen days being a Sunday: *Cline* v. *Cawley*, 4 Prac. R. 87; contra, *Adshead* v. *Upton*, *Ib.* 88, *note*.

(*l*) The party appearing may limit his defence to part of the property described in the writ: section 12.

(*m*) The want of this notice would, it is apprehended, make the writ irregular.

(*n*) Taken from the latter part of section 221 of C. L. P. Act 1856; the origin of which is Eng. Stat. 15 & 16 Vic. cap. 76, s. 169. Founded upon the first report of the Common Law Commissioners, section 91.

(*o*) See note *q* to section 11 C. L. P. Act.

(*p*) Before this act the law was otherwise: see *Passmore* v. *Smith*, 1 Prac. R. 318. A writ issued from a county other than that in which the lands lie, though not a nullity, may be set aside on application to a judge in chambers: *The Metropolitan Building Society* v. *McPherson*, 2 U. C. L. J. 228, *per* Burns, J. But when defendants appeared and allowed issue to be found in a county other than that in which the land was situate the court refused to interfere, leaving defendants to their remedy by writ of error when judgment was entered: *The Trust and Loan Co. of Canada* v. *Stevens*, 2 Prac. R. 60. The venue in ejectment is of course local: *McKindsey* v. *Johnston*, 14 U. C. Q. B. 209; and is shown by the description of the premises in the body of the writ and not by the marginal note: *Riddell* v. *Briar*, 2 Cham. R. 198. But the court or a judge may order the trial to take place in any county other than that in which the venue is laid: section 23, C. L. P. Act.

(*q*) *i. e.* Three calendar months: Con. Stat. U. C. cap. 2, s. 13. As the service of the writ need not necessarily be personal, no provision is made for the renewal of the writ as in the case of writs of summons in personal actions: section 21 C. L. P. Act.

(*r*) When the legislature prescribe a form of procedure it should not be departed from, unless for some good reason: see note *c* to section 53 C. L. P. Act.

(*s*) The writ should be endorsed with the name and abode of the attorney actually suing out the same, whether he sues out the same as agent of the attorney or as himself attorney for the claimant: *Webster* v. *Gore*, 4 Prac. R. 169; see further section 12 C. L. P. Act, and notes thereto.

dence of the party (*t*) shall be endorsed thereon, in like manner as the endorsements on Writs of Summons in a personal action, (*u*) and the same proceedings may be had to ascertain whether the Writ was issued by the authority of the Attorney whose name appears indorsed thereon, and who and what the Claimants are, and their abode, and as to staying the proceedings upon Writs issued without authority, as in the case of Writs in personal actions. (*v*) 19 Vic. c. 43, s. 221.

NOTICE.

Notice of plaintiff's title to be attached to the Writ.

4. (*a*) To the Writ and to every copy thereof served on any party, shall be attached a notice of the nature of the title intended to be set up by the Claimant, as for example, by grant from the Crown, or by deed, lease or other conveyance derived from or under the grantee of the Crown, or by marriage, descent or devise, stating to or from whom, or by length of possession, or otherwise, (*b*) according to the nature of the

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(*t*) See note *u* to section 13 C. L. P. Act.

(*u*) The indorsements will be amendable, it is presumed, in the same manner as in personal actions: see section 48, C. L. P. Act. In ejectment the courts have always been liberal in allowing amendments: see *Doe d. Simpson* v. *Hall*, 5 M. & G. 795; *Doe d. Parsons* v. *Heather*, 8 M. & W. 158; *Doe d. Wilton et ux.* v. *Beck et al*, 22 L. J. C. P. 6; *Doe d. Bacon et al* v. *Brydges*, 1 D. & L. 954; *Doe d. Rabbits et al* v. *Welch*, 4 D. & L. 115; *Doe d. Sinclair* v. *Arnold*, H. T. 4 Vic. *MS.* R. & H. Dig. "Amendment," II. 8; *Doe d. Ausman* v. *Munro*, 1 U. C. Q. B. 160.

(*v*) See section 50, C. L. P. Act, and notes thereto.

(*a*) Taken from C. L. P. Act 1856, section 222, which in that act was a new and original provision.

(*b*) The object of this section is to render it obligatory upon a claimant in ejectment to make known to defendant the title intended to be set up by plaintiff, so that defendant may with the least possible expense prepare himself to meet it. A similar principle is involved in section 8, which makes it necessary for defendant to inform plaintiff of the grounds of defence intended to be relied upon by the former. The manifest design of both enactments is that neither party to a suit shall be kept in ignorance of the case intended to be set up by his adversary. A writ which informs a defendant that plaintiff claims the land of which he is in possession gives no tangible information. The bare issue of a writ of itself shows that the party issuing it advances some claim. But it is only just that a defendant should be informed not merely that a claim is advanced, but the grounds upon which that claim is based, *i. e.* claimant's title. In the absence of such information defendant is left to conjecture the probable grounds of claim, against some of which he at great expense prepares to defend himself, but which at the trial may turn out to be wholly imaginary. This of itself would be a hardship upon a defendant in any action, but in ejectment where there are no pleadings would be a positive injustice. It is however only necessary to state how the party claims, as by conveyance, descent, &c., and from whom without

Claimant's title, stating it with reasonable certainty. (*c*) 19 Vic. c. 43, s. 222.

Such notice limited to one claim of title.

5. (*d*) Such notice shall not contain more than one mode in which title is set up, without leave of the Court or a Judge, (*e*) and at the trial the Claimant shall be confined to

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exhibiting the whole chain of title: section 5, and notes. Claimant is confined to proof of the title stated in his notice: section 5 of this act. It was at one time held that a judge at nisi prius had no power to amend a notice of title: *Morgan et al* v. *Cook et al*, 18 U. C. Q. B. 599. But it is now otherwise held: *Chadsey* v. *Ransom*, 17 U.C. C.P. 629; *Parsons* v. *Ferriby*, 26 U. C. Q.B. 380. Where plaintiff claimed the land as part of lot 6, and defendant defended first as part of lot 5, and no notices of title were attached to the writ, it was held that plaintiff was not bound to prove title to lot 6: *Cascaden* v. *Conway*, 17 U. C. Q. B. 598.

(*c*) Though the notice to be annexed to the writ may be very general in its terms, it must be neither vague nor obscure. A compliance with the spirit and intention of the section must be made. Defendant may if necessary have an order for particulars: *Watson et al* v. *Brewer*, 4 Prac. R. 202. A plaintiff in ejectment having under the old law opened his case as heir-at-law of the patentee, was not allowed to change his ground and show himself entitled under the statute of limitations: *McKinley* v. *Bowbeer*, 11 U. C. Q. B. 86. So where since this act the plaintiff claimed as devisee of F. and defendant under a sheriff's deed of F's lands, it was held that plaintiff could not in answer rely upon the statute of limitations: *Fields* v. *Livingston et al*, 17 U. C. C. P. 15. So where plaintiff claimed by direct chain from the patentee of the crown, and defendant under a lease, it was held that plaintiff could not in answer rely upon a forfeiture of the lease, not having set out the forfeiture in his notice of title: *Pettigrew* v. *Doyle*, 17 U. C. C. P. 34; affirmed in appeal, *Ib.* 459. This doctrine applies to a plaintiff claiming to avoid his lease on the ground of infancy: *Hartshorn* v. *Earley*, 19 U. C. C. P. 139. It is the duty of the judge at the trial to prevent the plaintiff in reply setting up a case which he did not set up at first as part of his case: *Orser* v. *Vernon*, 14 U. C. C. P. 573. But an objection that the title relied on is not the same as that mentioned in the notice, will not be allowed after the trial: *Penlington* v. *Brownlee*, 28 U. C. Q. B. 189. Interrogatories referring to the defence will not be allowed in an action of ejectment: *West* v. *Holmes*, 3 U. C. L. J. 72; but see *Phillpotts* v. *Harrison*, 4 U. C. L. J. 86. As to interrogatories referring to plaintiff's title in a personal action: see *Finney* v. *Forwood et al*, L. R. 1 Ex. 6; *The Derby Commercial Bank, Limited*, v. *Lumsden et al*, L. R. 5 C. P. 107; see further note *q* to section 190 of C. L. P. Act. *Quære.* May interrogatories be administered in ejectment now that separate provision is made for the action and no provision for administering interrogatories: see note *a* to section 1.

(*d*) Taken from latter part of C. L. P. Act, 1856, section 222, which in that act was new and original.

(*e*) Claimant may set up any number of conveyances from the grantee of the crown of respective portions of land claimed, such being but *one mode* of setting up title: *Grimshaw* v. *White et al*, 12 U.C. C.P. 521. Where plaintiff, an executrix, claimed title by virtue of "a mortgage made by the defendant," held that she was not restricted to proof of a mortgage to herself, but might show one to her testator: *Skeahon* v. *Whelan*, 24 U. C. Q. B. 174. Defendant applied *ex parte* for leave to state in the notice of his title required by this section not only a paper title from the crown, through various parties to himself, but also a possessory title by length of possession in himself and others, through whom he claimed,

proof of the title set up in the notice; (*f*) but the Claimant shall not be required to set out in such notice the date or particular content of any Letter Patent, Deed, Will or other instrument or writing, which shows or supports his title, or the date of any marriage or death, unless it be specially directed by order of the Court or a Judge. (*g*) 19 Vic. c. 43, s. 222.

SERVICE.

Service of Writ.

6. (*h*) The Writ shall be served in the same manner as a declaration in Ejectment was formerly served, (*i*) or in such

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and to set up in his defence both of said modes of title. The application was founded upon an affidavit of the defendant that he could establish a good possessory title for over twenty years through the person from whom deponent purchased; that he could also establish a good paper title to the same land from the crown, through various persons to himself, deponent; that it would tend to the accomplishment of justice if he should be allowed to state in the notice required to be filed with his appearance both of the said modes of making title "he being desirous of establishing a paper title, but lest he should fail in his defence from being unable to procure the witnesses necessary to prove all such paper title, he desires to set up also his title by possession." An order was made absolute in the first instance: *Todd* v. *Cann et al*, 2 U. C. L. J. 232, *per* Burns, J. No amendment can be allowed so as to enable a claimant to set up grounds of claim other than such as are specified in his notice: *Morgan et al* v. *Cook et al*, 18 U. C. Q. B. 599.

(*f*) But still is, subject to what is stated in note *c* to section 4, at liberty by any means in his power to defeat the title set up by his opponent: *Canada Company* v. *Weir*, 7 U. C. C. P. 341.

(*g*) It is only necessary to state how the party claims, as by conveyance, descent, &c., and from whom, without exhibiting the whole chain of title: *Coltman et al* v. *Brown*, 16 U. C. Q. B. 133. But in ejectment for breach of covenant contained in a lease, the particular covenant and the particulars of the breach should be specified in general terms: *Kenny et al* v. *Shaughnessy*, 3 U. C. L. J. 29; see also *Doe d. Birch* v. *Phillips*, 6 T. R. 597.

(*h*) Taken from C. L. P. Act 1856, section 223; the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 170. Founded upon the first report of the Common Law Commissioners, section 92.

(*i*) It is enacted that the *writ* shall be served in the same manner as a *declaration* in *ejectment* was formerly served. This provision is similar to that of repealed Stat. 14 & 15 Vic. cap. 114, s. 2, which enacted that the writ should be served "in the same manner as a *declaration* in ejectment is at present served." Of the section here annotated it may be said, as has been said of the repealed enactment, that a good deal of difficulty will and must inevitably arise upon so loose an expression as that already quoted: *Riddell* v. *Briar*, 2 Cham. R. 201, *per* Burns, J. The repealed statute declared that the writ should be served "in the same manner" as the "declaration," not "declaration and notice," the latter of which under the former practice required *explanation* at the time of service. It was consequently held under Stat. 14 & 15 Vic. cap. 114, that service of the writ without explanation of its contents was sufficient: *Riddell* v. *Briar*, 2 Cham. R. 201. The writ itself now says all that is necessary to be said by way of explanation: *Fothergill* v. *White*, 14 L. T. N.S. 768; see also *Edwards* v. *Griffith*, 15 C.B. 397. It may be

manner as the Court or a Judge may order. 19 Vic. c. 43, s. 223.

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served during the long vacation between 1st July and 21st August: *Doe d Shortis* v. *Roe*, 2 Cham. R. 106. The words "in the same manner" mean that service upon a wife, child, servant, agent, or other person, which, in the case of a declaration and notice, would have been good service, shall under this act be a sufficient service of the writ. Thus:

As to a sole defendant.

1. *Personal service.* The object of service in any case is to notify defendant of intended proceedings against him. Personal service when it can be effected is always to be preferred, and is obviously the most satisfactory mode of bringing the proceeding to the notice of the party. Of this fact it is always necessary to satisfy the court with a view to ulterior proceedings. In ejectment a prominent feature of personal service is, that it will be good though not effected upon the premises sought to be recovered: *Savage* v. *Dent*, 2 Str. 1064; *Doe d. Daniell* v. *Woodroffe*. 7 Dowl. P. C. 494. There may be personal service, though the writ be not placed in the corporal possession of defendant. Thus if with full notice of the intention of the party trying to effect the service defendant designedly thwart him by refusing to have anything to do with the writ or otherwise misconduct himself with a similar intent: *Halsal* v. *Wedgwood*, Barnes, 174; *Bugshaw d. Ashton* v. *Toogood*, *Ib.* 185; *Short d Elmes* v. *King*, *Ib* 188; *Fenn d Knights* v. *Dean*, *Ib.* 192; *Doe d. Visger* v. *Roe*. 2 Dowl. P. C. 449; *Doe d. Frith* v. *Roe*, 3 Dowl. P. C. 569; *Doe d. Ross* v. *Roe*, 7 Scott, 846; *Doe d. Hunter* v. *Roe*, 5 Dowl. P. C. 553; *Doe d Colson* v. *Roe*. 6 Dowl. P. C. 765; *Doe d Lowndes* v. *Roe*, 7 M. & W. 439; *Doe d. Roberts* v. *Roe*, 6 Scott N. R. 833; *Doe d Clifton* v. *Roe*, 7 Jur. 701; *Doe d. Hellier* v. *Roe*, *Ib* 800; *Doe d. Mann* v. *Roe*. 11 M. & W. 77; *Doe d. Hope et al* v. *Roe*. 3 C. B. 770. Where personal service has been effected and default is made in appearance, judgment may be signed upon filing the writ together with an affidavit of service: R. G. pr. 92. But if the service effected do not amount to personal service, then before signing judgment, leave must be obtained by a rule of court or judge's order: *Ib.* This requirement is analogous to the old practice of moving for judgment against the casual ejector. Whenever the service was personal the rule for judgment was absolute, in the first instance. In other cases the rule was *nisi* only. It might be a question under this section whether a service not personal must not be authorized by the court or a judge before such service is made, in which case the application should be supported by affidavit of inability to effect personal service. There are many analogous rules of practice. Had the act read "a judge shall approve and by order confirm," there would be no doubt that the order intended ought to be made *after* service. Further as to what constitutes personal service see note *v* to section 16, C. L. P. Act.

2. *Service upon the wife.* Before moving for an order or rule for judgment it will be necessary to show some service which if not personal would be considered sufficient in the case of an ejectment under the old practice. Service upon the wife of defendant if living with him will be sufficient. And if the wife be living with her husband at the time of service it is immaterial whether she reside upon the premises sought to be recovered or elsewhere, the only test being her residence with her husband. Service under such circumstances raises a very strong presumption that the husband has been made acquainted with the proceeding. In these cases the fact of such residence and place of service should be made to appear on affidavit: *Doe d. Morland* v. *Bayliss*, 6 T. R. 765; *Goodright d Waddington* v. *Thrustout*, 2 W. Bl. 800; *Jenny d. Preston et al* v. *Cutts*, 1 B. & P. N. R. 308; *Doe d. Wingfield* v. *Roe*, 1 Dowl. P. C. 693; *Doe d. Boullott* v. *Roe*. 7 Dowl. P. C. 463; *Doe d. Marquess of Bath* v. *Roe*, *Ib* 692; *Doe d. Grove* v. *Roe*, 8 Jur. 338; *Doe d. Grange* v. *Roe*, 1 Dowl. N.S. 274; *Doe d. Croley* v. *Roe*, 2 Dowl.

N.S. 344; *Doe d. Royle et al* v. *Roe*, 4 C. B. 256; *Doe* v. *Roe*, 17 L. J. Ex. 176. If the wife, with a full knowledge of the intention of the party to serve her, of her own wrong and by her own misconduct wilfully prevent the service from being completed, the service notwithstanding may be held sufficient: see *Doe d. Dry* v. *Roe*, Barnes, 178; *Miles d. Farmer* v. *Thruxtout*, *Ib* 180; *Doe d. Courthorpe* v. *Roe*, 2 Dowl. P. C. 441; *Doe d. George* v. *Roe*, 3 Dowl. P. C. 541; *Doe d. Nash* v. *Roe*. 8 Dowl. P. C. 305. Indeed service upon a stranger on the premises with a subsequent acknowledgment from the wife that the papers had come to her hands, has been held sufficient: *Doe d. The Governors of the Greycoat Hospital* v. *Roe*, 7 M. & G. 537. But service on a stranger found upon the premises and not shown to be a resident there is of itself insufficient: *Doe d Story* v. *Roe*, 4 M. & G. 843. Service upon the widow of defendant, he being dead in the house at the time, has been held to be insufficient: *Doe d Crouch* v. *Roe*, 13 L. J. Q. B. 80. However, there may be circumstances under which service upon a widow would be clearly sufficient: see *Doe d. Pamphilon* v. *Roe*, 1 Dowl. N.S. 186.

3. *Service on a son daughter, or other member of the family.* This mode of service may be held sufficient, provided it can be shown by admission of the tenant or otherwise that the paper served was served on the premises and actually reached defendant: see *Doe d. Cockburn* v *Roe*, 1 Dowl. P. C. 692; *Doe d. Protheroe* v. *Roe*. 4 Dowl. P. C. 385; *Doe d. Agar* v. *Roe*, 6 Dowl. P. C. 624; *Doe d. Fowler* v. *Roe*, 11 Jur. 309; *Doe d. Eaton* v. *Roe*, 7 Scott, 124; *Doe d Overy* v. *Roe*, 1 D. & L. 803; *Doe d. Crippe* v. *Walker*, 7 Jur. 745; *Doe d. Harris* v. *Roe*, 1 Dowl. N.S. 704; *Doe d. Jenkins* v. *Roe*, 8 Jur. 39; *Doe d. Gibbard* v. *Roe*, 3 M. & G. 87; *Loe d Pattison* v. *Roe*, 10 Jur. 34; *Doe d Farncombe et al* v. *Roe*, 10 Jur. 525; *Doe d. Fowler* v. *Roe*, 11 Jur. 309; *Doe d. Chaffey* v. *Roe*, 9 Dowl. P. C. 100; *Doe d Ginger* v. *Roe*, *Ib*. 336; *Doe d Threader* v. *Roe*, 1 Dowl. N.S. 281; *Doe d Morgan* v. *Roe*, *Ib*. 543; *Doe d. Taylor* v. *Coutes*, 8 Jur. 20; *Doe d Royle* v. *Roe* 4 C. B. 258; *Doe d. Gray* v. *Roe*, 5 O.S. 483; *Doe d. Hunter et al* v. *Roe*, 3 U. C. Q. B. 127.

4. *Service on a servant, agent, clerk, or other employee.* This mode of service if effected on the premises, and if there be reason to believe that the defendant had notice thereof, may be held sufficient: see *Doe d Baring* v. *Roe*, 6 Dowl. P. C. 456; *Doe d Fisher* v. *Roe*. 2 Dowl. N.S. 225; *Doe d Bower* v. *Roe*, *Ib*. 923; *Doe d Middleton* v. *Roe*, 1 D. & L. 149; *Doe d. Read* v. *Roe*, 1 M. & W. 633; *Doe d Lord Dinorben* v. *Roe*, 2 M. & W. 374; *Anon* 6 Jur. 371; *Doe d. Dobler* v. *Roe*, 2 Dowl. N.S. 333; *Doe d. Harleigh* v. *Roe*, 11 Jur. 18; *Doe d. Reynolds* v. *Roe*, 1 C. B. 711; *Doe d. Watson* v. *Roe*, 5 C. B. 521. Service upon a person in apparent possession, who professed to be agent of the tenant, who was abroad, without circumstances showing facts whence agency might be inferred, was held to be insufficient; *Doe d Nottage* v. *Roe*, 1 Dowl. N.S. 750; see also *Doe d Johnson* v. *Roe*, 12 L. J. Q. B. 97. If after the decease of defendant a servant, &c., remain in possession, such servant, if he refuse to give up possession, may be ejected as a tenant in possession: *Doe d Atkins* v. *Roe*. 2 Chit. R. 179. Service on the managing clerk of the tenant, who was an attorney, was held to be insufficient: *Anon* 1 Jur. 1105; but see *Doe d. Bower* v. *Roe*. 2 Dowl. N.S. 923. Service on a tenant of part of the premises, who was not named in the writ, held insufficient: *The Queen* v. *Benson*, 1 Prac. R. 221. In the case of a lunatic having a committee, service should be made on such committee: *Anon* Loft. 401; if not, then on himself, the lunatic: *Doe d Gibbard* v. *Roe*, 9 Dowl. P. C. 844; *Doe d. Brown* v. *Roe*. 6 Dowl. P. C. 270; or person having the care or custody of the lunatic, though not appointed by a regular committee: *Doe d* —— v. *Roe*. 7 Jur. 725; *Doe* v. *Roe*, Barnes, 190; *Doe d. Lord Aylesbury* v. *Roe*. 2 Chit. R. 183.

As to several defendants.

Service upon one of two or more joint tenants in possession is sufficient: *Doe d. Clothier* v. *Roe*, 6 Dowl. P. C. 291; *Doe d. Overton* v. *Roe*, 9 Dowl. P. C. 1039;

If possession vacant.

7. (*j*) **In case of a vacant possession, service may be by posting a copy of the writ and notice upon the door of the dwelling-house or other conspicuous part of the property.** (*k*) **19 Vic. c. 43, s. 223.**

Doe d. Worthay v. *Roe*, 10 Jur. 984; *Doe d. Bennet* v. *Roe*, 7 C. B. 127. So service was allowed as to three defendants in possession, though made on one of the three only, and though it was not sworn that there was a joint tenancy: *Right* v. *Wrong*, 2 Chit. Rep. 175; but such service, though sufficient for a rule *nisi* for judgment, might not, it is apprehended, be sufficient for a rule absolute in the first instance: *Doe d. Field* v. *Roe*, *Ib.* 174. Service upon one of several joint tenants, when the writ is directed to that one only, will not, it is apprehended, in any event have effect against the others not named: *Doe d. Braby* v. *Roe*, 10 C. B. 663. Where there were three several tenants, it was held that the copy of the notice of ejectment might be directed to each individual tenant for whom it was intended: *Doe* v. *Roe*, 8 Jur. 360. If there be nothing to show a joint tenancy of several persons in possession, all should be served: see *Doe d. Lord Darlington* v. *Cook et al*, 4 B. & C. 259; *Doe d. Bell* v. *Roe*, 3 O.S. 64. But if the service be made on an original tenant, who appears, he cannot afterwards object that his sub-tenants are in possession and have not been served: *Roe* v. *Wiggs*, 2 B. & P. N. R. 330. It has been held that where lodgers cannot be served, service on the keeper of the house at the house is sufficient for a rule *nisi* for judgment: *Doe d. Threader* v. *Roe*, 1 Dowl. N.S. 261. If service be perfect as to two or three defendants, judgment may be obtained as to such as have been regularly served: *Doe d. Murphy* v. *Moore et al*, 2 Chit. Rep. 176. In proceedings against railway and other public companies, service upon the president, secretary, or other public officer, is in general sufficient. This more particularly if there be a provision in the statute incorporating the company that papers shall be so served: *Doe d. Bromley* v. *Roe*, 8 Dowl. P. C. 858; *Doe d. Bayes* v. *Roe*, 16 M. & W. 98; *Doe d. Fisher* v. *Roe*, 2 Dowl. N.S. 225; see further *Doe d. Weeks* v. *Roe*, 5 Dowl. P. C. 405; *Doe d. Fishmongers' Co.* v. *Roe*, 2 Dowl. N.S. 689; *Doe d. Kirschner* v. *Roe*, 7 Dowl. P. C. 97; *Doe d. Dickens* v. *Roe*, *Ib.* 121; *Doe d. Smith* v. *Roe*, 8 Dowl. P. C. 509; *Doe d.* —— v. *Roe*, 1 D. & L. 873. Service in cases not provided for by any precedent may be made "in such manner as the court or judge shall order:" as to which see *Doe d. Pope* v. *Roe*, 7 M. & G. 602; *Doe d. Dovaston* v. *Roe*, 5 Scott, N. R. 174; *Doe d. Haggett* v. *Roe*, 6 Jur. 950. Where a tenant underlet part of the premises and deserted the remainder, and his under-tenants were served, it was held that the lessor of the plaintiff was entitled to judgment as to the part of the premises occupied, and to take possession of the remainder as upon a vacant possession: *Doe d. Henson* v. *Roe*, 1 D. & L. 657. It is unnecessary for the person serving a writ of summons in ejectment to make the endorsement of such service within three days as required by section 19 of the C. L. P. Act: *Leeson* v. *Higgins*, 4 Prac. R. 340; but see *Vandeleur* v. *Smith*, 3 Ir. C. L. R. 86.

(*j*) Taken from C. L. P. Act, 1856, section 223, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 170. Founded upon the first report of the Common Law Commissioners, section 92.

(*k*) A party who proceeds on a vacant possession should perform everything he does in such a case more regularly than in the case of a contested possession: *Anon.* 2 Chit. Rep. 188. If the premises have been abandoned, proceedings may be had as on a vacant possession: *Doe d. Laundy* v. *Roe*, 12 C. B. 451; but there may in such a case be circumstances under which the proceedings ought to be as on a contested possession: *Ib.* It is not declared in what manner the writ shall be directed in proceeding on a vacant possession. A writ directed to "the assignees and personal representatives of S. B. deceased" (the last occupier) has

APPEARANCE.

8. (*l*) **The persons named as Defendants in the Writ, or any of them, may appear within the time appointed;** (*m*) **and with the appearance shall file a notice addressed to the Claimant, stating that besides denying the title of the Claimant, the party asserts title in himself, or in some other person (stating who), under whom he claims, and setting forth the mode in which such title is claimed, in like manner, to the same extent, and subject to the same conditions, rules and restrictions as are hereinbefore set forth in respect to the notice of a Claimant's title,** (*n*) **and the giving proof thereof at the trial. 19 Vic. c. 43, s. 224.**

When tenant to appear and notice to be thereupon given.

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been held regular: *Harrington* v. *Bytham, assignees of*, 2 C. L. Rep. 1033; 28 L. & Eq. 443. And *per cur.* "the writ does very well in its present form, as nobody is thereby made liable for costs." Service of summons by posting same on a conspicuous part of the dwelling-house deemed good service, the tenant being resident abroad: *Lord Clifden* v. *The Casual Ejector*, Sm. & Bat. 61.

(*l*) Taken from C. L. P. Act, 1856, section 224, the first part of which was taken from Eng. Stat. 15 & 16, cap. 76, s. 171. Founded upon the first report of the Common Law Commissioners, section 93, and the remainder of it original.

(*m*) *i. e.* An appearance may be entered as a matter of course "by the persons named in the writ." Any person not named in the writ, if in possession, may apply to be permitted to defend under the next succeeding section. The time limited for appearance is sixteen days: section 3, Form No. 1. The appearance serves the purpose of a plea, and is the defence to the action, and the person appearing may limit his defence to part of the premises named in the writ: section 12. Landlords may, in right of their tenants, appear under section 9 pursuant to section 11. It was in one case held that to entitle the tenant to move against the declaration, notice, or other proceedings under the old practice, it was necessary for him to appear to the action, because without "appearance there is no *locus standi* in the court:" *Doe d. Williamson et al* v. *Roe*, 3 D. & L. 328; see also *Doe d Simpson* v. *Roe*, 6 Dowl. P. C. 469. Security for *costs* cannot be obtained before appearance: *Crowe et al* v. *McGuire*, 3 U. C. L. J. 205.

(*n*) Defendant appeared to a summons in ejectment, but by mistake the plaintiff's name in the appearance was written "Samuel" instead of "Thomas," and thereupon judgment was signed; the judgment was set aside on an affidavit of merits and on payment of costs: *Street* v. *McDonell*, 2 Prac. R. 65. Where defendant either omits to file with his appearance the notice required by this section or files an irregular one, he will be allowed to amend on payment of costs: *Kane* v. *Kane*, 2 U. C. L. J. 213; *Trust and Loan Co.* v. *Elliott et al*, 3 U. C. L. J. 69, *Thompson* v. *Welch*, *Ib.* 133. If plaintiff refuse to state or receive the amount of the costs of the amendment, then amendment may be made prior to payment of costs: *Duffill* v. *Lawder*, 4 U. C. L. J. 137. The defendant is confined to proof of the title claimed in his notice, but is at liberty to defeat, and that without going into his title, the title set up by plaintiff: *Canada Company* v. *Weir*, 7 U. C. C. P. 341. Indeed the mere filing of an appearance without any notice of defence puts the plaintiff to proof of title: *Fairman* v. *White*, 24 U. C. Q. B. 123; *Shore et al* v. *McCabe et al*, 10 U. C. C. P. 26. But if plaintiff proves his title, defendant, without a notice of title, will be debarred from going into his

Landlords may appear.

9. (*o*) Any other person not named in the Writ, may, by leave of the Court or a Judge, appear and defend, on filing an

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defence: *Ib* 31. The omission of the words "besides denying the title of the plaintiff," in the notice of defence, does not entitle plaintiff to recover without proof of the title stated in his notice: *Ib* 30. Defendant, by the simple appearance, may show title out of the plaintiff, but not in himself, defendant, or any one under whom he claims: *Burke* v. *Battle*. 17 U. C. C. P. 478. A judge in chambers has no power to order a defendant to file a notice of title, and in default thereof that plaintiff may sign judgment: *Fairman* v. *White*, 24 U. C. Q. B. 123. It was at one time held in the Queen's Bench that if defendant, besides denying plaintiff's title, claimed title under the plaintiff, that plaintiff was thereby relieved from proof of title: *Brandon* v. *Cawthorne*, 19 U.C. Q.B. 368; *Cartwright et al* v. *McPherson*, 20 U. C. Q. B. 251; but the Common Pleas were of a contrary opinion: *Thompson et al* v. *Falconer*, 13 U.C. C. P. 78; see also *Colby et al* v. *Wall*, 12 U.C. C. P. 93. Finally the court of Queen's Bench became so constituted that each of its members had in the Common Pleas joined in a construction of the statute opposed to that previously adopted in the Queen's Bench, and in order to prevent differences of decision between the two courts on this point expressly overruled *Brandon* v. *Cawthorne* and *Cartwright et al* v. *McPherson*: *McGee* v. *McLaughlin*, 23 U. C. Q. B. 90. The rule, therefore, in both courts now is that a simple appearance without notice puts plaintiff to proof of title, that plaintiff is not relieved from such proof by reason of any thing contained in the defendant's notice of title, and that unless defendant file a notice of title in the event of plaintiff proving his title, defendant will be precluded from going into a defence of his title. But defendant having put plaintiff to proof of title and taken exceptions thereto, cannot then set up a tenancy under him: *Wilson* v. *Baird*, 19 U. C. C. P. 98. Defendant allowing plaintiff to prove title at the trial, without, however, cross-examining his witnesses or otherwise taking objection to the title proved, is at liberty to show title under the plaintiff as tenant for years: *Hartshorn* v. *Earley*, *Ib* Where in ejectment the plaintiff claimed as assignee of a mortgage made by defendant, and defendant by his notice of title claimed under a deed made by the mortgagee, it was held that defendant might show he was an infant when he executed the mortgage: *Grace* v. *Whitehead*, 16 U. C. Q. B. 50 Where defendant in his notice claimed the whole premises under a conveyance from a third party, he was not allowed at the trial to set up that he was tenant in common with the plaintiff and insist upon proof of ouster: *McCallum* v. *Boswell*, 15 U. C. Q. B. 343; see also *Leech* v. *Leech et al*, 24 U. C. Q. B. 321.

(*o*) Taken from C. L. P. Act, 1856, section 225, the origin of which was Eng Stat. 15 & 16 Vic. cap. 76, s. 172. Founded upon the first report of the Common Law Commissioners, section 94.

The principle of this section is not new. It is the same as involved in 11 Geo. II. cap. 19, s. 13, the language of which is as follows: "That it shall and may be lawful for the court where such ejectment (*i. e* against a tenant in possession, his landlord not being an occupier) shall be brought to suffer the landlord or landlords to make him, her, or themselves, defendant or defendants, by joining with the tenant or tenants to whom such declaration in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords of any part of the lands, tenements, or hereditaments for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule that by the course of the court the tenant in possession, in case he or she had appeared, or ought to have done; then the court where such ejectment shall be brought shall and may permit such landlord or landlords so to do, and to order a stay of execution upon

affidavit shewing that he is in possession of the land either by himself or his tenant. 19 Vic. c. 43, s. 225.

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such judgment against the casual ejector, until they shall make further order therein." It was said by a learned judge that between this statute and the C. L. P. Act there is no difference, except that the latter gives to the court or a judge powers which the former statute gives to the court alone: *Butler* v. *Meredith*, 11 Ex. 93, *per* Parke, B. In the construction of the Stat. of Geo. II. it was held that the word "landlord" extended to all persons claiming title consistent with that of the occupant. Thus a mortgagee, though out of possession: *Doe d. Tilyard* v. *Cooper*, 8 T. R. 645; when interested in the result of the action: *Doe d. Pearson* v. *Roe*, 6 Bing. 613; an heir-at-law, though out of possession: *Doe d. Hiblethwaite et al* v. *Roe*, 3 T. R. 783, *n*; a devisee in trust: *Lovelock d. Norris* v. *Doncaster*, 4 T. R. 122. But a person claiming in opposition to the occupant's title was clearly not entitled to defend as landlord: *Driver d. Ozenden et al* v. *Lawrence*, 2 W. Bl. 1259; *Doe d. Horton* v. *Rhys*, 2 Y. & J. 88; *Doe d. Mee et al* v. *Litherland et al*, 4 A. & E. 784; *Doe* v. *Challis* 17 Q. B. 166. The affidavit should show the interest of the applicant: *Croft* v. *Lumley*, 4 El. & B. 608; *Webster et al* v. *Horsburgh*, 3 U. C. L. J. 32; *McDermott* v. *Keeling*, 7 U. C. L. J. 150. Where a defendant was by mistake described as "landlord" in the consent rule, it was held that at the trial he might show that a third party was tenant to the lessor of the plaintiff: *Doe d. Fellowes et al* v. *Alford*, 1 D. & L. 470. If a person made landlord has no real interest in the premises, relief may be given to plaintiff: *Doe d. Carr et al* v. *Jordan* 4 Scott, 370. The time within which application for leave to appear should be made by a landlord is sixteen days after service of the writ, and at least before judgment for non-appearance It has been held that in the absence of collusion between the plaintiff and occupant, the court will not set aside a regular judgment in order to let in a landlord who had not received any notice of the proceedings: *Doe d. Thomson* v. *Roe*, 4 Dowl. P. C. 115; see also *Doe d. Ledger* v. *Roe* 3 Taunt. 506; *Goodtitle* v. *Badtitle*, 4 Taunt. 820; *Mercer* v. *Bond*, 3 U. C. L.J. 150; but see *Turley* v. *Williamson*. 13 U. C. C. P. 581. Where a landlord defrayed the costs of an ejectment in the name of an illiterate person who gave a cognovit and *retraxit*, the court set them aside: *Doe d. Locke* v. *Franklin*, 7 Taunt. 9. Where, owing to ignorance of the party or his attorney, judgment had been signed, leave to defend was given upon terms. *Doe d. Pollen* v. *Roe*. W. W. & D. 371. So where the attorney made affidavit that he had received instructions for entering an appearance, which he neglected owing to matters personally affecting himself: *Doe d. Shaw* v. *Roe*. 13 Price, 260; see also *Doe d. Mullarky et al* v. *Roe*, 11 A. & E. 333. So in other cases upon the merits and upon the terms where the step was an advancement of justice without much inconvenience to plaintiff, and especially where no writ of possession had been executed: *Doe d. Meyrick* v. *Roe*, 2 C. & J. 682; *Doe d. Troughton* v. *Roe* 4 Burr. 1996; see also *Dobbs* v. *Passer*. 2 Str. 975. Where collusion can be shown, a landlord may be let in to defend even after a writ of possession executed: *Doe d. Grocers' Co* v. *Roe*, 5 Taunt. 205; *Hunter* v. *Keightley et al*, 3 U. C. L. J. 68. And where a judgment is set aside and an order made for possession to be restored, that order must be obeyed under penalty of a contempt: *Corbett d. Clymer* v. *Nicholls*, 2 L. M. & P. 87; and if necessary a writ of restitution may issue: *Doe d. Whittington* v. *Hurds*, 20 L. J. Q. B. 406.

The possession intended is an actual not a legal possession merely: *Thompson* v. *Tompkinson et al*, 11 Ex. 442; *Whitworth* v. *Humphries*, 6 Jur. N.S. 231. Thus it has been held that a tenant by *elegit* cannot be admitted to defend: *Croft* v. *Lumley*, 24 L. J. Q. B. 78. Much less is a person who has recovered a judgment in ejectment but who has never issued a writ of possession nor taken possession of the premises entitled to make application under this section: *Thompson* v. *Tom-*

In what office appearances to be entered.

10. (*p*) All appearances (*q*) shall be entered and all sub-

kinson et al, 11 Ex. 442. But a sufficient *prima facie* right of actual possession will satisfy the court. It is not desirable on interlocutory motions to decide questions of title. The court, when it decides upon the application of a landlord or other person sworn to be in possession, that he is entitled to defend, does so without at all deciding upon the rights of the parties: *Croft* v. *Lumley*, 4 El. & B. 608. Thus in ejectment to recover an opera house on the ground that the tenant ha. committed a forfeiture, application was made for leave to appear and defend the action by a grantee from the lessee of a private box for a term of years, and it was sworn that the applicant was "in possession of the box," the court granted the leave without coming to any decision on the effect of the instrument under which applicant claimed: *Ib.* The intention of the statute is that whether a landlord be in possession by his own personal and actual possession, or by that of his tenant, he shall be allowed to come in and defend on satisfying the court or a judge that he has the possession. There is no power to impose terms on the applicant under such circumstances: *Butler* v. *Meredith*, 11 Ex. 85, Parke, B. *dubitante*. A person who swore she was in possession, and that defendant was not when served with the summons, was allowed to appear, although the defendant named in the writ had previously confessed judgment, upon which a writ of possession issued: *Harrington* v. *Harrington*, 3 U. C. L. J. 30. So where applicant disclosed title and swore that he was in possession, though not named in the writ: *Webster et al* v. *Horsburgh*, *Ib.* 32. So upon an affidavit of defendant's attorney, "that since receiving instructions to defend for defendant, deponent has discovered that one O. M. is living on the west half of the land sought to be recovered in this action, and that said O. M. claims under the same title as defendant; that deponent will not be able to communicate with said O. M. to enable him to obtain his affidavit within the time allowed for appearing to the writ:" a summons granted to show cause why O. M. should not be allowed to appear and defend, was afterwards made absolute: *Caricaller* v. *Wessells*, Chambers, Oct. 22, 1856, *MS. per* Burns, J. A person answering the description of landlord according to the decided cases, is entitled as *a matter of right* to be let in to defend: *Butler* v. *Meredith*, 11 Ex. 85. So that in the case of a landlord residing out of the jurisdiction, the court has no power to impose a condition that he shall give security for costs: *Ib* : but see *Doe d. Hudson* v. *Jameson*, 4 M. & Ry. 470. But after judgment in ejectment he may be left to bring his action: *Cameron et al* v. *Murphy*, 4 Prac. R. 132. As to modes of appearance see next section and notes thereto.

(*p*) Taken from C. L. P. Act, 1856, section 226, which in that statute was an original enactment.

(*q*) Where a person not named in the writ has under section 9 obtained leave to appear and defend, he *must* enter an appearance entitled in the action against the parties named in the writ as defendants, and forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he be suing in person: R. G. pr. 93. *After* appearance and notice the person or persons admitted to defend must be named in the issue book, nisi prius record, &c.: *Heron* v. *Elliott et al*, 1 U. C. L. J. N.S. 156; and the appearance may be in *lieu* of the defendants named in the writ or *with* them, according to the terms of the order allowing the third party to appear and defend: *Butler* v. *Meredith*, 11 Ex. 85. Where the landlord appeared in lieu of the original defendant, and by mistake the name of the original defendant was retained in the record, whereby, under the old law of evidence, the evidence of the original defendant was excluded, the court set aside the record and verdict for irregularity: *Peebles et al* v. *Lottridge et al*, 19 U. C. Q. B. 628. Where the judge's order did not express whether the landlord was to defend in lieu of the defendants named in the writ or with them, nor did this

sequent proceedings conducted in the Office from which the Writ issued. (*r*) 19 Vic. c. 43, s. 226.

ance and proceedings to be entered.

11. (*s*) Any person appearing to defend as landlord in respect of property whereof he is in possession, in person or by his tenant, (*t*) shall state in his appearance that he appears as landlord, (*u*) and he may set up any defence which a landlord appearing in an Ejectment has heretofore been allowed to set up, and no other. (*uu*) 19 Vic. c. 43, s. 227.

What landlords to do if they appear.

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appear from his appearance or notice, and the defendants named in the writ did not appear, judgment was signed against them by default, the issue with the landlord was carried down and tried, and a verdict rendered for the plaintiff on which judgment was entered, and costs taxed against the landlord only, and a writ of possession issued against all the defendands, *held* proceedings regular: *Haskins* v. *Cannon et al*, 2 Prac. R. 334. Defendant being tenant was served with a writ of ejectment, which he handed to his landlord, who took it to his attorney, and the attorney, instead of getting leave to defend, entered an appearance in the name of the original defendant without his authority. The court, at the instance of the tenant, refused to interfere, leaving him to his remedy against the landlord or his attorney: *Moran et al* v. *Schermerhorn*, 2 Prac. R. 261. The entry of appearance, though a plea, does not so far put the cause at issue as to prevent defendant obtaining security for costs: *Crowe et al* v. *McGuire*, 3 U. C. L. J. 205. In ejectment brought against A. & B. by consent of plaintiff's attorney, an appearance was entered for S. as landlord in lieu of the tenants. The notice of trial, however, was entitled as against A. & B. and notice was served on plaintiff's attorney, warning him that this would be objected to. The nisi prius record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, no one appearing for the defence. On application to set aside the verdict, plaintiff objected that the affidavits filed by defendant entitled as against S. alone were wrongly entitled, and that no judge's order was shown entitling S. to defend. *Held* that plaintiff was precluded from the last objection; but *held* that the notice of trial was wrongly entitled: *Jones* v. *Seaton*, 26 U. C. Q. B. 166.

(*r*) See note *p* to section 3.

(*s*) Taken from C. L. P. Act, 1856, section 227, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 173.

(*t*) Instead of "in person or by his tenant," read in Eng. C. L. P. Act "only by his tenant." A tenant served with a writ of ejectment is bound to notify his landlord: section 50; and the landlaud may obtain leave to appear and defend under section 9. As to form of appearance see note *q* to section 10.

(*u*) The words "as landlord" should be written on the face of the appearance paper. As to the word "landlord" see note *o* to section 9.

(*uu*) The landlord may be allowed to appear either with his tenant or in lieu of him: see note *q* to section 10. In either case he is bound to set up no title inconsistent with that of the tenant when the latter is the occupant: see note *o* to section 9. "The theory and principle of a man out of possession defending as landlord is this—that whereas ordinarily the only person who is competent to defend is the person who is in possession of the premises, the law allows one who is in possession by a tenant to come in and defend as if he were himself actually

DEFENCE.

The defence may be limited if notice given.

12. (*v*) Any person appearing to such Writ may limit his defence to a part only of the property mentioned therein, (*w*) describing that part with reasonable certainty (*x*) in a notice entitled in the court and cause, and signed by him or his Attorney, (*y*) which notice must be served within four days after appearance (*z*) upon the Attorney whose name is

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in possession—not in respect of his having a right but in respect of his being actually in possession by a tenant who acknowledges him as his landlord:" *Clarke* v. *Arden*, 16 C. B. 252, *per* Maule, J. A person who pays rent to another person as his landlord, whether rightfully or wrongfully his landlord, the latter is nevertheless his landlord in fact: *Ib.* 250, *per* Jervis, C. J. The landlord, therefore, when admitted to defend, may, so long as he sets up a defence consistent with that of the occupant, assert *his* right to the land in dispute as against the plaintiff in the ejectment: *Doe d Willis* v. *Birchmore et al*, 9 A. & E. 662; *Roe d Blair et al* v. *Street et al*, 4 N. & M. 42; *Doe d Wawn* v. *Horn et al*, 3 M. & W. 333. But where a person defends as landlord, the occupiers having suffered judgment by default, *he* cannot object that *they* have not received notice to quit: *Doe d. Davies* v. *Creed*, 5 Bing. 327. Where under the old practice two persons delivered separate consent rules, each claiming to defend as landlord, the one for the whole of the premises claimed in the action, the other for part of them specifically named in the consent rule, under adverse titles, the court ordered the consent rules to be amended by confining them respectively to such parts of the premises as were really in the occupation of each party or his tenants: *Doe d. Lloyd et al* v. *Roe*, 15 M. & W. 431.

(*v*) Taken from C. L. P. Act, 1856, section 228, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 174. Founded upon the first report of the Common Law Commissioners, section 95. Substantially a re-enactment of section 3 of repealed Stat. 14 & 15 Vic. cap. 114.

(*w*) In an action of ejectment under 14 & 15 Vic. cap. 114, for "lot No. 1, in broken front concession of the township of Escott, in the county of Leeds," the defendant, by his notice, limited his defence "to a part of the said lot mentioned in the said writ, that is to say, &c.:" setting out such part with metes and bounds. At the trial defendant admitted that plaintiff was the owner of the lot described in the writ, but contended that the tract for which he defended was not embraced within the patent: *Held* that having in express terms defended for "a part of lot No. 1, mentioned in the writ," he was not entitled at the trial to contend that what he defended for was *not* a part of No. 1, and on that account not the property of the plaintiff: *Darling* v. *Wallace* 9 U. C. Q. B. 611. Under the old practice defendants were allowed to limit their defences by describing the property for which they defended in the consent rule: *Doe d Lloyd et al* v. *Roe*. 15 M. & W. 431. If at present the property be not so described in the writ as to convey to defendant a correct idea of the property sought to be recovered, both as to situation and extent, application may be made to a judge in chambers for better particulars: section 13.

(*x*) See notes to section 13.

(*y*) The notice may be to this effect—*Title of Court—Cause*—Take notice that the defendant, A. B., limits his defence to part only of the property mentioned in the writ—that is to say, to all and singular the parcel described as follows, commencing at a post, &c.

(*z*) Computation of time: see C. L. P. Act, section 342, and notes thereto.

endorsed on the Writ, if any, (*a*) and, if none, then filed in the proper Office; (*b*) and an appearance without such notice confining the defence to a part shall be deemed an appearance to defend for the whole. (*c*) 19 Vic. c. 43, s. 228.

If notice too vague, a better may be ordered.

13. (*d*) Want of "*reasonable certainty*" in the description of the property, or part of it, in the Writ, or in the notice of defence, or in the notice of the title given by either party, (*e*) shall not nullify them, (*f*) but shall only be

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(*a*) Whose name must be indorsed pursuant to section 3.

(*b*) *i. e.* Office whence writ issued.

(*c*) The appearance when filed may not, in the first instance, indicate how far, or for what, defendant intends to defend. After the expiration of four days, if there be no notice limiting the defence, plaintiff may assume the appearance to be for the whole property described in the writ: see *Doe d. Davenport* v. *Rhodes et al*, 11 M. & W. 600. Where an appearance was entered for the defendant, and plaintiff, without waiting four days, made up and served the issue book, together with notice of trial, and subsequently within the four days the defendant gave notice limiting his defence, which notice did not appear upon the issue book or record, the notice of trial was held irregular: *Grimshaw* v. *White et al*. 12 U. C. C. P. 521. The defendant is entitled by the statute to the four days for limiting his defence and to eight days for notice of trial, and an order will not be granted to plaintiff to amend the issue served before the four days have elapsed without prejudice to the notice of trial: *Buchanan* v. *Bettes et al*, 2 U. C. L. J. N.S. 71; *Phillips et al* v. *Winters*, 3 Prac. R. 312. But where the notice limiting the defence is a mere trick to throw plaintiff over the assizes, summary relief may be given to the plaintiff: see *Vrooman* v. *Vrooman*, 17 U. C. C. P. 523. Where there is a limited defence in ejectment it is irregular for plaintiff to enter judgment without first obtaining a judge's order or a rule of court authorizing the entry of judgment: *Harold et ux* v. *Stewart et al*, 3 Prac. R. 335. *Semble*, in such case the execution should follow the judgment, and there should be an entry on the roll to authorize the deviation from the writ: *Ib*.

(*d*) Taken from C. L. P. Act, 1856, section 229, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 175. Founded upon the first report of the Common Law Commissioners, section 96.

(*e*) The declaration in ejectment, which was the first proceeding in the action when ejectment was a fictitious mode of procedure, gave no information as to the property sought to be recovered. There being in such a case a want of "reasonable certainty," the court or a judge had power, upon application of the casual ejector, to order particulars to be delivered: see *Doe d. Saxton et al* v. *Turner*, 11 C. B 896; which order might be obtained before appearance: *Doe d. Vernon et al* v. *Roe*, 7 A. & E. 14; and if obtained but not obeyed for more than four terms, it became necessary for the lessor of plaintiff to give a term's notice of intention to proceed: *Ib* However, the order, unless expressly made a stay of proceedings, did not so operate: *Doe d Roberts et al* v. *Roe*, 2 D. & L. 673. Orders have been made, upon application of the lessor of the plaintiff, for defendant to specify the particular property for which he defended: *Doe d. Webb et al* v. *Hull*, *Doe d. Saunders* v. *The Duke of Newcastle*, 7 T. R. 332, *notes*.

(*f*) A want of "reasonable certainty" is at most an irregularity on the part of either party, which his opponent may waive: see R. G. pr. 106. If the latter

ground for an application to a Judge for better particulars of the land claimed or defended, or of the title thereto, which a Judge may order in all cases. (*g*) 19 Vic. c. 43, s. 229.

Defence of persons out of possession may be restrained.

14. (*h*) The Court or a Judge (*i*) may strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants. (*j*) 19 Vic. c. 43, s. 230.

JUDGMENT BY DEFAULT.

Judgment in case of non-appearance or defence for part only.

15. (*k*) In case no appearance be entered within the time appointed, or if an appearance be entered, but the defence be limited to part only, (*l*) the Plaintiff may sign a Judgment that the person whose title is asserted in the Writ shall recover possession of the land, or of the part thereof to which the defence does not apply, (*m*) which Judgment, if

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take a step which in itself raises a presumption that he is informed of the premises intended, and nature of claim or defence in respect thereof respectively, he will be prevented from raising the objection: *Ib.*

(*g*) The remedy for want of reasonable certainty is *only* ground for an application "for better particulars," and therefore is no ground of application to set aside the writ, &c. as in other cases of irregularity. Particulars may in ejectment be had of plaintiff's title: *Watson et al* v. *Brewer*, 4 Prac. R. 202.

(*h*) Taken from C. L. P. Act, 1856, section 230, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 176. Founded upon the first report of the Common Law Commissioners, section 97.

(*i*) *Relative powers:* see note *w* to section 48, C. L. P. Act.

(*j*) The power "to strike out or confine appearances and defences" is one that the courts have for a long time exercised independently of any statutory enactment: see *Doe d. Lloyd et al* v. *Roe*, 15 M. & W. 451.

(*k*) Taken from C. L. P. Act, 1856, section 231, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 177. Founded upon the first report of the Common Law Commissioners, section 98. Substantially a re-enactment of 14 & 15 Vic. cap. 114, s. 5. The section applies as well to ejectments on a vacant as on a contested possession: *Harrington* v. *Bytham, Assignees of*, 2 C. L. Rep. 1033.

(*l*) If defendant served be not in possession his course is not to appear: *Harper* v. *Lowndes*, 15 U. C. Q. B. 430; but to move to strike his name out of the writ: *Hall* v. *Yuill*, 2 Prac. R. 242. Where defendant when served gave notice that he did not deny plaintiff's title, and had given up possession before service of writ, but at same time entered an appearance, it was held that plaintiff could not upon the notice sign judgment by default: *Harper* v. *Lowndes*, 15 U. C. Q. B. 430; and was not bound at the trial to prove that defendant was in possession when the writ issued: *Ib.*

(*m*) If the writ has been personally served, an affidavit of service must be filed before signing judgment in default of appearance: R. G. pr. 92. If not personally

for all, may be in the form No. 2, or to the like effect, and if for part, may be in the form No. 3, or to the like effect. (*n*) 19 Vic. c. 43, s. 231. Form of.

ISSUE.

16. (*o*) In case an appearance be entered, the claimants or their Attorney (*p*) may, without any pleadings, (*q*) make If appearance is entered, plain-

served a judge's order or rule of court must be obtained to authorize the signing of judgment: *Ib.* One month's notice of intention to proceed after the lapse of four terms is as much necessary in ejectment as in other actions: *Bishop of Toronto* v. *Cantwell*, 11 U. C. C. P. 371; but see *Scrope* v. *Paddison*, 4 L. T. N.S. 254. The judgment when by default can only be for recovery of possession of the land simply, and not for costs: *White* v. *Cochlin*, 2 Prac. R. 249; *Haskins* v. *Cannon et al*, *Ib.* 334; *Bleecker* v. *Campbell*, 4 U. C. L. J. 136; but see *Roots* v. *Farniscott et al*, 2 Prac. R. 239.

(*n*) In an action for *mesne* profits a judgment by default for claimant may, except as provided in section 19 of this act, be replied to by way of estoppel against the defendant in the same manner as a judgment by default in any other form of action: *Wilkinson* v. *Kirby*, 15 C. B. 430. Where in trespass for *mesne* profits, to which the pleas were, first, not possessed, and secondly, that before the said time when, &c. one W. was seised in fee and demised for 21 years to T. who demised to the defendant, who entered by virtue of the demise and replication by way of estoppel as to trespass since 26th October, 1853, setting out a writ of ejectment in which the plaintiff was claimant, and dated 26th October, 1853, directed to the defendant as tenant in possession, and judgment thereon by default and entry of plaintiff by virtue of the judgment, the replication was held on demurrer to be good to both pleas: *Ib.* *Held* also that it was of possession had been issued or executed, and that entry by plaintiff if not necessary to aver notice of the proceedings to defendant or that the writ necessary was sufficiently averred: *Ib.* *Held* also that the estoppel was from the date of the writ, and that plaintiff's title would be presumed to continue, until by rejoinder it was shown to have been determined. *Ib.* But unless the judgment in ejectment be replied by way of estoppel it is not conclusive: see *Steen* v. *Steen*, 21 U. C. Q. B. 454. It is competent to claimant in ejectment, after having established his right to possession, to give evidence of and recover *mesne* profits in the same action: section 60.

(*o*) Taken from C. L. P. Act, 1856, section 232, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 178. Founded upon the first report of the Common Law Commissioners, section 99.

(*p*) *i. e.* By claimants, if suing in person, or by their attorney, if suing by attorney.

(*q*) In ejectment under this act there is no plea of any kind allowed, and hence defendant will not be allowed to plead an equitable defence: *Neave* v. *Avery et al*, 16 C. B. 328. The claimant by his writ does all that is necessary to assert title in himself, and defendant by his appearance does all that is necessary to deny it, Thereupon the parties are at issue. It has been held that if plaintiff prove title in himself to any part of the premises sued for he must have a verdict: *Doe d. Sheldon* v. *Ramsay et al*, 7 U. C. Q. B. 446; see also *Doe d. Strong* v. *Jones*, *Ib.* 385. But it has also been held the plea of not guilty, under the old form of ejectment, was divisible so that claimant might have a verdict as to the part of the

tiff may make up issue.

up an issue by setting forth the Writ and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons defending, so that it may appear for what defence is made, and directing the Sheriff to summon a Jury; (*r*) and such issue, in case

Form of.

defence is made for the whole, may be in the form No. 4, or to the like effect, and in case defence is made for part, may be in the form No. 3, or to the like effect. (*s*) 19 Vic. c. 43, s. 232.

VEXATIOUS DEFENCES.

Provision respecting vexatious defences without merits.

17. (*t*) It being desirable in actions of Ejectment brought against persons who are merely intruders not to prevent claimants from recovering land to which they have just claim on account of some want of technical form in their title, or some imperfection not affecting the merits of their case and of which mere strangers to the title having no claim or colour of legal claim to the possession should not be permitted to take advantage; (*u*) the claimant or his Attor-

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property sought to be recovered, to which he proved title, and defendant as to the residue: *Doe d Bowman et al* v. *Lewis* 2 D. & L. 667; see also *Doe d. Errington* v. *Errington*. 4 Dowl. P. C. 602; *Doe Smith et al* v. *Webber*, 2 A. & E. 448; and the latter now seems to be the correct rule of law: *Alcock et al* v. *Wilshaw*, 6 Jur. N.S. 628; s. c. 29 L. J. Q. B. 143; *McNab* v. *Stewart*, 15 U. C. C. P. 189; and the costs in such case are divisible: *Doe Hellyer* v. *King*. 2 L. M. & P. 493; *McBride* v. *Lee*, 16 U. C. C. P. 315. As to amendments in ejectment at nisi prius: see note *n* to section 21. If the jury, though defendant is entitled to a part of the land sought to be recovered, find a general verdict for plaintiff, the court, instead of ordering a new trial, may restrain the execution of the writ of possession: *Ferrier* v. *Moodie*, 12 U. C. Q. B. 379; *Johnston et al* v. *McKenna*, 3 Prac. R. 229. But the jurisdiction to restrain the *habere* will only be exercised in a very plain case: *Hemmingway* v. *Hemmingway*, 11 U. C. Q. B. 317.

(*r*) In ejectment it is not necessary to annex the notices of title on either side to the issue book: *Campbell* v. *Pettit*, 26 U. C. Q. B. 507.

(*s*) When a statute enacts that a proceeding shall be in a given form, that form must be followed: see *Warren* v. *Love*, 7 Dowl. P. C. 602; *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.

(*t*) Taken from our old Real Property Act, 4 Wm. IV. cap. 1, s. 52.

(*u*) In general plaintiff in ejectment must recover by the strength of his own title and not by the weakness of that of his adversary: *Doe d. Wilkes* v. *Babcock*, 1 U. C. C. P. 392; *Eccles et al* v. *Paterson et al*. 22 U. C. Q. B. 167. But to this rule an exception is here created, *i. e.* as against persons "who are merely intruders" in favor of persons having a just claim, but also having some technical defect in their title or some imperfection not affecting the merits of the case, &c. Where it is necessary to leave the question of possession in the defendant for twenty years in a doubtful point to the jury, the case is not one in which the

ney, in any action of Ejectment, may serve a notice upon the Defendant in words or to the effect following: (*v*)

Form of notice.

Take notice that I claim the premises for which this action is brought, as the *bonâ fide* purchaser thereof from A. B. ——, or as heir-at-law of A. B. of ——, (*or otherwise, as the case may be,*) and that you will be required to show, upon the trial of this cause, what legal right you have to the possession of the premises. (*w*) 4 Wm. IV. c. 1. s. 52.

Formal defects in plaintiff's title aided, when and how.

18. (*a*) If upon the trial of such Ejectment, the evidence of title given by the Claimant satisfies the Court and Jury (*b*) that he is entitled in justice to be regarded as the proprietor of the land, or is entitled to the immediate possession thereof for any term of years, but that he cannot shew a perfect legal title by reason of some want of legal form in some instrument produced, or by reason of the defective registration of some will or instrument produced, or from any cause not within the power of the Claimant to remedy by using due diligence, (*c*) the Jury, under the direction of the Court, may find a verdict for the Claimant, unless the Defendant, or his counsel, upon being required by the other party so to do, gives such evidence of title as shews that he is the person legally entitled, or that he does *bonâ fide* claim to be the person legally entitled to the land, by reason of the defect in the title of the

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plaintiff can be allowed to remedy legal defects in his title by availing himself of the provisions of this statute: *Doe d. Lyons* v. *Crawford*, 6 O.S. 334.

(*v*) See note *s* to preceding section.

(*w*) Unless defendant show title the jury may be directed to find a verdict for the plaintiff, notwithstanding his defective title: section 18.

(*a*) Taken from our old Real Property Act, 4 Wm. IV. cap. 1. s. 52.

(*b*) Both court *and* jury must be satisfied. This intends a submission by the judge to the jury of the question of the justice of plaintiff's demand.

(*c*) Claimant must satisfy the court and jury—

1. That he is entitled in justice to be regarded as the proprietor of the land;
2. *Or* is entitled to the immediate possession thereof for any term of years;
3. *But* that he cannot show a perfect legal title—
   1. By reason of some want of legal form in some instrument produced;
   2. *Or* by reason of the defective registration of some will or instrument produced;
   3. *Nor* from any other cause not within the power of the claimant to remedy by using due diligence.

Claimant, or that he holds, or does *bonâ fide* claim to hold, under the person so entitled. (*d*)

The verdict to be endorsed as rendered under this Act.

19. (*e*) When a verdict is rendered under the authority of the foregoing provision, it shall be endorsed as given under the seventeenth and eighteenth sections of this Act, and it shall be stated in the *postea* and entry of the judgment to have been so given; (*f*) and in any action thereafter brought for the *mesne* profits, such Judgment in Ejectment shall not be evidence to entitle the Claimant to recover. (*g*) 4 Wm. IV. c. 1, s. 52.

SPECIAL CASES.

A special case may be stated.

20. (*h*) By consent of the parties and by leave of a Judge, (*i*) a special case may be stated (*j*) as in other actions. (*k*) 19 Vic. c. 43, s. 233.

(*d*) If the jury find the foregoing in favor of the claimant, they may find for the claimant unless—

1. The defendant or his counsel, upon being required by the other party so to do, gives such evidence of title as shows that he is the person legally entitled;

2. *Or* that he does *bonâ fide* claim to be the person legally entitled to the land by reason of the defect in the title of the claimant;

3. *Or* that he holds or does *bonâ fide* claim to hold under the person so entitled.

See note *u* to preceding section.

(*e*) Taken from old Real Property Act, 4 Wm. IV. cap. 1, s. 52.

(*f*) The object of this indorsement is with a view to what follows, viz. to avoid the judgment being used in an action for *mesne* profits as evidence of title.

(*g*) This is an exception to the general rule, which is that judgments in ejectment even by default are evidence of title in an action for *mesne* profits: see note *n* to section 15.

(*h*) Taken from C. L. P. Act, 1856, section 233, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 179. Founded upon the first report of the Common Law Commissioners, section 100.

(*i*) Whenever a thing is directed to be done by leave of a judge, an application to that judge is intended. Applications to a judge should generally be supported by affidavit. The proceedings under this section will be by summons and order. The summons should be entitled in the court and cause, and be "to show cause why a special case should not be stated in this cause pursuant to section 20 of the Ejectment Act."

(*j*) For precedents of special cases in ejectment: see *Doe d. Kimber* v. *Cafe*, 7 Ex. 675; *Armstrong* v. *Bowdidge*, 16 C. B. 358; *O'Toole* v. *Browne*, 3 El. & B. 572.

(*k*) See C. L. P. Act, section 150.

QUESTIONS OF FACT.

Questions to be tried if no special case agreed upon.

21. (*l*) If no special case be agreed to, the Claimants may proceed to trial in the same manner as in other actions, (*m*) and the particulars of the claim and defence and of the notices of Claimant and Defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the Claimants; (*n*) and except in the cases hereinafter mentioned, (*o*) the question at the trial shall be whether the statement in the Writ of the title of the Claimants is true or false, and if true, then which of the Claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; (*p*) and the entry of the

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(*l*) Taken from C. L. P. Act 1856, s. 234, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 180. Founded upon the first report of the Common Law Commissioners, section 101.

(*m*) It is directed that claimants "may" proceed to trial in the same manner as in other actions, and of course serve notice of trial and take other steps necessary before a trial in ordinary actions: see C. L. P. Act, section 201, *et seq.* So after the lapse of four terms without a proceeding, a months' notice of intention to proceed must be given: *Bishop of Toronto* v. *Cantwell*, 11 U. C. C. P. 371.

(*n*) The "particulars of claim" "if any" here mentioned in contradistinction to notice of the nature of claimant's title, may mean the "better particulars," for which provision is made in section 13. So "particulars of defence" "if any," may mean the notice limiting the defence, under section 12. Delivery of particulars of the claim or defence will not require to be proved when they are appended to the record: *Macarthy* v. *Smith*, 8 Bing. 145. If they materially vary from the particulars delivered, claimant's right to recover may be placed in jeopardy. Should claimants go to the jury and recover upon any ground varying from the particulars proved to have been delivered, defendant might be entitled to move for a new trial: see *Morgan* v. *Harris*, 2 C. & J. 461. Should, however, defendant at the trial be in a position to prove the variance, he might have the point reserved, and afterwards in the event of claimant's recovering move the court to enter a nonsuit: *Ib.* In either case it would be in the discretion of the court to order the attorney for the claimant to pay the costs of the first trial: *Ib.* The want of an appearance on the nisi prius record may be amended at the trial: *Johnson et al* v. *McKenna*, 10 U. C. Q. B. 520; *Dewson* v. *St. Clair*, 14 U. C. Q. B. 97. So the notice of title or defence: see note *b* to section 4. Defendant may waive such irregularities by appearing and defending, without objecting to them: *The Queen* v. *Adams et al*, 3 U. C. C. P. 404; *Johnson et al* v. *McKenna*, 10 U. C. Q. B. 520.

(*o*) The cases to which reference is made are, it is believed, such as are mentioned in section 30, which provides for the case of claimant being a joint tenant, tenant in common, or coparcener, in which the jury, to entitle claimant to a verdict, must find an actual ouster.

(*p*) This section seems to sanction the principle of the issue being divisible either as to the property sought to be recovered, or the number of parties appearing as claimants: see note *q* to section 16. Under the 14 & 15 Vic. cap. 114, it was held in a case where the jury found a general verdict for plaintiff,

Form of entry of verdict.

verdict may be made in the form No. 5, or to the like effect, with such modifications as may be necessary to meet the facts. (*q*) 19 Vic. c. 43, s. 234.

If claimant was entitled at service of Writ, but not afterwards.

22. (*r*) In case the title of the Claimant as alleged in the Writ existed at the time of service thereof, (*s*) but had expired before the trial, (*t*) the Claimant shall, notwithstanding, be entitled to a verdict, according to the fact, that he was entitled at the time of serving the Writ, and to judgment for his costs of suit. (*u*) 19 Vic. c. 43, s. 235.

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though defendant was in fact entitled to a part of the land mentioned in the writ; the court held that this was not a ground for a new trial, but for an application to restrain plaintiff from taking possession of such part: *Ferrier* v. *Moodie*, 12 U. C. Q. B. 379. Under this act, execution may issue "for the recovery of possession of the property *or of such part thereof* as the jury have found the claimant entitled to:" section 26. The court has power to grant a new trial as to half of a lot of land, allowing the verdict to stand as to the other half, when the granting of such new trial is in the *discretion* of the court: *McNab* v. *Stewart*, 15 U. C. C. P. 189. When the new trial is ordered *ex debito justitiæ*, the whole record is thrown open. And this will be done in ejectment, unless the defendant consents to a verdict standing for such portion of the land as plaintiff has failed to make title to: *Ib.*

(*q*) If it appear that claimant though having had a right to possession when he issued and served his writ, has none at the time of trial, the verdict may be entered according to the fact: section 22. If defendant appear and claimant do not, the latter may be nonsuited: section 24; in which case defendant will be entitled to judgment for his costs: R. G. pl. 24.

(*r*) Taken from C. L. P. Act 1856, section 235, the origin of which is Eng. Stat. 15 & 16 Vic. cap. 76, s. 181.

(*s*) The writ should be directed to the persons in possession of the land sought to be recovered, "to the possession whereof claimant is entitled." The writ alleges a right of claimant to possession, but does not show any *title*. Upon this ground exception has been taken by several legal writers to the language of that part of the Eng. C. L. P. Act which corresponds with the section here annotated. But under our C. L. P. Act there is a distinction to be observed, in this, that in addition to the allegations of the writ, there must be a notice annexed to the writ disclosing "the nature of claimant's title:" sections 4, 5, of this act.

(*t*) Which fact in general can only be established by testimony given at the trial.

(*u*) This was always the law. Upon a special verdict in ejectment under the old practice, it appeared that the lessor of plaintiff claimed as tenant for life. And upon an affidavit of his death it was moved that all proceedings might be stayed, since it would be useless to contest the suit upon the merits. *Sed per curiam*, "Though the possession cannot be obtained, yet the plaintiff has a right to proceed for damages and costs; all we can do is to oblige him to give security for costs, now that the lessor is dead, as we do in the case of infant lessors, who cannot enter into the common rule:" *Thrustout d. Turner* v. *Grey et al*, 2 Str. 1055; see also *Doe d. Butt* v. *Rous*, 22 L. J. Q. B. 111. And a claimant is entitled to a writ of possession notwithstanding the lease under which he claims, though

PLACE OF TRIAL MAY BE CHANGED.

Court may alter place of trial on affidavit.

23. (*a*) On the application of either party, and on grounds shewn by affidavit, (*b*) the Court or a Judge (*c*) may order that the trial (*d*) shall take place in any County other than that in which the *Venue* is laid, (*e*) and such order being suggested on the record, the trial may be had accordingly. (*f*) Vic. c. 43, s. 236.

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in force at the time the action was commenced, has expired before the trial, unless the defendant show affirmatively that the claimant has no title whatever: *Gibbins* v. *Buckland*, 1 H. & C. 736; but see *Buckland* v. *Gibbins*, 32 L. J. Ch. 391. In ejectment, it appeared that the plaintiff had recovered judgment in dower against the defendant's landlord, who had submitted to the claim, and that defendant after this action had attorned to the plaintiff and paid rent to the attorney; *Held* that plaintiff was entitled to a verdict and judgment for costs, but not to a writ of possession: *Fisher* v. *Johnston*, 25 U. C. Q. B. 616. A defendant in ejectment, who claimed under an unregistered lease subsequent in date to an unregistered lease under which the plaintiff derived title, registered his lease after action brought and before trial: *Held* that plaintiff, notwithstanding, was entitled to a verdict and judgment for his costs: *Ryan* v. *Landers*, 9 Ir. C. L. R. 487.

(*a*) Taken from C. L. P. Act, 1856, section 236, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 182. Substantially the same as Stat. U. C. 7 Wm. IV. cap. 3, s. 14, which is taken from Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 22, and which extends to all local actions.

The venue in ejectment is local: *McKindsey* v. *Johnston*, 14 U. C. Q. B. 209. ...plication for a change as to the place of trial must be grounded upon an ...avit showing a necessity for the change intended. It is not declared what shall be a sufficient ground for the application. Under the Act of William, any cause would be sufficient which showed that *delay* or *expense* would be avoided, and that it would be more *convenient* to have the trial take place in the county to which a change was desired: see *Doe d. Baker* v. *Harmer*, 1 H. & W. 80. If the ground be that an *impartial* trial cannot be had in the county in which the venue is laid, that ground must in a local action be made out in a most satisfactory manner to induce the court to interfere: see *Briscoe* v. *Roberts*, 3 Dowl. P. C. 424; see further note *h* to section 89, C. L. P. Act.

(*c*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*d*) The power conferred by the Act of William is to order the "issue" to be tried in any other county than that in which the venue is laid. Hence it was held that no application under that statute could be made until issue joined: *Bell* v. *Harrison*, 2 Dowl. P. C. 181; see also *The Guardians of the Youghal Union* v. *Atkinson*, 9 Ir. C. L. R. App. xvii.

(*e*) The summons may be "to show cause why the trial in this cause should not be had in the county of B. and not in the county of A. in which the venue is laid; and why, for that purpose, a suggestion should not be entered on the record that the trial may be had in the said county of B. according to the statute in such case made and provided."

(*f*) The suggestion may be to this effect:—And the plaintiff (*according to the fact*) gives the court here to understand and be informed that on, &c. the honorable, &c. one of the justices, &c. did order that the trial in this cause should take place in the county of B. instead of the county of A. The court refused after

FAILURE OF CLAIMANT OR DEFENDANT TO APPEAR.

Defendant appearing and Claimant making default, and *vice versa*.

24. (*g*) If the Defendant appears, and the Claimant does not appear at the trial, the Claimant shall be non-suited, (*h*) and if the Claimant appear and the Defendant does not appear, the Claimant shall be entitled to recover without any proof of his title. (*i*) 19 Vic. c. 43, s. 237.

SPECIAL VERDICT.

Special verdict, &c.

25. (*k*) The Jury may find a special verdict, (*l*) and

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judgment to change the venue in ejectment when by mistake it had been laid in a county different from that in which the lands were situate: *The Grocers' Co.* v. *Coll*, 9 Ir. C. L. R. App. viii.

(*g*) Taken from C. L. P. Act, 1856, section 237, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 182.

(*h*) And defendant shall be entitled to judgment and his costs of the cause: R. G. pl. 24.

(*i*) *i. e.* to recover possession of the property sought to be recovered. If claimant seek to recover *mesne* profits, whether defendant appear or not, evidence must be offered of the *mesne* profits: section 60.

(*k*) Taken from C. L. P. Act, 1856, section 238, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 184. Founded upon the first report of the Common Law Commissioners, section 102.

(*l*) The origin of a special verdict is the Statute of Westminster II. 13 Ed. I. cap. 30, s. 2. When during the trial of a cause any difficult question of law arises the determination of which is necessary to a finding either for plaintiff or defendant, the jury, instead of finding generally for the one or the other, find specially the facts disclosed upon the evidence before them, and conclude to the effect "that they are ignorant in point of law on which side they ought upon these facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly and assess the damages at such sum, &c. (*according to the nature of the case*), but if the court are of an opposite opinion then *vice versâ*." This form of finding is called a special verdict. However, as on a general verdict the jury do not themselves actually frame the *postea*, so they have in fact nothing to do with the formal preparation of a special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled under the correction of the judge by the counsel on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion; and with respect to other particulars according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered *on record*, and the question of law arising on the facts found is argued before the court *in banc.* and decided by that court as in the case of demurrer: Steph. Pl. 7 ed. 85. The jury must find facts, and not merely the evidence of facts: see *Bird* v. *Appleton*, 1 East. 111. The court cannot draw from other statements in a special verdict any inference of facts necessary to the determination of the case; such facts must be expressly found one way or the other, and if they be

either p: rty may tender a bill of exceptions. (*m*) 19 Vic. c. 43, s. 233.

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not found the court will award a *venire de novo*: *Tancred et al* v. *Christy*, 12 M. & W. 316. The judge ought to make a note of the verdict at the trial, upon which note the special verdict is afterwards prepared in form. Amendments of the special verdict, when in accordance with this note, may be made: *Manners qui tam* v. *Postan*, 3 B. & P. 343; *Bowers* v. *Nixon*, 12 Q. B. 546; provided, however, the alterations be such as to carry out the intention of the jury: *Williams* v. *Breedon*, 1 B. & P. 329; *Richardson* v. *Mellish*, 3 Bing. 334. No alteration of substance can, it seems, be made: *Spencer* v. *Goter*, 1 H. Bl. 78. In one case an amendment was allowed upon an affidavit of what had been proven at the trial: *Mayo* v. *Archer*, 1 Str. 513. The special verdict when drawn up may be set down for argument without *concilium*: R. G. pr. 15; upon request of either party four days before the day on which the same is intended to be argued: *Ib.* The party setting it down must, four days before the day appointed for argument, deliver a copy of the special verdict to each of the judges of the court in which it is set down to be heard: R. G. pr. 17. Notice of argument should thereupon be forthwith given to the opposite party: R. G. pr. 15.

(*m*) The origin of a bill of exceptions is Statute of Westminster II., 13 Ed. I. cap. 31. It is the province of the judge at *nisi prius* to superintend the conduct of a case and to direct the jury upon all matters of law arising out of the case. If the judge in his direction mistake the law the counsel on either side may require him to seal a bill of exceptions stating the point or points in which he is supposed to err. If the statement be truly made the judge is bound to seal it in confession of its accuracy: *Gibbs* v. *Pike*, 9 M. & W. 351; *Corsar et al* v. *Reed*, 21 L. J. Q. B. 18. The cause then proceeds to verdict as usual. The opposite party, for whom the verdict is given, is entitled, as in the common course, to judgment upon such verdict in the court *in banc.* for that court takes no notice of the bill of exceptions. But the whole record being afterwards removed by writ of error, the bill of exceptions is then taken into consideration in the court of error and there decided: Steph. Pl. 7 ed. 84. Thus a bill of exceptions is in the nature of an appeal from the court out of which the record issued for trial after judgment given in that court to one of superior jurisdiction. The points of exception must be in fact taken at the trial: *Doe d. Tolson et al* v. *Fisher*, 2 Bligh. N. R. 9; *Wright* v. *Sharp*, 1 Salk. 288; *Culley* v. *Doe d. Taylerson*, 11 A. & E. 1013, *n.* But the bill is usually settled, drawn up, signed and sealed afterwards: see *Gardner* v. *Baillie*, 1 B. & P. 32. It ought to contain the exceptions made to the directions and ruling of the judge, together with so much of the evidence given at the trial as is necessary to make the exceptions intelligible to the court in error, and furnish grounds for the allowance or disallowance of the exceptions. It is unnecessary that the bill should contain the statement of a verdict within it, although it more commonly does so; for it may be appended to the judgment roll which contains the pleadings, the issue joined, the jury process, the verdict, and the judgment of the court below: *Davies et ux* v. *Lowndes*, 1 M. & G. 482, *per* Tindal, C. J. It is *misdirection* and not *non-direction* that is the proper subject of a bill of exceptions: *McAlpine* v. *Mangnall*, 3 C. B. 517; *Sedley* v. *McGowan*, 7 Ir. C. L. R. 427; *Anderson* v. *Fitzgerald*, 3 Ir. C. L. R. 475; s. c. 4 H. L. C. 484. It is no misdirection to express in strong terms an opinion upon the evidence unless it be manifest that the opinion was not at all warranted: *Davidson* v. *Stanley*, 2 M. & G. 721. The misdirection, if any, on a matter of law, must be material to the decision of the case: *Earl of Norbury* v. *Kitchen*, 7 L. T. N.S. 685. Exception must be made to the particular parts of the charge that are objectionable: *Scanlan et ux.* v. *Sceals et al*, 5 Ir. L. R. 139. The exceptions must be to the ruling of the

JUDGMENTS.

1.—Upon a Finding for the Plaintiff.

Judgment if Claimant recover.

26. (*n*) Upon a finding for the Claimant, (*o*) Judgment may be signed (*p*) and Execution issued for the recovery of

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judge and not to the reasons he may have given for the ruling: *McMahon* v. *Leonard et al*, 4 Ir. C. L. R. 16, 31; see also s. c. 5 Ir. C. L. R. 209, 253. A refusal to nonsuit is not a ground of exception: *Sedley* v. *McGowan*, 7 Ir. C. L. R. 427. Whether the overruling of a challenge to the array can be made the subject of an exception: see *Earl of Aldborough et al* v. *Bland et al*, 7 Ir. C. L. R. 571; see further *The Queen* v. *Whalen*, 28 U. C. Q. B. 2, 108. The party in whose favour the finding on an issue has been obtained cannot except to that finding, although it may have been in an immaterial part of the issue: *Greenham* v. *Gray*, 3 Ir. Jur. N.S. 9. An exception stating what the judge refused to do is improper unless it contain a statement of what the charge was and wherein it was objectionable: *Malcomson et al* v. *Morton*, 11 Ir. L. R. 230. Distinct exceptions to different parts of the charge ought not to be allowed: *Strong et al* v. *Kean et ux*. 13 Ir. L. R. 93. It is not necessary on a bill of exceptions to set out more than enough of the evidence to make the exceptions intelligible: *Watson et al* v. *Clooney*, 1 Ir. C. L. R. 62. Though the exception complain of some erroneous ruling of the judge on a single point, it goes to the whole case: *The Trustees of Evans' Charities* v. *The Bank of Ireland*, *Ib* 424. The exceptions must be taken before the jury is discharged: *Close* v. *Batt*, 1 Ir. Jur. O.S. 256. If it appear that the judge was sufficiently apprised of what the parties intended by the exceptions the court of error will not scan the wording of them too narrowly: *Clooney* v. *Watson*, 2 Ir. C. L. R. 135. The bill of exceptions need only contain what the judge did, and what he was requested to do, and what he refused to do: *Ward* v. *Freeman*, *Ib* 460. The specific question required to be left to the jury should be stated: *Hanks* v. *Cribbin et al*, 7 Ir. C. L. R. 489. In some cases, instead of allowing the exceptions, a *venire de novo* may be awarded: *Thelwall* v. *Yelverton*, 7 Ir. Jur. N.S. 347. The bill may be amended after it is sealed: *Richardson* v. *Mellish*, 3 Bing. 334; see also *Doe d. Church et al* v. *Perkins et al*, 3 T. R. 749. The party who tenders a bill of exceptions is not thereby precluded from moving in arrest of judgment for defects apparent on the face of the original record: *Enfield* v. *Hall*, 2 Lev. 236. A party cannot select one point to go into error, and apply to the court *in banc.* on another. He must elect to take all the points on which he relies into error or none. But if there be any point which could not in any way be taken into error he may apply to the court *in banc.* for a new trial upon that point without abandoning his bill of exceptions: *Adams* v. *Andrews*, 15 Q. B. 1001; *Gregory* v. *Slowman*, 1 El. & B. 360; see also *Fabrigas* v. *Mostyn*, 2 W. Bl. 929.

(*n*) Taken from C. L. P. Act, 1856, section 239, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 185. Founded upon the first report of the Common Law Commissioners, section 103. Substantially a re-enactment of Stat. 14 & 15 Vic. cap. 114, s. 8.

(*o*) The finding must be upon the question whether "the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part, and if to part then to which part of the property in question:" section 21.

(*p*) Which judgment ought to be signed pursuant to section 48. Form thereof see Form No. 5 to this act; and may in some cases be entered *nunc pro tunc*: *Doe d. Hay* v. *Hunt*, 12 U. C. Q. B. 625; *Davy et al* v. *Cameron*, 14 U. C. Q. B. 483; s. c. 15 U. C. Q. B. 175.

possession of the property or of such part thereof as the Jury have found the Claimant entitled to, (*q*) and for costs, (*r*) within the time (not exceeding the fifth day in Term next after the verdict) ordered by the Court or Judge who tried the cause, (*s*) and if no such order be made, then on the fifth day in Term next after the verdict. (*t*) 19 Vic. c. 43, s. 239.

2.—Upon a Finding for Defendant.

Execution and costs.

27. (*u*) Upon a finding for the Defendants, or any of them, (*v*) Judgment may be signed and Execution for costs issued against the Claimants named in the Writ, (*w*) within

Costs to Defendant if

(*q*) See note *u* to section 21.

(*r*) There may be either one writ of execution or separate writs for the recovery of possession and costs at the election of claimant: section 28. It will be observed that the costs are made to follow the judgment as in other actions. But since the C. L. P. Act, as before it, the court in an action of ejectment has jurisdiction to order by rule the parties who really defend to pay the costs of claimant though such parties be strangers to the record: *Hutchinson et al* v. *Greenwood et al*, 4 El. & B. 324. However, to entitle claimant to call upon such third parties being strangers to the record to pay the costs of the action, it must be clearly shown that the defence was conducted by such third parties and was really *their* defence and not that of the party who ostensibly defended: *Anstey et al* v. *Edwards*. 16 C. B. 212; see also *Thornton* v. *Wilkinson*, 11 W. R. 916; *Mobbs* v. *Vandenbrande*, 12 W. R. 405. There can be no costs where judgment is signed by default: see note *n* to section 15. A defendant who in England had been in execution for costs for more than twelve calendar months, was held entitled to his discharge under 48 Geo. III. cap. 123: see *Humphreys* v. *Franks*, 3 C. B. N.S. 765.

(*s*) *Qu.* Is it intended that the court or judge shall have power in ejectment to issue speedy execution? In England there is an express provision to this effect: 2 Geo. IV. & 1 Wm. IV. cap. 70, s. 38. Authority is given to the judge who may try an ejectment cause, in his discretion "to order that judgment may be entered and execution issue in favor of the claimant at the expiration of six days next after the giving of the verdict:" section 61.

(*t*) The Eng. C. L. P. Act here continues, "or within fourteen days after such verdict, whichever shall first happen," which expression has reference to section 120 of Eng. C. L. P. Act, 1852, not adopted by our legislature, allowing execution in all cases to issue in fourteen days after verdict under certain regulations.

(*u*) Taken from C. L. P. Act, 1856, section 240, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 186. Founded upon the first report of the Common Law Commissioners, section 140.

(*v*) It is presumed that if one of several defendants succeed as against plaintiff, such defendant will be entitled to his costs, being an aliquot proportion of the whole costs of the cause.

(*w*) The effect of the judgment is declared to be the same as that of the judgment in ejectment heretofore used: section 49. The costs of a successful defendant may be given by rule against the real claimant, though not named in the writ: *Mobbs* v. *Vandenbrande et ux.* 4 B. & S. 904.

Claimant fail.

the same time, and in like manner as upon a finding for the Claimant. (*x*) 19 Vic. c. 43, s. 240.

EXECUTIONS.

One or more Writs of Execution may issue.

28. (*a*) Upon Judgment for recovery of possession and costs, there may be either one Writ or separate Writs of Execution for the recovery of possession, and for the costs, (*b*) at the election of the Claimant. 19 Vic. c. 43, s. 241.

(*x*) See notes to preceding section. Section 186 of Eng. C. L. P. Act, corresponding with this section, concludes in the same manner as mentioned in note *t* to the preceding section and for the reasons therein assigned.

(*a*) Taken from C. L. P. Act, 1856, section 241, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 187.

(*b*) The judgment in ejectment entitles claimant to possession of the land described in the writ; but he cannot take possession by force. His remedy is by writ of *habere facias possessionem: Doe d. Stevens* v. *Lord*, 6 Dowl. P. C. 256. There may be circumstances under which a writ of restitution would be more proper than a writ of *hab. fac. poss.:* see *Doe d. Pitcher* v. *Roe*, 9 Dowl. P. C. 971; *Doe Whittington* v. *Hards*, 20 L. J. Q. B. 406. The writ of *habere*, like the writ of *fi. fa.* is returnable immediately after the execution thereof: *Doe d. Hudson* v. *Roe*, 18 Q. B. 806. All writs of execution must be directed to the sheriff of some particular county. The writ to deliver possession of land must of course be directed to the sheriff of that county in which the land is situate. And if in that county there be sufficient goods and chattels or other property liable to execution, there would not seem to be any good reason for issuing two separate writs where one might suffice, viz. *hab. fac. poss.* and *fi fa.* A sheriff cannot, under an ordinary writ of *fi. fa.* break outer doors: *Semaynes* case, 5 Rep. 92; *Burdett* v. *Abbott*, 14 East 157; but if he has a writ both for possession and costs, he may, it is presumed, open outer doors to give possession, and then levy for costs. Where a defendant in ejectment, after judgment against him but before writ of *habere* executed, acquired title to the land, the court stayed the execution of the writ of *habere: Helm* v. *Crossin*, 17 U. C. C. P. 156. The execution should follow the judgment, and the judgment, where there has been a limited defence, should be so prepared as to award the execution for the part only recovered: *Harold et ux.* v. *Stewart et al.* 3 Prac. R. 335. As to restraining the execution when plaintiff has by his verdict recovered more than he is entitled to: see note *q* to section 16. Where a writ of *habere* issued within one year after the entry of judgment, an *alias* issued more than six years thereafter was held to be regular: *Johnston et al* v. *McKenna*, 8 Prac. R. 229. Where the sheriff returned to the first writ that "none came to receive possession," the presumption of release of the judgment does not arise in the same manner as if nothing had been done upon the judgment: *Ib.* And it was held that the second writ might be executed by the removal from possession of a person who was the widow of a person that claimed under a judgment defendant: *Ib.* There are some cases which appear to favour the idea that if there be a disturbance of possession recently after possession delivered, the court may, on application, order possession to be restored, and punish by attachment: see *Thompson* v. *Mirehouse*, 2 Dowl. P. C. 200; *Doe d Lloyd* v. *Roe*, 2 Dowl. N.S. 407; *Doe d. Pitcher* v. *Roe*, 9 Dowl. P. C. 971. But the better opinion now appears to be that after the possession of premises recovered in ejectment has been delivered to the

JOINT TENANTS, &c.

As to defendants being joints tenants, tenants in common, &c., admitting right of claimant to, &c.

29. (*c*) In case the action has been brought by some or one of several persons entitled as joint tenants, tenants in common or coparcenary, any joint tenant, tenant in common or coparcener in possession, may, (*d*) at the time of appearance or within four days after, give notice in the same form as the notice of a limited defence, (*e*) that he or she defends as such and admits the right of the Claimant to an undivided share of the property (stating what share), but denies any actual ouster of him, from the property, (*f*) and may within the same time file an affidavit, stating with reasonable certainty, that he or she is joint tenant, tenant in common or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the

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rightful owner by the sheriff and the writ of possession duly returned, the power of the court in the suit is at an end, and if the defendant take possession afterwards the court will not summarily interfere: *Wilson* v. *Chanton et al*, 6 L. T. N.S. 255; *McDermott* v. *McDermott*, 4 Prac. R. 252; *Edwards et al* v. *Bennett*, 5 Prac. R. 161.

(*c*) Taken from C. L. P. Act, 1856, section 242, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 188. Founded upon the first report of the Common Law Commissioners, section 105.

(*d*) *May.* If the notice made necessary by this section be not given, the possession of defendant will be considered adverse and the action maintainable against him without proof of actual ouster: *Scott et al* v. *McLeod*, 14 U. C. Q. B. 574; *McCallum* v. *Boswell*, 15 U. C. Q. B. 343; *Leech* v. *Leech et al*, 24 U. C. Q. B. 321; *Dudgeon* v. *Dudgeon*, 10 Ir. L. R. 534. But see *Lyster* v. *Kirkpatrick et al*, 26 U. C. Q. B. 217; *Lyster* v. *Ramage*, *Ib.* 233.

(*e*) See section 12.

(*f*) At common law the possession of one joint tenant, coparcener, or tenant in common is presumed to be the possession of all: *Ford* v. *Grey*, 1 Salk. 285; *Smales* v. *Dale*, Hob. 120; *Doe d. Barnett et al* v. *Keen*, 7 T. R. 386; and this presumption is only removed by proof of circumstances indicative of an adverse holding. It is clear law that one joint tenant, &c., may so conduct himself as to oust his co-tenants and hold in severalty. Such conduct in law and in fact amounts to an actual ouster, to constitute which, actual force is quite unnecessary. Proof of any circumstances indicating an intention on the part of the tenant in possession to hold to the exclusion of his co-tenants, establishes an actual ouster. Thus thirty-six years sole and unterrupted possession by a tenant in common without any account to or demand made by or claim set up by his co-tenant, was before Stat. 4 Wm. IV. cap. 1, s. 24, held to be a sufficient ground for a jury to presume an actual ouster: *Doe d. Fishar et ux.* v. *Prosser*, 1 Cowp. 217. So proof of a demand of possession by one tenant in common, and a refusal by the other tenant in common, and proof that the latter stated he claimed the whole property: *Doe d. Hellings et ux.* v. *Bird*, 11 East. 49. So where one of several joint tenants authorized a railway company to take possession of the property,

Claimant, (*g*) and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue, the additional question of whether an actual ouster had taken place shall be determined. (*h*) 19 Vic. c. 43, s. 242.

Question to be tried if such joint tenancy, &c. with claimant be found, &c. and the contrary.

30. (*i*) If upon the trial of such issue as last aforesaid, it be found that the Defendant is joint tenant, tenant in common, or coparcener with the Claimant, then the question whether an actual ouster had taken place shall be tried, and unless such actual ouster be proved the Defendant shall be entitled to Judgment and costs; (*j*) but if it be found either that the Defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster had taken place, then the Claimant shall be entitled to Judgment for the recovery of possession and costs. (*k*) 19 Vic. c. 43, s. 243.

DEATH NOT TO ABATE SUIT.

Death of either party

31. (*l*) The death of a Claimant or Defendant shall not

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which the company did: *Doe d. Wawn* v. *Horn et al*, 3 M. & W. 333; s. c. 5 M. & W. 564.

(*g*) In ejectment by one joint tenant, &c., to recover land in the possession of a co-tenant when the action was a fiction, the consent rule confessed only lease and entry but not ouster.

(*h*) Thus it appears that the right of one joint tenant, &c., to maintain ejectment against another, after notice to the claimant admitting his right to recover an undivided share, depends entirely upon proof of an actual ouster. Wanting this, the suit must fail; otherwise the absurdity would arise of a man bringing an action to recover possession of land of which in the eye of the law he is legally possessed.

(*i*) Taken from C. L. P. Act, 1856, section 243, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 189.

(*j*) The provisions of this section necessarily arise out of the preceding one. If it be not proved that the party in possession, being a joint tenant, &c. is holding adversely to claimant, then a recovery in ejectment would be most harassing, and such as the law would never tolerate. On the contrary, under these circumstances, a verdict would pass for defendant, and he would be entitled under this section to judgment and costs.

(*k*) This proposition is the converse of that enacted in the first part of the section and supported by similar principles. In the event of a recovery by claimant, then defendant would be ejected in the ordinary manner and be liable to payment of claimant's costs of suit under this section.

(*l*) Taken from C. L. P. Act, 1856, section 244, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 190.

cause the action to abate, (*m*) but it may be continued as hereinafter provided. 19 Vic. c. 43, s. 244. not to abate action, &c.

32. (*n*) In case of the death of a Claimant, if the right of the deceased Claimant survives to another Claimant, a suggestion may be made of the death, (*o*) which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, (*p*) and the action may proceed at the suit of the surviving Claimant; and if such a suggestion be made Right of one Claimant surviving to another.

(*m*) The abolition of all fictions in the action of ejectment has resulted in this and the following enactments. This section is a mere echo of section 131 of C. L. P. Act. The same may be said of each of the following sections, in so far as they have reference to the revival or continuation of proceedings either before or after judgment. A general clause declaring that ejectment should be conducted as near as may be in the same manner, as personal actions might have saved much useless repetition. When John Doe, a legal myth, was plaintiff in ejectment, he never died, and the death of his lessor, who was the real plaintiff, did not affect the proceeding: *Doe d. Egremont* v. *Stephens*, 10 Jur. 570; *Doe d. Hay* v. *Hunt*, 12 U. C. Q. B. 625; s. c. 1 Prac. R. 202. But now that the real claimant must be the actual plaintiff in this, as in other forms of action, the application of like rules as to reviving or continuing the action as are applied to ordinary actions, is both just and reasonable. The right to costs or liability to them is also a natural result of the same change. Costs formerly in ejectment being only recoverable under the consent rule, which was enforceable by attachment, established a personal liability determinable with the death of the party liable: *Doe d. Harrison* v. *Hampson*, 4 C. B. 745. This section which speaks of the continuation of the action, applies only, it is apprehended, to proceedings before final judgment: see *Jones* v. *Finlay*, 3 Ir. Jur. N. S. 180. Where after a verdict for a sole claimant, taken subject to a special case and before the case came on for argument, the claimant died, the court ordered the case to stand over until after a suggestion had been entered by the legal representative of the claimant: *Denison* v. *Holiday*, 1 H. & N. 61. But this direction, which was erroneous, was not carried out: s. c. *ib.* 650, *n*; and the argument was allowed to proceed on the case as it originally stood, and judgment was afterwards entered *nunc pro tunc*: s. c. 26 L. J. Ex. 228. A similar difficulty arose, and was discussed in *Davy et al* v. *Cameron*, 14 U. C. Q. B. 483; and in the same case the court afterwards allowed the judgment to be entered *nunc pro tunc*: s. c. 15 U. C. Q. B. 175. The death of one of two plaintiffs after judgment (where for all that appears the recovery is joint and survives) does not render necessary a suggestion of the death on the roll or order to support a writ of possession: *Johnston et al* v. *McKenna*, 3 Prac. R. 229.

(*n*) Taken from C. L. P. Act, 1856, section 245, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 191, in effect the same as section 132 of C. L. P. Act.

(*o*) The entry of the suggestion necessary to the continuance of the suit may be made at any time during the progress of the suit and before verdict. If at nisi prius it may be substantially the same as that in note *a* to section 132, C. L. P. Act.

(*p*) The application to set aside a suggestion because of its untruth must be grounded upon an affidavit. The proceedings will be by summons and order. The summons may be "to show cause why the suggestion of the death of C. D. &c. should not be set aside with costs, the same being untrue."

before the trial, (*q*) then the surviving Claimant shall have a verdict, and recover such Judgment as aforesaid, (*r*) upon proof that he was entitled to bring the action either separately or jointly with the deceased Claimant. (*s*) 19 Vic. c. 43, s. 245.

If the right of the deceased claimant does not survive to another, &c.

33. (*t*) In case of the death before trial of one of several Claimants, whose right does not survive to another or others of the surviving Claimants, and the legal representative of the deceased claimant does not become a party to the suit in the manner hereinafter mentioned, (*v*) a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, (*w*) and the action may proceed at the suit of the surviving Claimant for such share of the property as he is entitled to (*x*) and costs. (*y*) 19 Vic. c. 43, s. 246.

One or more of several Claimants

34. (*a*) In the case of a verdict for two or more Claimants, if one of such Claimants dies before execution executed, (*b*) the

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(*q*) It is not clear that under this section a suggestion can be made after trial. Upon a suggestion being made it is enacted in the early part of the section "that the action may proceed," &c. The doubt is as to the peculiar language of the part of the section here annotated, "and if such suggestion shall be made *before* the trial," &c.

(*r*) See section 26.

(*s*) This section appears to provide for the death of one of two or more claimants during the pendancy of a suit, "in case the right of the deceased claimant shall survive to another claimant," and yet at the end of the section enacts that the surviving claimant shall have a verdict if it be made to appear that he was entitled to bring the action "either separately or jointly with the deceased claimant." It is intended that the survivor shall recover, whether entitled in his own right, independently of the deceased, or by survivorship. The next section explicitly provides for the death of one of several claimants whose right does not survive.

(*t*) Taken from C. L. P. Act, 1856, section 246, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 192.

(*v*) Under section 35.

(*w*) See note *p* to section 32.

(*x*) This section is not, like the last, applicable to the death of one of several joint tenants. It applies rather to the death of one of several tenants in common.

(*y*) See section 28.

(*a*) Taken from C. L. P. Act, 1856, section 247, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 193.

(*b*) There may be execution to recover possession of the property and execution to recover costs of suit: section 28. This section has reference exclusively to the

other Claimant may, whether the legal right to the property survives or not, (*c*) suggest the death in manner aforesaid, (*d*) and proceed to Judgment and execution for the recovery of possession of the entirety of the property and the costs; (*e*) but this shall not affect the right of the legal representative of the deceased Claimant, or the liability of the surviving Claimant to such legal representative, and the entry and possession of such surviving Claimant under such Execution shall be considered an entry and possession on behalf of such legal representative in respect of the share of the property to which he is entitled as such representative, (*f*) and the Court may direct possession to be delivered accordingly. (*g*) 19 Vic. c. 43, s. 247.

dying after verdict for them but before execution.

35. (*h*) In case of the death of a sole Claimant, or in case of the death before trial of one of several Claimants whose right does not survive to another or others of the Claimants, the legal representative of such Claimant (*i*) may, by leave of the Court or a Judge, (*j*) enter a suggestion of

Death of sole claimant, or one whose right does not survive to another.

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former. An execution to recover possession of property cannot be said to be "executed" until there has been at least a dispossession of the parties who defended, and perhaps a delivery to claimant or his agent: see section 35; where the language is "and before execution executed by delivery of possession."

(*c*) This seems to have reference to the cases contemplated in sections 32 and 33, provided the death take place "after verdict."

(*d*) *i. e.* In the same manner, and subject to be set aside, if untrue, as provided in the two preceding sections.

(*e*) See section 28.

(*f*) The provisions of this section are peculiar. In case of the death of one of several claimants before "execution executed," the survivor, "whether the legal right to the property shall survive or not," may proceed for the recovery of the possession of the "entirety of the property," and be, it is presumed, tenant in common with, or trustee for, the representatives of the deceased, whenever the representatives derive any interest from the deceased in the land recovered.

(*g*) Although it is enacted that "the Court" may direct possession to be delivered, it is presumed that a judge in Chambers might exercise that power: see *Smeeton et al* v. *Collier*, 1 Ex. 457; see also note *w* to section 48, C. L. P. Act.

(*h*) Taken from C. L. P. Act, 1856, section 248, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 194.

(*i*) *Such claimant, i. e.* either the sole claimant in the action, or one of several claimants in respect of a separate and individual estate or interest.

(*j*) The application must be grounded upon affidavit. In a case where the representative of a deceased sole claimant made application, the affidavit was as

the death, and that he is such legal representative, and the action shall thereupon proceed, (*k*) and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased Claimant, and such Judgment shall follow upon the verdict in favor of or against the person making such suggestion as hereinbefore provided with reference to a judgment for or against such Claimant; (*l*) and if in case of a sole Claimant the suggestion be made after trial and before execution executed by delivery of possession thereunder, (*m*) and the suggestion be denied by the Defendant within eight days after notice thereof, (*n*) or such further time as the Court or a Judge may allow, (*o*) then such suggestion shall be tried, and if upon the trial thereof, a verdict passes for the person making the suggestion, he shall be entitled to such Judgment as aforesaid (*p*) for the recovery of possession and for the costs of and occasioned by the suggestion, and in case of a verdict for the Defendant, the Defendant shall be entitled to such Judgment as aforesaid for costs. (*q*) 19 Vic. c. 43, s. 248.

Death of one of several joint defendants.

36. (*r*) In case of the death before or after Judgment of one of several Defendants who defend jointly, a suggestion may be made of the death, (*s*) which suggestion shall not be

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follows, "1. That this is an action of ejectment brought by plaintiff to recover possession of certain land, being, &c.; 2. That the action was commenced by writ of summons, issued on, &c.; 3. That defendant, on, &c. appeared and defends this action; 4. That on, &c. plaintiff died at, &c.; 5. That plaintiff, by his last will and testament, devised said land to deponent, whereby deponent became and is the legal representative of said plaintiff; 6. That the venue in this action is laid in the county of, &c.": *Stringer* v. *Ammerman*, *MS.* Chambers, Oct. 25, 1856, *per* Burns, J.

(*k*) *i. e.* Upon entry of suggestion.

(*l*) See sections 26, 27 of this act.

(*m*) See note *b* to section 34.

(*n*) See note *i* to section 302, C. L. P. Act.

(*o*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*p*) See section 26 of this act.

(*q*) See section 27 of this act.

(*r*) Taken from C. L. P. Act 1856, section 249; the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 195.

(*s*) The suggestion may be in effect the same as that given in note *m* to section 134, C. L. P. Act.

traversable, but only be subject to be set aside if untrue, (*t*) and the action may proceed against the surviving Defendant to Judgment and execution. (*u*) 19 Vic. c. 43, s. 249.

Death of sole defendant or of all the defendants before trial.

37. (*a*) In case of the death of a sole Defendant, or of all the Defendants before trial, (*b*) a suggestion may be made of the death, (*c*) and such suggestion shall not be traversable, but only be subject to be set aside if untrue, (*d*) and the Claimants shall be entitled to Judgment for recovery of possession of the property, unless some other person appears and defends within a time appointed for that purpose, by the order of the Court or a Judge, made upon the application of the Claimants. (*e*)

After suggestion, judgment may be signed at the time limited by Judge's order.

38. (*f*) The Court or a Judge (*g*) upon such suggestion being made, and upon such application as aforesaid, may order that the Claimants shall be at liberty to sign Judgment at such time as the Court or a Judge thinks fit, unless the person then in possession by himself or his tenant, or the legal representative of the deceased Defendant, appears within such time and defends the action; (*h*) and such order may be served in the same manner as the Writ, (*i*) and in case such person

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(*t*) See note *p* to section 32.

(*u*) See section 28.

(*a*) Taken from C. L. P. Act, 1856, section 250, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 196.

(*b*) Death after verdict is provided for in section 39.

(*c*) The suggestion may be substantially the same as that contained in note *m* to section 134, C. L. P. Act.

(*d*) See note *p* to section 32.

(*e*) The Court or Judge is by order, upon the application of claimant, to fix the time at which the claimant may sign judgment, unless the person then in possession, &c. shall appear, &c. The order intended is a conditional one, granting leave to sign judgment on a day named, unless, &c.

(*f*) Taken from C. L. P. Act, 1856, section 250, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 196.

(*g*) *Relative powers:* see note *w* to section 48, C. L. P. Act.

(*h*) It is designed, in the event of a person being in possession other than the original defendant deceased, that such person shall have notice of the pending action, and be in a position to defend himself before being dispossessed under a judgment obtained against deceased.

(*i*) See sections 6, 7, and notes thereto.

appears and defends, the same proceedings may be taken against such new defendant as if he had originally appeared and defended the action, (*j*) and if no appearance be entered and defence made, then the Claimant may sign Judgment pursuant to the order. (*k*) 19 Vic. c. 43, s. 250.

Death of sole defendant or of all the defendants after verdict.

39. (*l*) In case of the death of a sole Defendant or of all the Defendants, after verdict, the Claimants shall nevertheless be entitled to Judgment as if no such death had taken place, (*m*) and may proceed by execution for recovery of possession without suggestion or revivor, (*n*) and may proceed for the recovery of the costs in like manner as upon any other Judgment for money, against the legal representatives of the deceased Defendant. (*o*) 19 Vic. c. 43, s. 251.

Death before a trial, of a defendant defending separately for part.

40. (*p*) In case of the death, before trial, of one of several Defendants who defends separately for a portion of the property for which the other Defendant or Defendants do not defend, (*q*) the same proceedings may be taken as to such portion as in the case of a sole Defendant, (*r*) or the Claimant may proceed against the surviving Defendants in respect of the portion of the property for which they defend. 19 Vic. c. 43, s. 252.

(*j*) It is presumed that such person may either defend for the whole or for part: section 12.

(*k*) See section 15 of this act.

(*l*) Taken from C. L. P. Act, 1856, section 251, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 197. The principle of this section is similar to that of section 139, C. L. P. Act, which see.

(*m*) Where, after verdict had before the C. L. P. Act, but judgment entered after that act, plaintiff proceeded under this section, *Held*, he was entitled so to do: *McCallum* v. *McCallum*, 2 U. C. L. J. 211.

(*n*) In which case judgment, it is presumed, must be entered against deceased defendant as if living.

(*o*) *i. e.* By suit upon the judgment, or by writ of revivor.

(*p*) Taken from C. L. P. Act, 1856, section 252, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 198.

(*q*) Provision is made by section 41 for the death before trial of one of several defendants, who defends separately for property for which the surviving defendants also defend.

(*r*) Section 37.

41. (*t*) **In case of the death, before trial, of one of several Defendants, who defends separately in respect to property for which the surviving Defendants also defend, (*u*) the Court or a Judge, (*v*) upon the application of the person in possession of the property at the time of the death, or the legal representative of the deceased Defendant, may at any time before trial allow such person or representative to appear and defend on such terms as appear reasonable and just, (*w*) and if no such application be made or leave granted, the Claimant suggesting the death in manner aforesaid, (*x*) may proceed against the surviving Defendants to Judgment and Execution. (*y*) 19 Vic. c. 43, s. 253.**

Death before a trial of the defendant who defends separately but for property for which others also defend.

DISCONTINUING.

42. (*a*) **The Claimant (*b*) may at any time discontinue the action as to one or more of the Defendants, (*c*) by giving to**

Claimant may discontinue as to

(*t*) Taken from C. L. P. Act, 1856, section 253, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 199.

(*u*) Provision is made by section 40 for the death before trial of one of several defendants, who alone defends separately for a portion of the property.

(*v*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*w*) The "person in possession" here intended must be some person other than the surviving defendants, and may or may not be the "legal representative" of deceased defendant.

(*x*) See sections 36, 37, 38.

(*y*) See section 28.

(*a*) Taken from C. L. P. Act, 1856, section 254, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 200.

(*b*) One of several claimants may discontinue under the provisions of section 43.

(*c*) The discontinuance may be made "at any time," and be "as to one or more of the defendants." This is a mode of procedure equivalent to *nolle prosequi* and *retraxit*, in ejectment formerly. It was allowable to enter a *nol. pros.* as to one or more of several defendants at any time before trial and even after the commission day of the assizes: *Gree* v. *Rolls et al*, 1 Ld. Rayd. 716. A difference, however, between a *discontinuance*, *nolle prosequi* and *retraxit*, appears to exist. A plaintiff who finds that he has misconceived his action may obtain leave to *discontinue*. For the same or for any other reason a plaintiff may, under certain circumstances, before verdict, enter a *nolle prosequi*. In either case there is the right to commence a new action for the same cause; but a *nolle prosequi* after judgment operates as a *retraxit*, and a *retraxit* is a bar to any future action for the same cause: *Bowden* v. *Horne*, 7 Bing. 716; *Benton et al* v. *Polkinghorne*, 16 M. & W. 8. It is a question whether a claimant desirous of discontinuing as to a sole defendant or as to all of several defendants, can do so under this section. The expression "one or more of the defendants," seems to have a contrary bearing. Before this

one or more defendants.

the Defendant or his Attorney a notice, headed in the Court and cause, and signed by the Claimant or his Attorney, stating that he discontinues such action, (*d*) and thereupon the Defendant, on receiving such notice, may forthwith sign Judgment for costs in the form No. 6, or to the like effect. (*e*) 19 Vic. c. 43, s. 254.

One of several claimants may discontinue.

43. (*f*) In case one of several Claimants desires to discontinue, he may apply to the Court or a Judge (*g*) to have his name struck out of the proceedings, and an order may be made therefor on such terms as to the Court or Judge seems fit, (*h*) and the action shall thereupon proceed at the suit of the other Claimants. 19 Vic. c. 43, s. 255.

CLAIMANT NOT PROCEEDING TO TRIAL.

Claimant not proceeding to trial in due time after notice.

44. (*j*) If after appearance entered, the Claimant without going to trial, allows to elapse the time fixed by the practice of the Court for going to trial in ordinary cases after issue joined, (*k*) the Defendant may give twenty days' notice

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act a plaintiff could not discontinue as to all the defendants to an action, without the leave of the court or a judge.

(*d*) The notice may be in this form: "Take notice, that in this cause the claimant discontinues the action as to C. D. one of the said defendants."

(*e*) The Stat. 8 Eliz. cap. 2, s. 2, gives costs to a defendant against whom a discontinuance or *nolle prosequi* is entered: *Cooper* v. *Tiffin*, 3 T. R. 511. But if the entry be made before notice of trial, it seems defendant will not be entitled to the costs of brief or draft copies: *Doe d. Postlethwaite* v. *Neale*, 2 M. & W. 732; nor of consultation with counsel for defence: *Rivis* v. *Hatton*, 8 Dowl. P. C. 164. Where the defendant obtained a verdict which was set aside upon the ground of misdirection at the trial, and the plaintiff gave notice for the second trial but before the time discontinued: *Held* that defendant was entitled to the costs of certain searches for documents used at the first trial, which would have been useful at the second, had not plaintiff discontinued: *Daniel* v. *Wilkin et al*, 8 Ex. 155; see also *Jolliffe* v. *Mundy*, 4 M. & W. 502.

(*f*) Taken from C. L. P. Act, 1856, section 255, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 201.

(*g*) *Court or a Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*h*) It is enacted that upon application "an order *may* be made," &c. A discretion will be exercised to prevent unfair conduct or injustice.

(*j*) Taken from C. L. P. Act, 1856, section 256, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s 202.

(*k*) As to which see section 227, C. L. P. Act, to which this section in many respects conforms.

to the Claimant (*l*) to proceed to trial at the Assizes next after the expiration of the notice, (*m*) and if the Claimant afterwards neglects to give notice of trial for such Assizes, or to proceed to trial in pursance of the said notice given by the Defendant, and the time for going to trial has not been extended by the Court or a Judge, (*n*) the Defendant may sign Judgment in the form No. 7, and recover the costs of the defence. (*o*) 19 Vic. c. 43, s. 256.

CONFESSION OF ACTION.

Sole defendant, or all the defendants, may confess the action as to the whole or part of the property.

45. (*p*) A sole Defendant or all the Defendants may confess the action as to the whole or a part of the property, (*q*) by giving to the Claimant a notice headed in the Court and cause, signed by the Defendant or Defendants, and the signature attested by his or their Attorney, (*r*) and thereupon the Claimant may forthwith sign Judgment and issue Execution

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(*l*) See note *y* to section 227, C. L. P. Act.

(*m*) See note *z* to same section.

(*n*) See note *d* to same section.

(*o*) See note *c* to same section.

(*p*) Taken from C. L. P. Act, 1856, section 257, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 203.

(*q*) Under the operation of this and the following sections, one, more, or all defendants in ejectment may confess the action as to the whole of the property sought to be recovered, or any part thereof.

(*r*) A judgment on confession given by a tenant acting in collusion with the claimant will be set aside and the landlord permitted to defend: *Doe d. Locke* v. *Franklin*, 7 Taunt. 9; *Doe d. Draper* v. *Dyer*, 3 Dowl. P. C. 696. Plaintiffs under the old practice were nonsuited for not confessing lease, entry and ouster. Subsequently to the trial defendant executed a cognovit. *Held* that this was a waiver of any formal objection he might otherwise take on a motion for a new trial: *Doe d Kerr et al* v. *Shoff*, 9 U. C. Q. B. 180. It is not said when the notice which by this section is apparently made a substitute may be served. It may be served at any time. But where after notice of trial, defendant on 29th October, served a notice of confession on the plaintiff at his residence, thirty miles from the assize town, and on 30th October a verdict was taken, defendant not appearing and the attorney being ignorant of the notice, the court under the circumstances refused to set aside the verdict: *Row* v. *Quinlan et al*, 21 U. C. Q. B. 452. It is a question whether the notice here mentioned is intended as a substitute for *cognovits* in ejectment, and if so whether it should be attested with all the formalities attending the execution of a cognovit. Our R. G. pr. 26, as to cognovits and warrants of attorney, is not, in any manner, expressly restricted to "personal actions." The Eng. Stat. 1 & 2 Vic. cap. 110, s. 9, whence it is taken, though upon the face of it restricted to personal actions in respect of warrants of attorney, was held to extend to cognovits in ejectment as in other forms of actions: *Doe d. Rees* v. *Howell*, 12 A. & E. 696.

for the recovery of possession and costs, in e form No. 8, or to the like effect. (*s*). 19 Vic. c. 43, s. 257

And so may one of several defendants defending for a part for which others do not defend.

46. (*t*) In case one of several Defendants who defends separately for a portion of the property for which the other Defendant or Defendants do not defend, (*u*) desires to confess the Claimant's title to such portion, he may give a like notice to the Claimant, (*v*) and thereupon the Claimant may forthwith sign Judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue. (*w*) 19 Vic. c. 43, s. 258.

And if others defend as to the same part.

47. (*a*) In case one of several Defendants who defends separately in respect of property for which other Defendants also defend, (*b*) desires to confess the Claimant's title, he may give a like notice thereof, (*c*) and thereupon the Claimant may sign judgment against such Defendant for the costs occasioned by his defence, and may proceed in the action against the other Defendants to Judgment and execution. (*d*) 19 Vic. c. 43, s. 259.

ENROLLING PROCEEDINGS.

Proceedings need not be

48. (*e*) It shall not be necessary before issuing execution

(*s*) The judgment awards both possession and costs, and as to execution there may be either one writ or separate writs: section 28.

(*t*) Taken from C. L. P. Act, 1856, section 258, the origin of which was Eng. Stat. 15 & 16, cap. 76, s. 204.

(*u*) The preceding section applies only to confessions by a "sole defendant," or if several, by "all defendants." This, to one of several defendants," who defends separately for a portion of the property "for which the other defendants do not defend." The case of a confession by one of several defendants, who defends in respect of property, "for which the others also defend," is provided for in section 47.

(*v*) See note *r* to section 45.

(*w*) See note *s* to section 45.

(*a*) Taken from C. L. P. Act, 1856, section 259, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 205.

(*b*) See note *u* to section 46.

(*c*) See note *r* to section 45.

(*d*) See note *s* to section 45.

(*e*) Taken from C. L. P. Act, 1856, section 260, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 206.

on any Judgment in Ejectment (*f*) to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the Judgment, and the Judgment may thereupon be signed, and costs taxed and execution issued; (*g*) but the proceedings shall be entered on the roll whenever the same becomes necessary for the purpose of evidence or of appealing, or the like. (*h*) 19 Vic. c. 43, s. 260. enrolled before execution.

EFFECT OF JUDGMENT.

49. (*i*) The effect of a Judgment in Ejectment (*j*) shall Effect of judgment.

(*f*) *In ejectment.* These words are not in the English C. L. P. Act. Their object is manifestly to restrict this enactment in its operation to the action of ejectment. There being no such restriction in the section of the English C. L. P. Act, whence ours is taken, it has been said to extend to judgments in all forms of action, when entered under the English C. L. P. Act: Kerr's C. L. P. A., 1852, s. 206. See *Frewen* v. *Lethbridge*, 7 W. R. 442, as to the entry of judgment when not necessary to be enrolled.

(*g*) The costs here intended are of course those between party and party, and not between attorney and client: *Doe* v. *Fulliter*, 13 M. & W. 47. Taxation of costs and entry of judgment are in general contemporaneous acts: *Pierce* v. *Derry*, 4 Q. B. 635; and unless there be a waiver of costs, the entry of judgment is not final until taxation of costs: *Ib.* Notice of taxation should be given, but the omission to give it is no ground for setting aside the entry of judgment: *Perry* v. *Turner et al*, 1 Dowl. P. C. 300; *Lloyd* v. *Kent*, 5 Dowl. P. C. 125; *Field* v. *Partridge*, 7 Ex. 689, however much it may be a ground for review of taxation: *Ilderton* v. *Sill*, 2 C. B. 249. But if upon any ground the judgment in ejectment be irregular, there may be a writ of restitution: *Doe d. Whittington* v. *Hards*, 20 L. J. Q. B. 406.

(*h*) To bring error upon a judgment, that judgment must be shown to be a record. No judgment is a record until enrolled.

(*i*) Taken from C. L. P. Act, 1856, section 261, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 207.

(*j*) The intention of this section is to declare that a judgment in ejectment shall not now have any other effect than one obtained when ejectment was a fictitious action. The action always has been of a possessory character, and still continues to be of that nature. When ejectment was a fictitious proceeding, the judgment was that John Doe, the lessor of the plaintiff, should recover his term. It is now that the plaintiff do recover possession of the land mentioned in the writ, or of so much thereof as in the opinion of the jury he may be entitled to recover. The direct issue raised and determined is the simple question of right to immediate possession. This stands or falls upon strength of title. The peculiarity of the action is, that while it directly determines the right to possession, it involves questions of title, and indirectly determines them. The nature of the action, and the consequences of a recovery in it, have been thus explained: "An ejectment is a possessory action, in which almost all titles to land are tried. Whether the party's title is to an estate in fee, fee tail for life or for years, the remedy is by one and the same action. In an action of ejectment the plaintiff recovers *only* the possession of the land, and the execution is of the possession

be the same as that of a Judgment in Ejectment obtained before the tenth day of August, one thousand eight hundred and fifty-six. 19 Vic. p. 43, s. 261.

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only. But if the lessor of the plaintiff recovers only the possession of the land, it may be asked, how he becomes seized according to his title? To which it may be answered, that when a person is in possession by title (as every person is who enters in execution of a judgment in ejectment, because the law does no wrong), the possession and title *unite*. For it is a rule of law, 'that when a man having a title to an estate comes to the possession of it by lawful means, he shall be in possession according to his title.' As where the title is to have a fee, he becomes seized in fee; where the title is to have an estate tail, he becomes seized of an estate tail, and so on, the law casting the estate upon him according to his title:" *Taylor d. Atkyns* v. *Horde*, 1 Burr. 90, *per* Lord Mansfield. In truth and in substance, a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the *right*, as it may afterwards appear even between the same parties. He who enters under it can only be possessed according to the right *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession endures according to the right. If he has no title he is in as a trespasser, and, without any re-entry by the true owner, is liable to account for the profits:" *Ib*; see also *Aslin* v. *Parkin*, 2 Burr. 665. This being the effect of a judgment in ejectment, it follows that no one action of ejectment can be pleaded to a subsequent action for the same land, though between the same parties. The judgment enforces only a right to possession, without conclusively determining the title of either party: *Clerke* v. *Rowell et al*, 1 Mod. 10. Hence there may be no end to trials in ejectment. Whatever the result of an action may be, no one recovery can be considered final between the litigants. It might be supposed that the abolition of the fictions in ejectment would have had the effect of subjecting it to the same rules as ordinary actions in respect of finality of procedure. But against this supposed intention there was an opinion given even upon the construction of Stat. 14 & 15 Vic. cap. 114, the expressed design of which was to place ejectment "as nearly as may be on the same footing as other actions." Upon a review of the statute it was said, "The intention of the Legislature was clearly, as respects the judgment in ejectment when for the claimant, to give no further force or effect to it than it would have had previous to the statute:" *Clubine* v. *McMullen*, 11 U. C. Q. B. 255, *per* Burns, J. It is enacted that if any person bring an action of ejectment, after having brought a prior action of ejectment, against the same defendant, or against any person through or under whom he claims, the court may order such person to give security for costs: section 76 of this act. Courts of equity possess a jurisdiction by entertaining bills of peace to prevent vexatious ejectments, and by means of such jurisdiction, when exercised after a recovery in ejectment, quiet titles at law: *Barefoot* v. *Fry*, Bunb. 158; *Leighton* v. *Leighton*, 1 Str. 404; s. c. 1 P. W. 671; s. c. affirmed in House of Lords, 4 Bro. P. C. 378.

It may be noticed that the section under consideration draws no distinction between a judgment in ejectment upon a verdict and a judgment by default. In the first case the right of the claimant is tried and determined; in the latter case it is as it were confessed: *Aslin* v. *Parkin*, 2 Burr. 665. One effect of a judgment against defendant remains to be considered, and that is as regards a claim or action for mesne profits. The claimant who alleges himself to be entitled to possession of a piece of land from a certain date, recovers it. This recovery is tantamount to a judgment that defendant was wrongfully in possession, and therefore liable to plaintiff for rents and profits of the land while wrongfully withholding possession. At present plaintiff may either recover mesne profits as a consequence of a

PENALTY ON TENANT NOT INFORMING LANDLORD.

50. (*l*) Every tenant to whom a Writ in Ejectment (*m*) has been delivered, (*n*) or to whose knowledge it comes, (*o*) shall forthwith give notice thereof to his landlord, or to his bailiff or receiver, (*p*) and if he omits so to do he shall forfeit

Penalty on tenant receiving Writ of Ejectment, and not notifying his landlord.

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recovery in ejectment in one and the same action: section 60; or as to part by means of a separate and independent action: *Ib.* In the event of a separate action being brought, defendant, if a party to the original ejectment or in privity with the defendant in that action, is estopped from disputing plaintiff's possession from the time alleged in the writ: *Aslin* v. *Parkin*, 2 Burr. 665; *Doe* v. *Wright*, 10 A. & E. 763; *Matthew* v. *Osborne*, 13 C. B. 919; *Doe* v. *Wellsman*, 2 Ex. 368; *Turner* v. *Cameron's Coalbrook Steam Coal Co* 5 Ex. 932; *Armstrong* v. *Norton*, 2 Ir. L. R. 96; *Earl of Listowell* v. *Greene*, 3 Ir. L. R. 205; *Nugent* v. *Phillips*, 8 Ir. L. R. 17; *Wilkinson* v. *Kirby*, 15 C. B. 430; *Steen* v. *Steen*, 21 U. C. Q. B. 454; but when brought against a person in possession of the land who was no party to the ejectment, unless such person be connected with the ejectment by some evidence, the recovery in that action is no evidence against him: *Denn* v. *White et ux* 7 T. R. 112; *Doe* v. *Harvey* 8 Bing. 239. And if plaintiff seek to recover mesne profits from a day anterior to that mentioned in the writ, he must prove his title, and that such title would have enabled him to have maintained trespass: *Litchfield* v. *Ready*, 5 Ex. 939: *Turner* v. *Cameron's Coalbrook Steam Coal Co Ib* 932. But wherever a recovery in ejectment would be an estoppel, in an action for mesne profits, it matters not whether that recovery be had by verdict or through a judgment by default: *Wilkinson* v. *Kirby* 15 C. B. 430. A defendant taken in execution on a judgment in ejectment has, since the C. L. P. Act in England been held entitled, under the 48 Geo. III. cap. 123, s. 1, to be discharged after a twelve months' imprisonment: *Humphreys* v. *Franks*, 3 C. B. N. S. 765.

(*l*) Taken from C. L. P. Act 1856, section 262, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 209. Substantially the same as Eng. Stat. 11 Geo. II. cap. 19, s. 12, which is a remedial law, and enacted for more effectually securing against frauds by tenants: *Crocker et al* v. *Fothergill*, 2 B. & Al. 659, *per* Bayley, J.

(*m*) The Stat. of Geo. II. was held to extend only to ejectments which are inconsistent with the landlord's title: *Buckley* v. *Buckley*, 1 T. R. 647. Therefore in ejectment by a mortgagee against a tenant of the mortgagor to enforce attornment, that statute was held to be inapplicable: *Ib.* In case a mortgagor in possession makes a lease after the execution of the mortgage, reserving rent, the mortgagee cannot, by merely giving the lessee notice of the mortgage, and that principal and interest are in arrear, and requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease: *Evans* v. *Elliot et al*, 9 A. & E. 342.

(*n*) Intending a personal service: see note *i* to section 6.

(*o*) Intending a service on a wife, child, or other member of the tenant's family, with subsequent notice to him; see note *i* to section 6.

(*p*) No precise form of notice is made necessary. The following may be used: "Take notice that you will receive herewith a copy of a writ of ejectment which has been served for the recovery of the possession of the land and premises at, &c., of which I am your tenant."

to the person of whom he holds, the value of three (*q*) years improved or rack rent (*r*) of the premises demised or holden in the possession of such tenant, (*s*) to be recovered by action in any Court of Common Law having jurisdiction for the amount. (*t*) 19 Vic. c. 43, s. 262.

EJECTMENT BY LANDLORD.

Landlord having power to re-enter for non-payment of rent, may

51. (*o*) In all cases between landlord and tenant, as often as it happens that one half year's rent is in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, (*p*) such landlord or

(*q*) This statute, like that of Geo. II, does not give treble damages, but only directs how single damages shall be ascertained: *Crocker* v. *Fothergill*, 2 B. & Al. 662, note *a*. An application for treble costs of suit was therefore refused: *Ib.*

(*r*) The improved or rack rent here mentioned is not the rent reserved, but such a rent as the landlord or tenant might fairly agree on at the time of the service of the writ of ejectment in case the premises were *then* to be let: *Crocker* v. *Fothergill*, 2 B. & Al. 652.

(*s*) The tenant shall forfeit three years improved or rack rent, not merely of the premises described in the writ of ejectment, but of the premises *demised* to him: *Crocker* v. *Fothergill*, 2 B. & Al. 660, *per* Bayley, J. Upon a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised, the tenant fraudulently concealed a declaration in ejectment delivered to him and suffered judgment by default. The declaration did not mention mines at all; but the sheriff in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: *Held* that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, the landlord might recover the treble rent in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig: *Ib.* 652.

(*t*) It may be that a party suing under this act in a superior court to recover an amount within the jurisdiction of an inferior court will deprive himself of superior court costs, unless the judge before whom the trial takes place shall certify for the same: see section 328 C. L. P. Act, and notes thereto.

(*o*) Taken from C. L. P. Act, 1856, section 263, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 210. Substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 2.

(*p*) By the common law it was necessary for the person claiming title to lands and tenements in all cases to make an actual entry upon them in order to support an ejectment. In the case of a lease, therefore, as the landlord could not enter and take the actual possession until the lease expired, it became usual to insert a clause that in case the rent should be behind and unpaid at a certain time, the lessor should have the right to re-enter: Adams on Ejectment, 120, 121; and see Con. Stat. U. C. cap. 92, Sch. No. 2, Form 9. This statute applies only to cases where the lease contains such a clause: *Doe d. Dixon* v. *Roe*, 7 C. B. 134. And where it is made to appear that the landlord had a power to re-enter in respect of the non-

lessor may, without any formal demand or re-entry, (*q*) serve a Writ in Ejectment for the recovery of the demised premises, or in case the same cannot legally be served or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in Ejectment be not for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in the Writ, and such affixing shall be deemed legal service thereof, (*r*) which service or affixing of the

recover possession by ejectment.

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payment of a half-year's rent at the time of serving the ejectment: *Ib.* The right of entry must be shown to be absolute and the lease to be thereby avoided: *Doe d. Darke* v. *Bowditch*, 8 Q. B. 973. Thus the statute was held not to apply in a case where the condition in the lease was that on non-payment of rent in twenty days after the time limited for payment thereof, the landlord might enter on the premises "till it be fully satisfied:" *Ib.* The landlord has a right to avail himself of the statute, provided half a year's rent be due, and he equally has that right if ten years' rent be due: *Cross et al* v. *Jordan*, 8 Ex. 150. Three quarters' rent being in arrear under a lease containing a clause of re-entry on non-payment of rent within twenty-one days after each quarters's day, the landlord on 2nd October distrained, and after sale of distress there remained due more than a quarter's rent but *less* than a half year's rent: *Held* ejectment not maintainable under this section: *Coatsworth et al* v. *Spokes*, 10 C. B. N.S. 103. The right of entry where it exists will not be waived by distraining for the rent within twenty-one days allowed for its payment, and continuing in possession until after the expiration of the twenty-one days: *Doe d Taylor* v. *Johnson*, 1 Stark. 411. But may be waived by bringing an action for rent accrued due after the forfeiture: *Dendy* v. *Nicholl*, 4 C. B. N.S. 376. A mere demand of subsequent rent is not necessarily such a waiver: *Blyth* v. *Dennett*, 13 C. B. 178. Actual entry is not necessary to enable the party to take advantage of such a clause: *Goodright d. Hare* v. *Cator et al*, 2 Doug. 477.

(*q*) By the common law, when a landlord reserved a right of entry in a lease in case of the non-payment of rent, it was necessary for him to make a demand of the precise sum in arrear: *Fabian* v. *Winston*, Cro. Eliz. 209; either in person or by attorney lawfully appointed by deed: *Doe d. West* v. *Davis*, 7 East. 363. The demand was required to be made on the premises: Co. Litt. 202, *a*; though no person was residing there: *Kidwelly* v. *Brand*, 1 Plowd. 71. To do away with with the necessity of complying with these and other prerequisites to ejectment at the common law, the Stat. of Geo. II. was passed: *Doe d. Forster* v. *Wandlass*, 7 T. R. 117. It is not necessary to make any demand in order to entitle a plaintiff to recover in a case brought within the statute, although the proviso for re-entry be expressed to be in case of the rent in arrear being lawfully demanded: *Doe d. Scholefield et al* v. *Alexander*, 2 M. & S. 525; see also *Doe d. Lawrence et al* v. *Shawcross*, 3 B. & C. 752. It may, however, be otherwise if the lease contain an express covenant that the lessor will not enter without demand: *Doe d. Earl of Shrewsbury* v. *Wilson*, 5 B. & Al. 385, *per* Abbott, C. J.

(*r*) If the action be under this section for the recovery of a dwelling-house and other premises demised by one lease, if the dwelling-house be unoccupied and the rest of the premises in the occupation of a tenant, service of the writ may be effected by personally serving the tenant with a copy and affixing another on the

Writ shall stand instead and in place of a demand and re-entry. (*s*) 19 Vic. c. 43, s. 263.

And how such right shall be exercised.

52. (*t*) In case of Judgment against the Defendant for non-appearance, if it be shown, by affidavit, (*u*) to the Court wherein the action is depending, (*v*) or be proved upon the

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front door of the dwelling-house: *Lord Clinton* v. *Wales*, 2 Jur. N.S. 1096; see also note *i* to section 6.

(*s*) This means that the service shall be in the place of a legal demand made on the day on which it ought to be made by the common law: *Doe d Lawrence et al* v. *Shawcross*, 3 B. & C. 754, *per* Bayley, J.; and therefore it was held to be no ground of nonsuit in ejectment that the declaration was served on a day subsequent to the day on which the demise was laid, and being after the rent became due, because the title of the lessor must be taken to have accrued at common law by non-payment of the rent: *Ib* 752. The effect of the statute is to dispense with the necessity of a demand by the landlord, and not to put the tenant in a worse situation than he would have been if he had tendered the rent when it ought to have been paid. The service of a writ in ejectment is substituted for the demand which was required at common law. At common law there could have been no legal title in the landlord until that demand had been made. The statute is beneficial to the tenant as well as to the landlord. It relieves the latter from the necessity of making a demand with all the precision required at common law, and the tenant incurs no forfeiture until the writ of ejectment is served upon him; and if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same benefit as if he had tendered it at that time: *Ib.* 756, *per* Holroyd, J.

(*t*) Taken from the latter part of C. L. P. Act 1856, section 263, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 210. Substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 2.

(*u*) An affidavit stating, *inter alia*, that three quarters of a year's rent were due from the tenant before the copy of the writ was affixed to the premises, and that at the time the copy was affixed "no sufficient distress was to be found upon the said premises, countervailing the said arrears," is sufficient: *Cross et al* v. *Jordan*, 8 Ex. 149. This decision overrules *Doe d. Powell* v. *Roe*, 9 Dowl. P. C. 548; see further *Doe d. Gretton et al* v. *Roe*, 4 C. B. 576. It is not necessary to state in the affidavit, if the premises are shut up, that search has been made and no sufficient distress found: *Romily* v. *Fycroft*, 4 W. R. 26. In such case it is enough to state the fact that the premises are shut up, and that deponent has been informed that there is no sufficient distress: *Ib.* The landlord, however, should if possible produce the lease as being the best evidence of its contents: *Leviscompte* v. *Feucel*, 3 U. C. L. J. 185. In one case the lessor having recovered in a former ejectment under the statute of Geo. II. the lessee, after the lapse of several years brought a second ejectment on the title of his lease; and the proceedings in the first ejectment being in all other respects confessedly regular, he insisted that he was entitled to recover because no affidavit was produced which had been made in conformity with the act: *Held* that it was not incumbent on the landlord to prove the regularity of all the circumstances upon which his judgment and execution were founded, but that the judgment must be taken to have been a right, regular, and good one, as nothing appeared to the contrary: *Doe d. Hitchins et al* v. *Lewis*, 1 Burr. 614.

(*v*) The motion is absolute in the first instance: *Yowens* v. *Keen et al*, 2 C. B. N. S. 384.

trial in case the Defendant appears, (*w*) that half a year's rent was due before the said Writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, (*x*) the lessor shall recover Judgment and have execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made; (*y*) but if a verdict pass for the Defendant, or if the Claimant be non-

(*w*) This section, like the statute of Geo. II. prescribes *two* cases, viz., one in case of judgment by default, and the other in case of the action coming to a trial. In the former case an affidavit must be made in the court where the suit is depending, that half a year's rent was due before the service of the writ, and that no sufficient distress was to be found upon the premises countervailing the arrears then due, and that the plaintiff had power to re-enter. In the latter case the same thing must be proved upon the trial: 1 Wms. Saund. 287, *c*.

(*x*) The insufficiency of the distress must be established, and in order thereto in general proof of a search must be adduced: *Doe d. Forster* v. *Wandlass*, 7 T. R. 117. Every part of the premises must be searched: *Rees d. Powell* v. *King et al*, Forrest, 19. The words "no sufficient distress *to be found* on the demised premises" appear to be pertinently introduced into the statute, because it is not enough that the tenant should have that secreted on the demised premises which would be sufficient to countervail the amount of rent due, but the property must be so visibly on the premises that a broker going to distrain on the tenant would, using reasonable diligence, find it so as to be able to distrain it: *Doe d. Haverson* v. *Franks*, 2 C. & K. 679, *per* Erle, J.; see also *Doe d. Chippendale et al* v. *Dyson et al*, M. & M. 77; *Doe d. Cox* v. *Roe*, 5 D. & L. 272. Goods of a person in charge of a part of the property for plaintiff need not to be taken into account as distrainable: *Wheeler et ux.* v. *Stevenson et al*, 6 H. & N. 155. If the landlord show that he was prevented from entering on the premises to distrain, he will be entitled to recover in ejectment, without showing that there was actually no sufficient distress upon the premises: *Doe d. Chippendale et al* v. *Dyson et al*, 1 M. & M. 77. Where the outer doors are locked up, so that the landlord cannot get at the premises to distrain, there is no available distress and consequently no sufficient distress within the meaning of the act: *Ib.* Under such circumstances an affidavit of belief that there was no sufficient distress on the premises, will be sufficient: *Doe d. Cox* v. *Roe*, 5 D. & L. 272. If the landlord make out a *prima facie* case that there was no sufficient distress on the premises, the *onus* of showing the contrary will be shifted to the tenant: *Doe d. Smelt et al* v. *Fuchau*, 15 East. 286; *Romily* v. *Fycroft*, 4 W. R. 26. Whenever there is a sufficient distress the landlord must proceed at common law as before the statute: *Doe d. Forster* v *Wandlass*, 7 T. R. 117. But by special consent of the parties, a recovery may be made for default of payment of rent, without the aid of the statute, and without any demand of the rent according to the common law: *Doe d. Harris* v. *Masters*, 2 B. & C. 490. Thus, if in the lease there be a proviso that in case of the rent being in arrear for twenty-one days, the lessor may re-enter, "although no legal or formal demand should be made" for payment thereof: *Ib.*

(*y*) Premises consisting of a cottage and garden had been let to a tenant who died, and subsequently a stranger took possession of the garden, but the cottage was left vacant. There being one half year's rent in arrear, and no sufficient distress to be found upon the premises, countervailing the arrears of rent, a writ of ejectment was served upon the person in possession of the garden, and a copy

suited, the Defendant shall recover his costs. (*z*) 19 Vic. c. 43, s. 263.

Consequences of the exercise of such right.

53. (*a*) In case the lessee or his assignee, or other person claiming or deriving title under the said lease, (*b*) permits and suffers judgment to be had on such trial and execution to be executed thereon, without paying the rent and arrears together with full costs, and without proceeding for relief in equity within six months after execution executed, (*c*) then and in every such case the said lessee and his assignee and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing a Writ of appeal for reversal of such Judgment, and the said landlord or lessor shall from thenceforth hold the demised premises discharged from such lease. (*d*) 19 Vic. c. 43, s. 263.

As to mortgagees of lease.

54. (*e*) Nothing hereinbefore contained shall bar the right of any Mortgagee of such lease or any part thereof, who is

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of the writ affixed to the door of the cottage, which was unoccupied: *Held*, service sufficient and that claimant was at liberty to sign judgment in ejectment to recover the whole premises: *Lord Clinton* v. *Wales*, 28 L. T. Rep. 105.

(*z*) See section 27 and notes thereto.

(*a*) Taken from the latter part of C. L. P. Act, 1856, section 263, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 210, substantially the same as the Eng. Stat. 4 Geo. II. cap. 28, s. 2.

(*b*) See note *h* to section 55, and note *r* to section 56.

(*c*) No relief can be had in equity against any forfeiture, except one caused by non-payment of rent of a sum certain: see *Bracebridge* v. *Buckley*, 2 Price, 200; *Wadman* v. *Calcraft*, 10 Ves. 67; *Bowser* v. *Colby*, 1 Hare, 109; *Green* v. *Bridges*, 4 Sim. 96. The time limited for relief is "six months after execution executed." The months intended must be held to be calendar months: Con. Stat. U.C. cap. 2, s. 13; see *Dowling* v. *Foxall*, 1 Ball & B. 193; see also note *i* to section 55 of this act, and section 342, C. L. P. Act, and notes thereto.

(*d*) The true end and professed intention of this enactment is to *take off* from the landlord the inconvenience of his continuing always liable to the uncertainty of possession (from its remaining in the power of the tenant to offer him a compensation at *any* time, in order to found an application for relief in equity), and to *limit* and *confine* the tenant to six calendar months after execution executed for his doing this, or else that the landlord should from thenceforth hold the demised premises discharged from the lease: *Doe d. Hitchings et al* v. *Lewis*, 1 Burr. 619, *per* Mansfield, C. J.

(*e*) Taken from the latter part C. L. P. Act, 1856, section 263, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 210, substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 2.

not in possession, so as such Mortgagee do, within six months after such Judgment obtained and execution executed, pay all rent in arrear and all costs and damages sustained by such lessor or person entitled to the remainder or reversion, and perform all covenants and agreements which on the part and behalf of the first lessee are to be or ought to be performed. (*f*) 19 Vic. c. 43, s. 263.

RELIEF OF TENANTS IN EQUITY.

Proceedings if the tenant ejected seek relief in equity.

55. (*g*) In case the said lessee, his assignee or other person claiming any right, title or interest in law or equity of, in or to the said lease, (*h*) proceeds for relief in any Court of Equity (*i*) within the time aforesaid, (*ii*) such person shall not have or continue any injunction against the proceedings at law on such Ejectment, unless, within forty days next after a full and perfect answer has been made by the Claimant in

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(*f*) This a mortgagee might do independently of this section, as being "a person claiming or deriving title under the said lease:" see *Malone* v. *Geraghty*, 5 Ir. Eq. R. 549; *Kelly* v. *Staunton*, 1 Hog. 393; see section 53.

(*g*) Taken from C. P. L. Act, 1856, s. 264, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 211; substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 3, which is similar to Ir. Stat. 11 Anne, cap. 2, s. 3.

(*h*) An equitable mortgagee of the tenant's interest is entitled to ask the relief: see *Malone* v. *Geraghty*, 5 Ir. Eq. Rep. 549.

(*i*) Courts of equity have from a very early period relieved tenants from forfeitures owing to non-payment of rent, upon payment of arrears with interest and all expenses: *Sanders* v. *Pope*, 12 Ves. 289. A landlord has no right to enter upon the property forfeited by force, and a landlord who does so must, according to the ruling of courts of law, withdraw from possession: *Newton et ux* v. *Harland et al*, 1 M. & G. 658, *per* Tindal, C. J.; see also *Hillary* v. *Gay*, 6 C. & P. 284.

(*ii*) *i. e.* Within six calendar months after execution executed: see note c to section 53. The day on which the *habere* is executed is not to be included in the computation: *Dowling* v. *Foxall*, 1 Ball & B. 193. Where a right would be divested or a forfeiture incurred by including the day of an act done, the computation will generally be made exclusively of it: *Ib.* In a redemption suit the bill charged that the writ of possession was executed "on or about the 18th November, and possession was on that day taken." The answer stated "that it is not true, as in the bill untruly stated, that the said *habere* was executed on the 18th November, for that defendant believed it was executed on the 17th November:" *Held*, that the precise day of the execution of the *habere* was sufficiently put in issue: *Fitzgerald* v. *Hussey*, 3 Ir. Eq. R. 319. The litigious conduct of a tenant in defending an ejectment for non-payment of rent, does not disentitle him to relief upon a bill for redemption, nor to the costs of that suit if he be otherwise entitled to them: see *Newenham et al* v. *Mahon et al*, 3 Ir. Eq. R. 304. Where plaintiff in equity established a waiver on the defendant's part, the Irish statute was held to be out of the question, and it was therefore held that it was not essential that the bill

such Ejectment, (*j*) he brings into Court and lodges with the proper officer such sum of money as the lessor or landlord in his answer swears to be due and in arrear over and above all just allowances, (*k*) and also the costs taxed in the said suit, (*l*) there to remain until the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; (*m*) and in case such proceedings for relief in equity are taken within the time aforesaid

If such proceedings be after execution executed.

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should be filed within the six months, as provided by the act of Parliament: see *Butler* v. *Burke*, 1 Dr. & Wal. 380.

(*j*) As to computation of time: see Taylor's Con. Orders, 319.

(*k*) See *McIneherny* v. *Galway*, Jon. & Car. 246. *Qu* How far this enactment applies to the case of a penal rent reserved as an indemnity, and to answer a particular purpose? See *Hume* v. *Kent*, 1 Ball & B. 558.

(*l*) Although the general rule is to make the party seeking a redemption pay the costs of suit, the court has jurisdiction to look at the landlord's conduct, and throw the costs on him, according to its discretion: see *Geraghty* v. *Malone et al*, 1 H. L. Cas. 81, affirming s. c. 5 Ir. Eq. R. 549; see also *Fitzgerald* v. *Hussey*, 3 Ir. Eq. R. 319; *McIneherny* v. *Galway*, Jon. & Car. 247; *Sheridan* v. *Casserly*, Beat. 249.

(*m*) On a bill to redeem under the Irish statute, it was held to be imperative to relieve upon the conditions required by it being complied with; and the court would not admit extrinsic considerations, such as breaches of other covenants in the lease, to be brought forward by the lessor to affect the equity of redemption of the tenant's interest evicted for non-payment of rent: see *Swanton* v. *Biggs*, Beat. 240. It is important to have settled forms of decrees. In this case the decree strictly followed the words of the Irish statute 11 Ann, cap. 2: *Ib.* In a redemption suit by a tenant against his landlord, it appeared that a mortgagee in possession of the tenant's interest had not been served with the ejectment, and that on executing the writ of possession the landlord made a six months lease to him. On the expiration of that lease the mortgagee refused to deliver possession to the landlord, and retained it with the privity and consent of the tenant. The landlord thereupon brought an ejectment on the title to evict the mortgagee and the persons in possession, and recovered judgment therein, but did not execute the writ of possession. The tenant had made the mortgagee a party defendant to his suit, and charged that he and the landlord were in collusion; but the prayer of the bill was simply for a redemption. The usual accounts in a redemption suit were directed, and also an account of what the mortgagee, without wilful default, might have received. The master reported that the entire amount of the head rent, including that for which the ejectment was brought, was due; that the mortgagee might, without wilful default, have received much more than the amount of head rent; and that, without wilful neglect, he did not receive anything: *Held*, first, that it was not wilful neglect in the landlord not to have taken possession under the judgment in ejectment on the title; secondly, that though the mortgagee was bound to apply the rents, in the first place, in payment of the head rent, yet as no account had been taken of the sum due on foot of the mortgage, the plaintiff was not entitled to a personal decree against the mortgagee, to be repaid the sums which he should be obliged to pay the landlord for arrears of rent: *Reade* v. *De Montmorency*, 5 Ir. Eq. R. 40. The admission in the bill, of rent being due to the landlord, does not entitle him to be paid the sum lodged in court if the bill

and after execution has been executed, (*n*) the lessor or landlord shall be accountable only for so much as he really and *bonâ fide* without fraud, deceit, or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof, (*o*) and if what he has so made be less than the rent reserved on the said lease, then the said lessee or his assignee, before being restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the lands. (*p*) 19 Vic. c. 43, s. 264.

STAY OF PROCEEDINGS IF RENT PAID.

56. (*q*) If the tenant or his assignee (*r*) at any time

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be dismissed: see *O'Keeffe* v. *Dennehy*, 4 Ir. Eq. R. 323. In a redemption suit, after the coming in of defendant's answer, the plaintiff entered a side bar rule dismissing his bill, and afterwards moved for the balance of the sum lodged in court, after payment thereout of the defendant's taxed costs: *Held*, that the motion should be granted, and that the landlord might have proceeded at law for his rent, pending the proceedings in the redemption suit: *Ib.*; see also *Callaghan* v. *Lord Lismore*, Beat. 223.

(*n*) See note *i* to this section.

(*o*) A landlord having rightfully evicted his tenant for non-payment of rent, is not, when called upon to restore possession and to account, chargeable with the whole rents at which the lands were let, but only with such rents as during his possession he received: *Callaghan* v. *Lismore*, Beat. 223; and if in actual occupation himself, according to the section here annotated, he shall be accountable "with so much and no more as he shall really and *bonâ fide*, without fraud, deceit or wilful neglect, make of the demised premises," &c. On a lease containing a clause of distress and provision for entry in case of no sufficient distress, an ejectment for non-payment of rent was brought, and judgment by default obtained, and the landlord sued out a writ of possession and went into possession. After bringing several ejectments unsuccessfully to recover possession, the tenant filed a bill for redemption and relief against the forfeiture: *Held*, that he was entitled to redemption, the landlord accounting for the profits while in possession, and the tenant paying the rent, interest and costs: *Canny* v. *Hodgens*, Hay & J. 769.

(*p*) The plain intention of this provision is, that in the event of a tenant being relieved against a forfeiture, the position of both parties concerned shall be made as nearly as possible the same as if no forfeiture had taken place, and no cause of forfeiture ever existed.

(*q*) Taken from C. L. P. Act 1856, section 265, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 212. Substantially the same as Eng. Stat. 4 Geo. II. c. 28, s. 4. The courts even before the statute of George II. exercised an equitable jurisdiction to stay proceedings in ejectment for non-payment of rent, upon payment of arrears of rent and costs: *Phillips* v. *Doelittle*, 8 Mod. 345; *Smith* v. *Parks*, 10 Mod. 383. The statute appears to be confirmatory of a power already inherent in the courts: *Roe d. West* v. *Davis*, 7 East. 363; *Doe d. Harris* v. *Masters*, 2 B. & C. 490.

(*r*) *Tenant or his assignee.* The construction of these words may be open to doubt when considered in connection with sections 53 and 55, and the expres-

Discontinuance if tenant pay arrears of rent and costs before trial, &c.

before the trial in the Ejectment, (*s*) pays or tenders to the lessor or landlord, or to his Attorney in the cause, or pays into the Court wherein the cause is depending, (*t*) all the rent and arrears together with the costs, (*u*) all furtner proceedings on the Ejectment shall cease; (*v*) and if such lessee

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sions used therein. Section 51 gives facilities to landlords in allowing them to bring ejectment for non-payment of rent, which may be conducted to judgment and execution; and then section 53 enacts that "in case the *lessee*, or his assignee, or *other person claiming or deriving under the said lease*," shall suffer a certain time to elapse without paying the rent, and without proceedings in equity for relief, then "the said lessee, and his assignee, and all other persons claiming and deriving under the said lease," shall be barred from relief both in law and equity. Section 55 provides that in case "the said *lessee*, his assignee, or other person claiming any right, title or interest in law or equity of, in, or to the said lease," shall within the time limited *after* judgment at law file a bill in equity for redemption, relief may be given upon certain terms. Then comes the section here annotated (section 56). It applies to the case of a party coming for relief before judgment to the court in which the action is brought. It begins by enacting that "if the *tenant*, or his assignee pays," &c., and further on proceeds thus, "and if *such* lessee or assigns," &c. In order to construe the three sections consistently, the word "tenant" must be construed as meaning something more than "lessee or assignee." It at least embraces "a sub-lessee:" *Doe dem. Wyatt* v. *Byron et al*, 1 C. B. 623; and "a mortgagee:" *Doe d. Whitfield* v. *Roe*, 3 Taunt. 402.

(*s*) The application must be *before* the trial: see *Goodright d. Stevenson* v. *Noright*, 2 W. Bl. 746; *Roe d. West* v. *Davis*, 7 East. 363; *Doe d. Harris* v. *Masters*, 2 B. & C. 490; *Doe d. Lambert* v. *Roe*, 3 Dowl. P. C. 557.

(*t*) *i. e.* The ejectment under section 51, and which must be brought under a right of entry for non-payment of rent. In ejectment brought on a clause of re-entry for not repairing as well as for rent in arrear, upon an application by the tenant to stay the proceedings, it was insisted for the plaintiff that the case was not within the act of George II. for that it was not an ejectment founded singly on the act, but brought likewise on a clause of re-entry for not repairing: *Held* that the application was within the statute: *Pure d. Withers et al* v. *Sturdy*, Bull N. P. 97. In an action of ejectment on a forfeiture for breach of a covenant to repair only, the court has no power to stay proceedings upon any terms against the consent of the plaintiff: *Doe d. Mayhew* v. *Asby*, 10 A. & E. 71. In one case the plaintiffs were both devisees and executors. Defendant moved to stay proceedings upon payment of the rent due to plaintiffs as devisees, they not being entitled to bring ejectment as executors. There appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account, taking in both demands as devisees and executors having just allowances, which plaintiffs refused; but the rule was made absolute to stay proceeding on payment of the rent due to plaintiffs as devisees, together with costs: *Duckworth d. Tubley et al* v. *Tunstall*, Barnes, 184.

(*u*) No rent can become due except on the day when reserved. The "arrears" here intended must be computed to the last day whereon rent is made payable by the demise, and not to the time of computation: *Doe d. Harcourt* v. *Roe*, 4 Taunt. 883. There is no power to stay proceedings for a forfeiture for breaches other than payment of rent: *Doe d. Mayhew* v. *Asby*, 10 A. & E. 71.

(*v*) The party who makes application should obtain an order to the effect here enacted.

or his assigns, upon such proceeding as aforesaid, be relieved in equity, (*w*) he and they shall have, hold and enjoy the demised lands according to the lease thereof made, without any new lease. (*x*) 19 Vic. c. 43, s. 265.

If he be relieved in equity.

R.S. 1897. c. 1667

IF TENANT REFUSES TO GO OUT.

57. (*a*) 1. In case the term or interest of any tenant of any lands, tenements or hereditaments, holding the same under a lease or agreement in writing (*b*) for any term or number of years certain, or from year to year, (*c*) expires or is determined either by the landlord or tenant by regular notice to quit; (*d*) and 2. In case a lawful demand of pos-

Proceedings when the time for which any tenant holds the lands leased has expired, and the tenant refuses to

(*w*) See section 53.

(*x*) It would seem that if the landlord obtain possession and crop the land, the court will not compel him to pay over the value of the crop to the tenant though it exceed the amount of rent reserved in the demise: see *Doe d. Upton et al* v. *Witherwick*, 3 Bing. 11.

(*a*) Taken from C. L. P. Act, 1856, section 206, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 213. Substantially the same as Eng. Stat. 1 Geo. IV. cap. 87, s. 1. The main object of the section here annotated is to save the landlord the necessity of going to trial where the tenant holds over vexatiously and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises sought to be recovered: see *Doe d. Phillips* v. *Roe*, 5 B. & Al. 768, *per* Abbott, C. J.; see also Stat. 23 Vic. cap. 43, and Stat. Ont. 31 Vic. cap. 26, passed for the same purpose.

(*b*) The words "under a lease or agreement in writing" apply to the whole sentence, and are not confined to the case of a tenant holding for a number of years certain: *Doe d. Earl of Bradford* v. *Roe*, 5 B. & Al. 770, *per* Bayley, J. Therefore where a tenant holds from year to year, but without a lease or agreement in writing, the case is not within the statute: *Ib.* A letting by parol is clearly not within the statute: *Rees d. Stepney* v. *Thrustout*, McClel. 492. With reference to the meaning of the word "tenant:" see *Jones* v. *Owen*, 5 D. & L. 669; *Banks et al* v. *Rebbeck*, 20 L. J. Q. B. 476.

(*c*) The intention of the legislature appears to be to make a provision for at least three classes of cases—tenancies "from year to year," for "a year or number of years certain," and for any other "term," though less than a year, for instance, three months: *Doe d. Phillips* v. *Roe*, 5 B. & Al. 766. A tenant holding from quarter to quarter, subject to a determination of the tenancy by three months' notice to quit, is not within the meaning of the section: *Doe d. Carter et al* v. *Roe*, 2 Dowl. N.S. 449; nor is a tenant whose term is determinable on lives: *Doe d. Pemberton et al* v. *Roe*, 7 B. & C. 2; for in neither of these cases can the tenancy be said to be "a term or number of years certain," such as intended. Where after entering into an agreement for a tenancy for a term certain, the parties on the same day made another agreement for the tenancy to continue as long as the lessor should be vicar of a parish, *held* nevertheless to be a case within the statute: *Doe d. Newstead* v. *Roe*, 10 Jur. 925.

(*d*) The section applies only to a case where the tenancy, if by lease, has expired by effluxion of time, or if a yearly tenancy, has been determined by a

deliver possession after notice.

session in writing (*e*) made and signed by the landlord or his agent, (*f*) be served personally upon the tenant or any person holding or claiming under him, or be left at the dwelling-house or usual place of abode of such tenant or person; (*g*) and 3. In case such tenant or person refuses to deliver up possession accordingly, and the landlord thereupon proceeds by action of Ejectment for recovery of possession, he may, at the foot of the Writ in Ejectment, address a notice to such tenant or person, requiring him to find such bail, (*h*) if ordered by the Court or a

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regular notice to quit: *Doe d. Tindal* v. *Roe*, 1 Dowl. P. C. 146, *per* Tenterden, C. J.; and not to the case of a lessee holding over after notice to quit given by himself, where his tenancy has not expired by effluxion of time: *Doe d Cardigan* v. *Roe*. 1 D. & R. 540; nor where the tenant holds over after having surrendered his term: *Doe d. Tindal* v. *Roe*, 1 Dowl. P. C. 143. If a landlord allow his tenant to hold over more than a year after the expiration of his term, a tenancy from year to year is thereby created: *Doe d. Thomas* v. *Field*, 2 Dowl. P. C. 542; see also *Doe d Hull* v. *Wood*. 14 M. & W. 682; and if the lease contain a condition for re-entry on non-payment of rent, a tenancy from year to year thus created is subject to that condition: *Thomas* v. *Packer*, 3 U. C. L. J. 58. The section does not apply where a right of entry is sought to be enforced for non-performance of covenants in any case where the term created has not expired: *Doe d Cundey* v. *Sharpley*, 15 M. & W. 558; nor where there is a *bona fide* dispute between the parties as to title: *Doe d Sanders* v. *Roe*, 1 Dowl. P. C. 4. A notice to quit given by one of several joint tenants, purporting to be given on behalf of all, is good for all: *Doe d. Aslin et al* v. *Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley et al* v. *Hughes et al*, 7 M. & W. 139.

(*e*) The demand may be in this form—"I, A. B. do hereby, as your landlord, according to the Act respecting Ejectment, demand of and require you immediately to give and deliver up to me possession of the land and premises, with the appurtenances, situate at, &c., which you hold as a tenant thereof under and by virtue of a lease bearing date, &c. by me to you made in that behalf, your term therein having expired (or "which you held as tenant thereof from year to year under and by virtue of an agreement in writing—*here state it*—and which tenancy of and in the same has been determined by a regular notice to quit given to you in that behalf."

(*f*) One of several tenants in common may avail himself of the section; for it is not restricted to those cases wherein the landlord is entitled to the exclusive possession: *Doe d Morgan* v. *Rotherham*. 3 Dowl. P. C. 690; and applies as much to the case of a tenant suing his undertenant as to cases of plaintiffs being superior landlords: *Doe d Watts* v. *Roe*. 5 Dowl. P. C. 213. So may the mortgagee of the lessor avail himself of the section: *Anon* 3 Prac. R. 350.

(*g*) Where the tenant had left England for America, his wife being still in possession of the premises, a service of the demand left on the premises, the wife having refused to take it, was held sufficient to entitle the landlord to a rule to show cause why the service should not be deemed good in order to entitle the landlord to a rule under the statute of 1 Geo. IV. c. 87, s. 1: *Doe d. Selgood* v. *Roe*. 1 W. W. & H. 206.

(*h*) It is enacted that "the landlord shall thereupon," &c. and that "it shall

Judge, (*i*) and for such purposes as are hereinafter next specified. 19 Vic. c. 43, s. 266.

Circumstances under which landlord may give notice to tenant to find security.

58. (*k*) Upon the appearance of the party, or in case of non-appearance, then on making and filing an affidavit of service of the Writ and notice, and on the Landlords producing the lease or agreement, or some counterpart or duplicate thereof, (*l*) and proving the execution of the same by affidavit, (*m*) and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, (as the case may be), (*n*) and that possession has been lawfully demanded in manner aforesaid, (*o*) the Landlord may move the Court or apply to a Judge at

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be lawful for *him* at the foot of the writ in ejectment to address a notice," &c. Therefore the notice ought to be signed in the name of the landlord: see *Anon.* 1 D. & R. 435, *n*; but a notice signed "A B, agent for plaintiff," is sufficient: *Doe d. Beard* v. *Roe*, 1 M. & W. 360. The intention is that the notice shall be as it from the landlord, and if such be the construction of it the bare formality of signature will be immaterial: see *Goodtitle d the Duke of Norfolk* v. *Notitle* 5 B. & Ad. 849. If signed by an agent it is not necessary that there should be an affidavit in proof of the agency: *Doe d Geldart* v. *Roe*, 1 W. W. & H. 346. A notice given by one of several lessors, joint tenants, enures the benefit to all: *Doe d Aslin et al* v. *Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley et al* v. *Hughes et al*, 7 M. & W. 139.

(*i*) *Court or a judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*k*) Taken from latter part of C. L. P. Act, 1856, section 286, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 213, and substantially the same as Eng. Stat. 1 Geo. IV. cap. 87, s. 1.

(*l*) The original agreement or some counterpart or duplicate thereof, when counterparts or duplicates have been executed, must be produced. When produced, the instrument should upon the face of it appear to be valid: *Doe d. Caulfield* v. *Roe*, 3 Bing. N. C. 329; see also *Doe d. Holder et al* v. *Rushworth*, 4 M. & W. 74.

(*m*) It is not indispensable that the attesting witness, if there be one, should make the affidavit of execution: see *Doe d Morgan* v. *Rotherham*, 3 Dowl. P. C. 690; *Doe d. Gowland* v. *Roe*, 6 Dowl. P. C. 35; also *Doe d. Avery* v. *Roe*, *Ib.* 518; and s. 212, C. L. P. Act.

(*n*) It would be well for the affidavit to state when the notice was given, in order that the court may judge of its sufficiency and regularity: *Doe d. Topping* v. *Boast*, 7 Dowl. P. C. 487. The affidavit should not omit the word "regular," in referring to the notice: *Ib.* The lease, agreement, counterpart, or duplicate should be annexed to the affidavit: *Doe d. Foucan* v. *Roe*, 2 L. M. & P. 322.

(*o*) See note *e* to section 57.

Chambers (*p*) for a rule or summons (*q*) for such tenant or person, to show cause within a time to be fixed by the Court or Judge on a consideration of the situation of the premises, (*r*) why such tenant or person should not enter into a recognizance by himself and two sufficient sureties, (*s*) in a reasonable sum, (*t*) conditioned to pay the costs and damages which may be recovered by the Claimant in the action, (*u*) and the Court or Judge, upon cause shown or upon affidavit of the service of the rule or summons in case no cause be shown, (*v*) may make the same absolute in whole or in part, and order such tenant or person within a time to be fixed upon a consideration of all the circumstances, to find such bail with such conditions and in such manner as shall be specified in the said rule or summons, or the part of the same so made

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(*p*) It is enacted that it shall be lawful for the landlord producing, &c., and proving, &c , and upon affidavit, &c., to move the court or a judge. These several acts mentioned are conditions precedent to the application, and necessary to sustain it.

(*q*) Though the powers of the court and of a judge in Chambers are for the purpose of the application under this section made co-ordinate, it is apprehended that the court will be slow to entertain the application in the first instance: see note *w* to section 48, C. L. P. Act.

(*r*) Two points are involved in this sentence: first, that the time within which cause must be shown should be fixed by the court or judge; second, that it shall be determined on a consideration of the situation of the premises.

(*s*) "*Two*," not "two or more." The defendant, as well as the bail, should enter into the recognizance. If sureties enter into the recognizance on the faith that the tenant will do so, and tenant omit to do so, the sureties will not be bound: see *Rastall* v. *The Attorney-General*, 17 Grant, 1.

(*t*) The reasonableness of which must be determined by the court or judge. It is unnecessary to express in the rule *nisi* the amount of the security required. The amount should be determined when the rule is made absolute, because then the court or judge will be enabled to decide what may be a reasonable sum to be fixed in view of all the circumstances of the case: *Doe d. Phillips* v. *Roe*, 5 B. & Al. 766; *Doe d. Marquis Anglesey* v. *Brown*, 2 D. & R. 688.

(*u*) Under the statute of 1 George IV. c. 87, s. 1, it was held that the court was only empowered to give a reasonable sum for the costs of the action, and not for mesne profits: *Doe d. Sampson* v. *Roe*, 6 Moore, 54. But in a case where mesne profits can now be recovered on the trial, *i. e.* where the ejectment is brought by a landlord against his tenant, there does not appear to be any reason why they should not be included in the recognizance: Pat. MacN. & Mar. Prac. 970. Special damage alleged to have been caused by the tenant to the premises cannot, it seems, be inserted in the recognizance: *Doe d. Marks et al* v. *Roe*, 6 D. & L. 87. The court or judge, in any event, can direct the recognizance to be taken to the extent of a year's value of the premises, and a reasonable sum for the costs of the action. The amount to be inserted in the recognizance, in respect of the costs, should be ascertained by the master: *Doe d. Levi et al* v. *Roe*, 6 C. B. 272.

(*v*) If the tenant can show with certainty that a new demise has been made to him, that will be sufficient cause: see *Doe d. Durant* v. *Doe*, 6 Bing. 574.

absolute. (*w*) 19 Vic. cap. 43, s. 266.

If not given when ordered, Judgment may be signed.

59. (*a*) In case the party neglects or refuses to comply with such rule or order, (*b*) and gives no ground to induce the Court or Judge to enlarge the time for obeying the same, (*c*) then the lessor or landlord, upon filing an affidavit that such rule or order has been made and served and not complied with, may sign Judgment for the recovery of possession and costs of suit, in the form marked No. 9, or to the like effect. (*d*) 19 Vic. c. 43, s. 266.

MESNE PROFITS.

Court may allow proof of mesne profits at trial, the landlord having first established his right to recover possession, &c.

60. (*e*) Whenever it appears on the trial of an Ejectment at the suit of a landlord against a tenant, (*f*) that the tenant or his Attorney has been served with due notice of trial, (*g*) the Judge before whom the cause comes on to be tried, shall, (whether the Defendant appears upon the trial or not), (*h*) permit the Claimant, after proof of his right to

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(*w*) The *bail-piece* may be as follows:

County of, &c. } On the, &c. A. B. against C. D. for the recovery of, &c.
To wit: } *according to the writ.*)

Recognizance in [£100] by rule of Court [*or* Judge's order]. } The sureties are, B. B. of, &c. butcher, and T. B. of, &c. tailor.

Taken and acknowledged, &c.

The *acknowledgment* may be as follows:

You do jointly and severally undertake that if you, C. D., shall be condemned in this action, you, C. D., shall pay the costs and damages which shall be recovered in such action by the plaintiff, or in default of your so doing, that you, B. B. and T. B., will pay the costs and damages for the defendant. Are you content?

(*a*) Taken from the latter part of C. L. P. Act, 1856, section 266, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 213, and substantially the same as Eng. Stat. 1 Geo. IV. cap. 87, s. 1.

(*b*) *i. e.* Mentioned in section 58.

(*c*) An enlargement, it is apprehended, could be had upon showing that it is really necessary in order to answer the application, and then only on such terms as the court or judge may deem reasonable.

(*d*) It may be a part of the rule that the landlord shall be at liberty to sign judgment in case of a default on the part of the tenant to give the required securities: see *Doe* v. *Roe*, 2 Dowl. P. C. 180.

(*e*) Taken from C. L. P. Act, 1856, section 267, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 214.

(*f*) The action of debt for double value given by Stat. 4 Geo. II. cap. 28, is not affected by this section: see *Hamer* v. *Laing*, 13 U. C. Q. B. 233.

(*g*) As to which see section 201, C. L. P. Act, and notes thereto.

(*h*) In case of defendant's non-appearance at the trial, if claimant be unprepared with proof of title he may waive mesne profits and take a verdict under section 24 of this act.

recover possession of the whole or any part of the premises mentioned in the Writ, (*i*) to go into evidence of the mense profits thereof which have or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein, (*j*) and if on the trial the Jury find for the Claimant, they shall give their verdict upon the whole matter both as to the recovery of the whole or any part of the premises, (*k*) and also as to the amount of the damages to be paid for such mesne profits, (*l*) and in such case the landlord shall have Judgment within the time hereinbefore provided, (*m*) not only for the recovery of possession and costs, (*n*) but also for the mesne profits found by the Jury; (*o*) and the landlord may after the verdict bring an action for the mesne profits which accrue from the time of the verdict, or from the day so specified therein, down to the day of the delivery of possession of the premises recovered in the Ejectment. (*p*) 19 Vic. c. 43, s. 267.

(*i*) See section 21.

(*j*) This section expressly provides that claimant may go into the question of mesne profits, and it does not contain any provision which makes notice of such a claim a condition precedent to the claimant's right to recover in respect of them: *Smith* v. *Tott*, 9 Ex. 307; see also *Tress* v. *Savage*, 18 Jur. 680; *Doe d. Thompson* v. *Hodgson*, 12 A. & E. 135. The only matter which is made a condition precedent is that the tenant or his attorney shall be served with due notice of trial. The claim for mesne profits must be considered as included in the writ. In this respect the C. L. P. Act differs from our former statute 14 & 15 Vic. cap. 114, which enacted that a plaintiff in ejectment, to entitle himself to recover for mesne profits at the trial of the ejectment, should with the original summons deliver a notice of his intention to claim substantial damages: section 12. If he omitted to give the notice he waived all such claim, and could not bring any action afterwards on that account: see *Curtis et ux.* v. *Jarvis*, 10 U. C. Q. B. 466; *Hamer* v. *Laing*, 13 U. C. Q. B. 233.

(*k*) See section 21.

(*l*) *Such mesne profits, i. e.* "which have or might have accrued from the day of the expiration or determination of the tenant's interest down to the time of the verdict given in the cause, or some preceding day to be specially mentioned therein."

(*m*) See section 26; further see section 61.

(*n*) Costs as between attorney and client cannot be recovered by claimant: *Doe* v. *Filliter*, 13 M. & W. 47; see further *Neale et ux.* v. *Winter*, 10 U. C. C. P. 199.

(*o*) See section 60.

(*p*) In an action for mesne profits it has been held that the judgment in eject-

SPEEDY EXECUTION.

Court may order execution within six days in cases where security is given, unless, &c.

61. (*r*) If upon the trial of any case in which such security has been given as aforesaid, (*s*) a verdict passes for the Claimant, (*t*) the Judge before whom the trial is had may (unless it appears to him, that the finding of the Jury is contrary to the evidence or that the damages given are excessive), (*u*) order that Judgment may be entered and execution issued in favour of the Claimant at the expiration of six days next after the giving of such verdict. (*v*) 19 Vic. c. 43, s. 268.

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ment is conclusive of plaintiff's right to possession from the day of the demise laid: *Dodwell* v. *Gibbs*, 2 C. & P. 615: and may be replied by way of estoppel to a plea of not possessed: *Doe* v. *Wright*, 10 A. & E. 763; *Matthew* v. *Osborne*, 13 C. B. 919; *Steen* v. *Steen*, 21 U. C. Q. B. 454. To an action for mesne profits from December, 1844, to March, 1846, it is no estoppel to reply a judgment in ejectment on a demise laid as of 14th October, 1845: *Doe* v. *Wellsman*, 2 Ex. 368; see also *Litchfield* v. *Ready*, 5 Ex. 939. Judgment by default alone is evidence of possession by defendant during the time mentioned in the writ: *Pearse et al* v. *Coaker*, L. R. 4 Ex. 92. Though formerly a judgment against the casual ejector was held not to estop a defendant in an action for mesne profits from disputing the title of plaintiff from the time of the demise laid in the action of ejectment: *Ponton* v. *Daly*, 1 U. C. Q. B. 187; it is now settled that a judgment by default is as much conclusive if properly replied as a judgment on verdict: *Wilkinson* v. *Kirby*, 15 C. B. 430. In trespass for mesne profits it is necessary to state that the land is the land of the plaintiff: *Grant et al* v. *Fanning*, Tay. Rep. 342. And in such an action defendants may give in evidence, in mitigation of damages, the value of buildings erected on the premises by them: *Lindsay et al* v. *McFarling et al*, Dra. Rep. 6; or other substantial improvements made by them: *Patterson* v. *Reardon*, 7 U. C. Q. B. 326. A defendant may be sued for mesne profits though he was never in actual occupation: *Doe* v. *Harlow et al*, 12 A. & E. 40.

(*r*) Taken from C. L. P. Act, 1856, s. 268. See further Eng Stat. 15 & 16 Vic. cap. 76, ss. 185, 215, and Eng. Stat. 1 Geo. IV. cap. 87, s. 3.

(*s*) Under section 58.

(*t*) *Qu.* And one of several claimants?

(*u*) The finding of the jury intended is as to the right of possession: s. 21; and the damages intended, those for mesne profits: s. 60.

(*v*) The words at the close of this section are in substitution for a wholly different provision in the section of the English C. L. P. Act corresponding with the one here annotated. In England, upon a finding for claimant, unless the judge make an order to the contrary, judgment may be entered on the fifth day in term after the verdict, "or within fourteen days after verdict, whichever shall first happen:" Eng. C. L. P. Act, 1852, s. 185. In this Province, unless ordered to the contrary, no judgment in ejectment shall be entered until "the fifth day in term next after the verdict:" s. 26. Thus there exists a difference in the language of the two sections, which is necessary to be noted. By the English C. L. P. Act, 1852, section 215, in the event of execution being stayed until the term following the verdict, when a longer period than fourteen days, provision is made requiring defendant to give security "not to commit any waste or act in the nature of waste

RECOGNIZANCES.

All recognizances, &c., to be taken in like manner as bail in the Superior Courts, with like fees, &c.

Limitation of actions upon such recognizances, &c.

62. (*a*) All recognizances and securities entered into in pursuance of this Act, shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the Superior Courts of Common Law, and subject to the like fees and charges; (*c*) but no action or other proceeding shall be commenced upon any such recognizance or security after six months from the time when the possession of the premises or any part thereof has actually been delivered to the landlord. (*d*) 19 Vic. c. 43, s. 269.

TENANTS OVERHOLDING WRONGFULLY.

More easy remedy against tenants who wrongfully hold over.

63. (*e*) In case a tenant, after the expiration of his term, (whether the same was created by writing or parol), wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him, (*f*) his landlord, or

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or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be."

(*a*) Taken from C. L. P. Act, 1856, s. 269, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 216, the origin of which is Eng. Stat. 1 Geo. IV. cap. 87, s. 4.

(*c*) As to recognizance and the practice of bail generally in Ontario, see note *p*, s. 33, C. L. P. Act.

(*d*) As to computation of time, see C. L. P. Act, s. 342, and notes thereto.

(*e*) Taken from section 53 of our Real Property Act, 4 Wm. IV. cap. 1, as to overholding tenants. Reference may also be had to statutes 23 Vic. cap 43, and Stat. Ont. 31 Vic. cap. 26, both passed since the Consolidated Statutes, and in extension of the remedies herein provided.

(*f*) The tenancy intended by this section is not one which can only be put an end to by notice, but one which comes to an end by the effluxion of a stipulated period: *Adams* v. *Bains*, 4 U. C. Q. B. 157; or perhaps by the happening of a particular event, as under a lease for the life of the lessor: *Patton* v. *Evans*, 22 U. C. Q. B. 606; so that a tenancy for a indefinite term at a monthly rent, subject to be put an end to by either party at a month's notice, is not within the statute: *Ib* Nor does this statute apply to a tenancy at will: *Adverant* v. *Shriver*, *MS.* T. T. 6 & 7 Wm IV. R. & H. Dig. "Landlord and Tenant," II. 2. A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot in the middle of the third month be ejected by his landlord as an overholding tenant within the meaning of this statute: *Adams* v. *Bains*, 4 U. C. Q. B. 157. The statute does not apply to tenants whose terms are alleged to be forfeited by alleged breach of covenant: *In re McNab and Dunlop et al*, 2 U. C. Q. B. 135. Where A, having become purchaser at sheriff's sale of B's interest

the agent of his landlord, (*g*) may apply to either of the Superior Courts of Common Law in Term, or to a Judge thereof in vacation, setting forth, on affidavit, the terms of the demise, if by parol, and annexing a copy of the instrument containing such demise, if in writing, and also a copy of the demand made for the delivery up of possession, and stating also the refusal of the tenant to go out of possession, and the reason given for such refusal, (if any were given), adding such explanation in regard to the ground of refusal as the truth of the case may require; (*h*) and if upon such affidavit it appears to the Court or Judge that the tenant wrongfully holds over, without colour of right, (*i*) such Court or Judge may order a writ to issue in the name of the Queen, and tested in the name of the Chief Justice or Senior Puisne Judge of such Court on the day that the same actually issues,

Application to a Superior Court or to a judge in vacation.

Writ to issue.

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in a term of years held under a third party at a time when B was in possession, and A afterwards, upon B's request, allowed him to remain in possession for five days, it was held that B could not be ejected under this act: *Bonser* v. *Boice*, 9 U. C. L. J. 213. When once a tenant has been ejected under the operation of this act, it is no ground for his restoration to possession that after the finding of the jury the agent of the landlord received a month's rent from the tenant: *Wright* v. *Johnson*, 2 U. C. Q. B. 273. Where a tenant overholds after the expiration of his term, the landlord has a right to take possession if he can without a breach of the peace: *Boulton* v. *Murphy et al*, 5 O. S. 731.

(*g*) A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises, will not be permitted, on the expiration of the term, to proceed under this section: *In re Reeve*, 4 Prac. R. 27; but a receiver, appointed by the court of Chancery, to whom the tenant has attorned, may apply under this section: *In re Babcock and Brooks*, 9 U. C. L. J. 185. If the interest of the original landlord be sold, the vendee may probably apply under this section: *Ib.* Where, on the expiration of a tenancy, crops remain to be valued, this should be done, and the amount tendered, before making application under this section: *In re Boyle*, 2 Prac. R. 134.

(*h*) To the affidavit must be annexed—

1. Copy of the demise, if in writing.
2. Copy of the demand of possession.

And the affidavit must set forth—

1. The terms of the demise, if by parol.
2. Demand of possession.
3. Refusal to give up possession.
4. The reason, if any, given for the refusal (adding such explanation in regard to the ground of refusal as the truth of the case may requir .)

(*i*) If the reasons given by the tenant, why he should not go out of possession, raise any difficult question of law or fact, relief cannot be had under this section: see remarks of Robinson, C. J. *In re Woodbury et ux and Marshall*, 19 U. C. Q. B. 597; see also *Doe d. Lyons* v. *Crawford*, 6 O.S. 334.

directed to such person as the Court or Judge appoints, and commanding him to issue his precept to the Sheriff of the County in which the land is situated, for the summoning of a Jury of twelve men, to come before the Commissioner at a day and place by such Commissioner named, to inquire and say upon their oaths whether the person complained of was tenant to the complainant for a term which has expired, and whether he does wrongfully refuse to go out of possession, having no right, or colour of right, to continue in possession, or how otherwise, (*j*) which writ shall be made returnable whenever the same has been duly executed, before any one of the Judges of the said Court.

Notice of holding inquisition.

64. (*k*) Notice in writing of the time and place of holding such inquisition shall be by the landlord served upon the tenant, or left at his place of abode, (*l*) at least three days before the day appointed, (*m*) to which notice shall be annexed a copy of the affidavit on which the writ was obtained, and of the papers attached thereto. (*n*)

Commissioners to be sworn.

65. (*o*) Before any Commissioner holds an inquisition under this Act, he shall take the following oath before some one of the Justices of the Peace in and for the County in which the inquisition is holden, (*p*) which oath shall be indorsed on the said writ, that is to say:

Oath.

"I, A. B., do solemnly swear, that I will impartially, and "to the best of my judgment, discharge my duty as Commis- "sioner under this writ. So help me God." (*q*) 4 Wm. IV. c. 1, s. 56.

(*j*) For forms of writ and precept: see 10 U. C. L. J. 2, 3.

(*k*) Taken from latter part of section 53 of repealed act 4 Wm. IV. cap. 1.

(*l*) For form of notice: see 10 U. C. L. J. 3.

(*m*) As to computation of time: see C. L. P. Act, sec. 342, and notes thereto.

(*n*) For the information of the tenant and to enable him without delay to make ready for the trial.

(*o*) Taken from section 56 of repealed act 4 Wm. IV. cap. 1.

(*p*) Not sufficient if taken before a clerk of the peace: *Herbert q. t.* v. *Dowswell*, 24 U. C. Q. B. 427.

(*q*) The court refused to entertain a motion to quash a commission for misconduct on the part of a commissioner, but considered there was power to hold him

Jury to be sworn.

66. (*r*) The Commissioner shall administer an oath or affirmation to the persons summoned on such Jury, well and truly to try, and a true verdict to give, upon the matters and things in the said writ contained, according to the evidence; (*s*) and shall also administer an oath or affirmation to the witnesses produced by either party. (*t*)

And witnesses.

Verdict.

67. (*u*) The Jurors (*v*) shall, under their hands, either with or without their seals, endorse their finding upon the back of the writ, or return the same upon a paper attached thereto by such Commissioner. (*w*)

Evidence be returned with commission.

68. (*x*) When executed, the writ and all the evidence, shall be certified and returned by the Commissioner to be filed with the commission and the proceedings thereupon in the office of the Clerk of the Crown and Pleas, at Toronto, from which the writ issued, (*y*) and if upon such return and a consideration of the evidence, it appears to the Court or to a Judge in Chambers, that the case is clearly one coming within the true intent and meaning of the sixty-third section of this Act, such Court or Judge may issue a precept to the Sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question. (*z*) 4 Wm. IV. c. 1, s. 53.

When landlord to be placed in possession.

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amenable on an application, independently of the proceedings between the landlord and tenant: *Allan* v. *Rogers*, 13 U. C. Q. B. 166.

(*r*) Taken from the latter part of section 53 of repealed act 4 Wm. IV. cap. 1.

(*s*) Where the first jury disagreed and was discharged, it was held that the authority of the commissioner was not determined, but that another jury might be summoned and an effectual inquisition had: *In re Woodbury et ux. and Marshall*, 19 U. C. Q. B. 597. The act of the discharge of the jury by consent will not prevent the writ being proceeded with: *In re Babcock and Brooks*, 9 U. C. L. J. 185.

(*t*) For forms of oaths for jurymen and witnesses, and forms of subpœnas for witnesses: see 10 U. C. L. J. 3, 4.

(*u*) Taken from the latter part of section 53 of repealed act 4 Wm. IV. cap. 1.

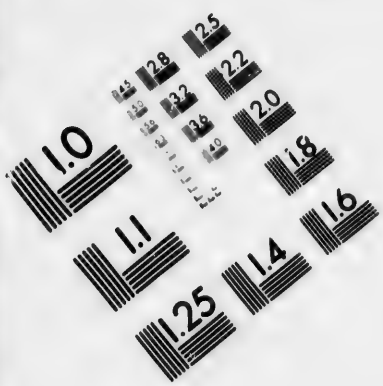
(*v*) See note *s* to section 66.

(*w*) For form of inquisition: see 10 U. C. L. J. 4.

(*x*) Taken from the latter part of section 53 of repealed act 4 Wm. IV. cap. 1.

(*y*) Not only the writ but *all* the evidence must be certified and returned in order to a review of the whole matter by the court or a judge, as in the latter part of this section provided

(*z*) It is on the application for this precept that any questions of law or fact as



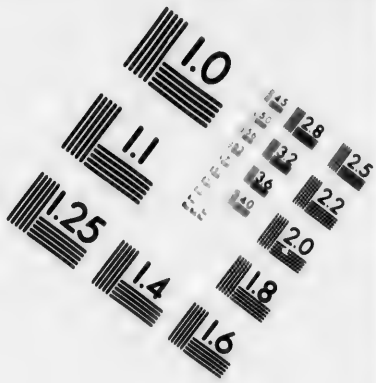
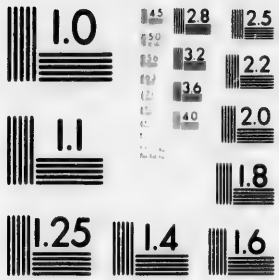
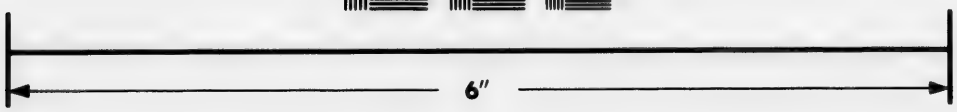
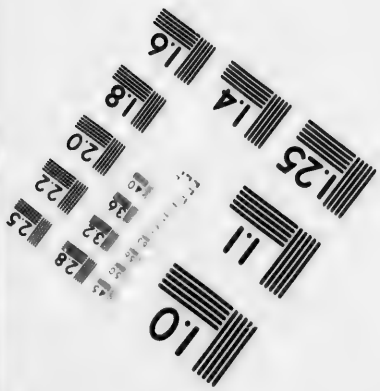
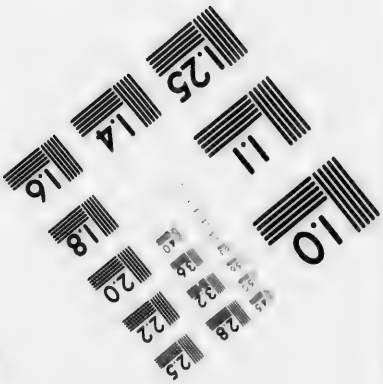


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The Court may revise the proceedings.

And if proper, order tenant to be restored to possession.

69. (*a*) When such precept has been made by a Judge, (*b*) the Court (*c*) may, on motion before the end of the second term after the issue of such precept, examine into the proceedings, and, if they find cause, set aside the same, (*d*) and may issue a precept to the Sheriff, if necessary, commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried as in other cases of Ejectment. 4 Wm. IV. c. 1, s. 54.

The Judges may devise forms of proceedings, and make orders respecting costs and enforce their payment.

70. (*f*) The Judges of the Superior Courts of Common Law, in term time or in vacation, may make and from time to time alter and amend the form of the writ, inquisition and return, and of the precepts to be issued under the sixty-third and following sections of this Act, and may make such orders respecting costs as to them seems just, and may make order respecting the issue of a writ to the Sheriff, commanding him to levy costs of the goods and chattels of the landlord or tenant, or person liable thereto, or (subject to the provisions of the Act respecting Arrests and Imprisonment for Debt) respecting the issue of an attachment for the non-payment thereof against the party liable to pay costs, as to them seems just. (*g*) 4 Wm. IV. c. 1, s. 55; 22 Vic. c. 33, s. 4. (1859.)

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disclosed by the evidence and objection if any to the regularity of the landlord's proceedings may be discussed. And although a jury may on the direction of the commissioner find for the claimant, a precept to the sheriff for delivery of possession will be refused if the court or judge do not think the evidence disclose a case within the meaning and operation of section 63 of this act: see *Bonser* v. *Boice*, 9 U. C. L. J. 213.

(*a*) Taken from section 54 of the repealed act 4 Wm. IV. cap. 1.

(*b*) Under section 68.

(*c*) *The court, i. e.* from which writ issued.

(*d*) The court refused in one case to set aside a writ of possession issued by a judge on a finding in favor of the claimant where the application was made on the ground that the agent of the landlord had received a month's rent after the finding of the jury: *Wright* v. *Johnson*, 2 U. C. Q. B. 273.

(*f*) Taken from section 55 of the repealed act 4 Wm. IV. cap. 1, as amended by Stat. 22 Vic. cap. 33, s. 4.

(*g*) The powers conferred are—

1. To alter and amend the form of writ, injunction, return and precepts.
2. To make such orders respecting costs as to them seems just.

Punishment if witness does not attend.

71. (*h*) If any person, required by notice from any such Commissioner to attend as a witness upon the inquisition (*i*) refuses or wilfully omits to attend, (*j*) he shall be liable to be committed upon the warrant of the Commissioner to the Common Gaol of the County for a term not exceeding one month. (*k*) 4 Wm. IV. c. 1, s. 57.

Perjury.

72. (*l*) If any witness sworn (*or* affirmed) (*m*) and examined before a Commissioner holding an inquisition as aforesaid, wilfully swears or affirms falsely, he shall be liable to the penalties of wilful and corrupt perjury. (*n*) 4 Wm. IV. c. 1, s. 57.

All other remedies of landlords saved.

73. (*o*) Except as hereinbefore expressly enacted, nothing herein contained shall prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for. (*p*) 19 Vic. c. 43, s. 270.

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3. To make orders respecting the issue of a writ to the sheriff, commanding him to levy costs, &c., as respecting the issue of an attachment for non-payment thereof, as to them seems just.

The court will not grant an attachment against an overholding tenant for non-payment of costs until an order to pay them has been first served upon him and a demand made: *In re McLachlan*, 3 U. C. Q. B. 331.

(*h*) Taken from section 57 of repealed act 4 Wm. IV. cap. 1.

(*i*) For form: see 10 U. C. L. J. 3.

(*j*) It is not every non-attendance that will subject the witness to the penalties of this section. The witness must "refuse" or "wilfully omit" to attend—in either case there must be an act of the will—contumacy, not accident.

(*k*) *i. e.* The common gaol of the county wherein the inquiry is being had or intended to be had.

(*l*) Taken from section 57 of repealed act 4 Wm. IV. cap. 1.

(*m*) The commissioner has power to administer an oath or affirmation to witnesses produced by either party: section 66.

(*n*) Perjury is the wilfully taking of a false oath (or affirmation) in some judicial proceeding before a person having competent authority to administer it, and in matter material to the point then in question, whether the party be believed or not: see Hawk P. C. b. 1, c. 69, s. 1. If a man swears to a fact which happens to be true, but of which he has no knowledge whatever at the time he swears, it is equally perjury: *Ib.* s. 6.

(*o*) Taken from C. L. P. Act 1856, s. 270, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 218.

(*p*) A landlord may bring ejectment in a county court (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200) in the following cases:

MORTGAGES.

Action of ejectment brought by mortgagee.

74. (*q*) In case an action of Ejectment be brought by any mortgagee or his assignees (*r*) for the recovery of the possession of any mortgaged lands, tenements or hereditaments, (*s*) and no suit be then depending in the Court of Chancery for or touching the foreclosing or redeeming the same, (*t*) if the person having right to redeem, (*u*) appears and becomes Defendant in such action, (*v*) at any time pend-

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1. Where the term and interest of the tenant shall have expired or been determined by the landlord or the tenant by a legal notice to quit.
2. Where the rent shall be sixty days in arrear, and the landlord have right by law to re-enter for non-payment thereof: Stat. 23 Vic. cap. 43, s. 1.

So in case a tenant after his lease or right of occupation, whether created by writing or by verbal agreement, has expired or been determined either by the landlord or tenant, or wrongfully refuses upon demand in writing to go out of possession of the land demised, application may be made to the county judge, who may exercise in respect of the complaint many of the powers of a commissioner, as described in the foregoing sections: Stat. Ont. 31 Vic. cap. 26, s. 2.

(*q*) Taken from C. L. P. Act 1856, section 271, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 219; taken from Eng. Stat. 7 Geo. II. cap. 20, s. 1.

(*r*) Although plaintiff being a mortgagee after the commencement of an action by him receive notice from a subsequent mortgagee not to part with the title-deeds, the case is still within the statute, and a rule will be granted directing such first mortgagee on payment of principal, interest and costs, to deliver up the title-deeds to the mortgagor: *Dixon* v. *Wigram*, 2 C. & J. 613.

(*s*) The act of 7 Geo. II. cap. 20, s. 1, which is still in force, extends also to actions brought "on any bond for payment of the money secured by such mortgage or performance of the covenants therein mentioned," which words have been held to include actions on covenants contained in the mortgage: *Smeeton et al* v. *Collier*, 1 Ex. 457. The section here annotated is restricted to actions of ejectment, and applies only to mortgagees not in possession: *Sutton* v. *Rawlings*, 3 Ex. 407; who have not attempted to exercise powers of sale, if there be such in their mortgages: *Ib.*

(*t*) There should be an affidavit of this fact: *Wilkinson* v. *Traxton*, 1 Selwyn's N. P. 13 ed. 626. See note *i* to section 75.

(*u*) A person will not be held to have the right to redeem if by denying the plaintiff's title he assumes a position inconsistent with that of the mortgagor: *Roe* v. *Wardle*, 3 Y. & C. 70. Nor if he has contracted to sell his equity of redemption to the mortgagee: *Goodtitle d. Tyaun* v. *Pope*, 7 T. R. 185.

(*v*) An appearance by the party is necessary before he can take the benefit of this section: *Doe d. Tubb* v. *Roe*, 4 Taunt. 887; *Doe d. Hurst et al* v. *Clifton*, 4 A. & E. 814. The court has no jurisdiction until after appearance: *Ib.* If a mortgagee recover possession of mortgaged premises under a judgment in an undefended ejectment the court has no jurisdiction to restore on payment of debt, interest and costs, the possession to the mortgagor who has not appeared: *Doe d. Tubb* v. *Roe*, 4 Taunt. 887. Unless the mortgagor make himself defendant, the court will not interfere either under the statute or in the exercise of its general power over actions in the court: *Doe d. Hurst et al* v. *Clifton*, 4 A. & E. 814.

ing the action, (*w*) and pays unto such mortgagee, or in case of his refusal to accept brings into the Court where the action is depending, (*y*) all the principal moneys, and interest due on such mortgage, (*z*) and also all such costs as have been expended in any suit at law or in equity thereupon, (*a*) (such money for principal, interest and costs, to be ascertained and computed by the Court where the action is pending, or by the proper officer by such Court to be appointed for that purpose), (*b*) the moneys so paid or brought into

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The fact of the mortgagor's appearance ought to be shown in his affidavit: *Doe d. Cox* v. *Brown*, 6 Dowl. P. C. 471.

(*w*) *i. e. before* judgment: *Wilkinson* v. *Traxton*, 1 Selwyn's N. P. 13 ed. 626; *Amis* v. *Lloyd*, 3 Ves. & B. 15; *Doe d. Tubb* v. *Roe*, 4 Taunt. 887; but see *Doe d. Milburne* v. *Sibbald*, 4 O.S. 330.

(*y*) If the section were strictly construed it would seem to contemplate that the mortgagor should first tender the money to plaintiff, and that only in case "of his refusal" will the mortgagor be entitled to make application to the court. But under the statute of Geo. II. in which the expression used corresponds precisely with that of this section, it was not usual for the affidavit to state that the money had been tendered: *Filbee* v. *Hopkins*, 6 D. & L. 264.

(*z*) The court of Queen's Bench stayed proceedings upon payment of principal, interest and costs, in an ejectment by plaintiff claiming under a deed absolute upon its face, where it appeared that the deed was in truth a security for money lent: *Doe d Shuter et al* v. *Maclean*, 4 O.S. 1; and refused to permit plaintiff to include in the redemption money a simple contract debt due to him by the mortgagor: *Ib.*

(*a*) The legislature intend to exonerate the mortgagor from the delay and expense of an equity suit to redeem, but not to deprive the mortgagee of any equity. To avoid such delay and expense they authorize the court of law, in which the mortgagee may bring his action to afford relief upon a summary application; but the legislature do not purpose to lessen the fine which in equity the mortgagor should pay for the redemption of the hereditaments pledged: *Sutton* v. *Rawlings*, 3 Ex. 411, *per* Pollock, C. B. Where a mortgagee in pursuance of a power of sale attempted to dispose of the property, the court refused to compel him to re-convey the premises and deliver up the title-deeds, except upon payment of the costs of the abortive attempt at sale: *Dowel* v. *Neale*, 10 W. R. 627. So where the instalments on a mortgage were by mistake for a larger sum than was advanced, and the mortgagee on discovering the mistake gave an undertaking on a separate paper, not under seal, that only the correct sum should be demanded, and afterwards assigned the mortgage, and the assignee brought an action against the mortgagor for non-payment of the instalments as set out in the mortgage, the court refused to stay proceedings on payment of the sum really due, being less than the sum which according to the face of the mortgage was due: *Baby* v. *Milne*, 5 O.S. 76. As to costs: see also *Goodright* v. *Moore*, Barnes, 176; *Doe d. Capps* v. *Capps*, 3 Bing. N. C. 768.

(*b*) The intention of the section is to break in upon the jurisdiction of the court of chancery only to the limited extent of perfectly plain cases on admitted

Discharge of mortgage.

such Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, (*c*) and the Court shall discharge every such mortgagor or Defendant of and from the same accordingly, (*d*) and shall by rule of the same Court compel such mortgagee to assign, surrender or reconvey such mortgaged lands, tenements and hereditaments, and such estate and interest as such mortgagee has therein, and to deliver up all deeds, evidences and writings in his custody relating to the title of such mortgaged lands, tenements and hereditaments unto the mortgagor who has paid or brought such moneys into the Court, or to such other person as he, for that purpose, nominates and appoints. (*e*) 19 Vic. c. 43, s. 271.

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facts or facts capable of ascertainment by the way ordinarily pursued on motion in the common law courts: *Doe d. Harrison et al* v. *Louch*, 6 D. & L. 276, *per* Coleridge, J. Therefore the court of Queen's Bench refused to stay proceedings in ejectment on a mortgage on payment into court of the money due upon the mortgage, together with the costs in the action, where the whole amount secured by the mortgage was not admitted to be due, and refused a reference to the master to ascertain the amount actually due in such case: *Doe d. McKenzie et al* v. *Rutherford*, 1 U. C. Q. B. 172; *Goodtitle d. Fisher* v. *Bishop*, 1 Y. & J. 344; see also *Huson* v. *Hewson*, 4 Ves. 105. So where the right to redeem was disputed: see section 75.

(*c*) The court has power to order a re-conveyance and delivery over of title deeds: see *Dixon* v. *Wigram*, 2 C. & J. [illegible]; *Smeeton et al* v. *Collier*, 1 Ex. 457; and conclusion of this section.

(*d*) A judge in chambers might exercise the powers conferred upon the court by this statute: *Smeeton et al* v. *Collier*, 1 Ex. 457; *Lawrence* v. *Hogben*, 26 L. J. Ex. 55. Re-payment to the mortgagee of the expenses of putting up the mortgaged property to sale may be made a condition of a rule to stay proceedings: *Dowle* v. *Neale*, 10 W. R. 627. The section does not apply to cases where the mortgagee is in possession: *Sutton* v. *Rawlings*, 3 Ex. 407.

(*e*) The formal part of the rule when *nisi* may be as follows—"Show cause why upon the defendant bringing into this court all the principal moneys and interest due to the plaintiff upon his mortgage upon the premises for the recovery of possession of which this action is brought, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained, computed, and taxed by the master of this court), the money brought into this court should not be deemed and taken to be in full satisfaction and discharge of such mortgage, and upon payment thereof to the plaintiff why all proceedings in this action should not be stayed, and why the mortgaged premises and the plaintiff's estate and interest therein should not be assigned, surrendered, and re-conveyed; and why all deeds, and evidences, and writings relating to the title of such mortgaged premises, and in the custody and power of the plaintiff, should not be delivered up to the defendant or to such person or persons as he shall for that purpose nominate and appoint: Pat. MacN. & Mar. Prac. 949.

Not to extend to cases where the right to redeem or the sum due is contested

75. (*f*) In case the person against whom the redemption is prayed, insists (by writing under his hand or the hand of his Attorney, Agent or Solicitor,) that the party praying a redemption has not a right to redeem, (*h*) or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or are admitted on the other side, (*i*) and delivers such writing to the Attorney or Solicitor for the other side, before the money is brought into Court, or in case the right of redemption to the mortgaged lands and premises in question in any cause or suit be contravened or questioned by or between different Defendants in the same cause or suit, (*j*) nothing in the last preceding section contained shall extend to any such cause or suit, nor shall any thing therein contained be of any preju-

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(*f*) Taken from C. L. P. Act 1856, section 272, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 220; which was taken from Stat. 7 George II. cap. 20, s. 3.

(*h*) A party who assumes a position inconsistent with that of a mortgagor, for instance, by disputing the mortgagee's title, will not be entitled to redeem: *Roe* v. *Wardle*, 3 Y. & C. 70. Nor if admitting mortgagee's title he has contracted to sell the equity of redemption to him: *Goodtitle d. Tayeum* v. *Pope*, 7 T. R. 185. Where A, having purchased a lot of land, and paid several instalments of the purchase money, but having received no deed and being unable to meet the remaining instalments, assigned his right to B, taking a bond from him that if he should obtain the deed on the payment by A to him of £130 in two years, he would convey the land to A; *Held* on ejectment brought by B, the two years having expired, that A was not entitled to treat the bond as a mortgage, and redeem on payment of principal, interest and costs: *Doe d. Shannon* v. *Roe*, 5 O.S. 484.

(*i*) The statute does not apply where the right to redeem is disputed upon affidavits: *Goodtitle d. Fisher* v. *Bishop*, 1 Y. & J. 344. But in order to deprive the mortgagor of his right to redeem, it is not sufficient that the mortgagee should in the notice mentioned in this section make a mere general statement that he insists that the mortgagor has no right to redeem, and that the mortgaged premises are chargeable with other sums than appear on the face of the mortgage deed or than are admitted by the mortgagor: *Goodtitle d. Leon* v. *Lonsdown*, 3 Anst. 937; *Doe d. Harrison et al* v. *Louch*, 6 D. & L. 270; but see *Filbee* v. *Hopkins*, *Ib.* 264. Enough must be stated by the mortgagee to enable the court to determine what the question is between the parties: *Doe d. Harrison et al* v. *Louch*, *Ib.* 270. The ulterior demand and its amount must also be stated: *Goodtitle d. Leon* v. *Lonsdown*, 3 Anst. 937.

(*j*) There is a material change in the language of this clause, as it advances to specify another case to which the statute shall not extend, where, instead of speaking of notices and their interests, it speaks of the right of redemption *being* controverted between different defendants. Here it is not enough to insist by notice in writing, but the fact of the dispute must be made out in order to get rid of the defendant's application: *Doe d. Harrison et al* v. *Louch*, 6 D. & L. 275, *per* Coleridge, J.

dice to any subsequent mortgage or subsequent encumbrance. 19 Vic. c. 43, s. 272.

SECURITY FOR COSTS.

When the claimant in subsequent action for the same property may be or-

76. (*l*) If any person brings an action of Ejectment after a prior action of Ejectment (*m*) has been unsuccessfully brought by him or by any person through or under whom he claims, against the same Defendant or against any person

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(*l*) Taken from C. L. P. Act, 1856, section 273, the origin of which was Eng. Stat. 17 & 18 Vic. cap. 125, s. 93.

(*m*) The peculiarity of the action of ejectment is that a claimant may litigate a title more than once, no one action being an estoppel to subsequent actions between the same parties or their representatives: see note *j* to section 49. This privilege, unless carefully watched by the courts, might be productive of vexation and expense. Because of this, the courts have exercised the jurisdiction of staying proceedings in a subsequent until payment of costs incurred in the prosecution of a prior ejectment: *Keene d. Angel* v. *Angel et al*, 6 T. R. 740; *Doe d. Feldon* v. *Roe*, 8 T. R. 645; *Doe d. Pinchard* v. *Roe*, 4 East. 585; *Benn d. Mortimer et ux.* v. *Dean*, Barnes, 180; *Doe d. Hussey* v. *Roe*, E. T. 3 Vic. *MS.* R. & H. Dig. "Ejectment," vi. 4. "The reason why the court stays proceedings on a second ejectment is to prevent vexation, for it is in the power of a person to bring as many ejectments as he pleases unless he has been enjoined to the contrary by the court of Chancery, which this court has no power to do. Therefore where a plaintiff has had judgment in a former ejectment against him and is for bringing a new one, we cannot deny it to him absolutely, but as it is as a creature of the court, and an equitable proceeding, we grant it him upon paying the costs and making the recompense for the vexation he had caused in the prior ejectment:" *Doe d. Duchess of Hamilton* v. *Atherly et al*, 7 Mod. 422, *per* Lee, C. J. Where a plaintiff, having failed in an action, brings a second action for substantially the same cause, unless the plaintiff satisfy the court that a reasonable cause of action exists, the proceeding is so *prima facie* vexatious and harassing that the court will stay the second action until the costs of the former action have been paid: *Cobbett* v. *Warner*, L. R. 2 Q. B. 108. The practice prevails in cases where the second or subsequent action is between the representatives of the original parties or the representatives of either of them, as much as if between the original parties themselves: *Doe d. Feldon* v. *Roe*, 8 T. R. 645; *Doe d. Chambers* v. *Law*, 2 W. Bl. 1180; *Doe d. Duchess of Hamilton* v. *Atherly et al*, 7 Mod. 420; *Doe d. Standish et al* v. *Roe*, 5 B. & Ad. 878; *Doe d. Heighley* v. *Harland et al*, 10 A. & E. 761; and in cases where the second or subsequent action, though not for the same land as the former suit, depends upon the same title: *Keene d. Angel* v. *Angel*, 6 T. R. 740; *Doe d. Heighley* v. *Harland et al*, 10 A. & E. 761; *Doe d. Brayne et ux.* v. *Bather*, 12 Q. B. 941; although the previous action may have been in a court different to that in which the suit is stayed: *Doe d. Chambers* v. *Law*, 2 W. Bl. 1180; *Doe d. Carthew et al* v. *Brenton*, 6 Bing. 469; see also *Wade* v. *Simeon*, 1 C. B. 610; and if there was jurisdiction in the court in which the action was first entered to try it: *Hodgson* v. *Graham*, 26 U. C. Q. B. 127; and if plaintiff had an opportunity to try it on the merits: see *Hoare* v. *Dickson*, 7 C. B. 164. But it has been said that a limitation of the practice is that it is only exercised in cases where the previous ejectment has been tried, and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is little vexation and very little expense: *Short* v. *King*, 2 Str. 681; *Doe d. Selby* v. *Alston*, 1 T. R.

through or under whom he defends, the Court or a Judge (*n*) may, (*o*) on the application of the Defendant at any time after his appearance entered, (*p*) order that the Claimant shall give to the Defendant security for the payment of costs, (*q*) and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action was disposed of by discontinuance or by non-suit, or by Judgment for the Defendant. (*r*) 19 Vic. c. 43, s. 273.

Ordered to give security for costs.

491; *Doe d. Blackburn* v. *Standish*, 2 Dowl. N. S. 2ª; *Doe d. McKay* v. *Roe*, M. T. 5 Vic. *MS.* R. & H. Dig. "Ejectment," vi. 5. Whether this limitation can now be sustained is a matter of doubt: see *Doe d. McLeod* v. *Johnston*, 1 Cham. R. 133; *Ferrier* v. *Moodie*, 1 Prac. R. 151; *Grimshawe* v. *White et al*, 3 Prac. R. 320; see also *Davis* v. *Weller*, 5 Prac. R. 150. But if the forfeiture in respect of which the action be brought be a new forfeiture, the second action will not be stayed: *Bell* v. *Cuff*, 4 Prac. R. 155; so if it can be shown that the previous suit was instituted and conducted without plaintiff's knowledge and privity: see *Souter* v. *Watts*, 2 Dowl. P. C. 263. The rule to stay proceedings in cases such as already mentioned is not, however, an inflexible one. If it be made to appear that in the previous ejectment plaintiff was nonsuited in consequence of the fraud or perjury of defendant, no stay will be granted: *Doe d. Rees* v. *Thomas*, 2 B. & C. 622. This section is an extension of the principle contained in the foregoing cases. The court now has authority not only to stay proceedings until payment of the costs of a previous ejectment, but until security be given for payment of costs in the pending suit.

(*n*) Relative powers: see note *w* to section 48, C. L. P. Act.

(*o*) The decision of a judge in chambers, when made in the exercise of a sound discretion, will not be the subject of an appeal to the court: note *w* to section 48, C. L. P. Act.

(*p*) Until appearance defendant is without a *locus standi* in the court: see note *m* to section 8. This was also the rule as to moving to stay proceedings for non-payment of costs in a previous suit under the old practice: *Doe d. Flanders et al* v. *Roe*, 3 U. C. Q. B. 127. In a second ejectment for the same premises between the same parties proceedings were thus stayed, and plaintiff, disregarding it, proceeded, and was non-suited for not confessing lease, entry and ouster. Defendant thereupon moved to set aside the proceedings, but the affidavit was so worded as to be evidently made in the first cause; the court notwithstanding overruled the objection and set aside the proceedings: *Doe d. Lake* v. *Davis*, 3 O.S. 311. In answer to an application to stay proceedings until payment of the costs of a previous suit, it has been held enough for plaintiff to deny that he claims under the same title as in the former ejectment: *Doe d. Bailey et at* v. *Bennett et uz.* 9 Dowl. P. C. 1012; see also *Doe d. Evans* v. *Snead et al*, 2 D. & L. 119.

(*q*) This, it is apprehended, means the costs of the pending suit in which application is made, and has no reference to any former suit. Though the appearance is in ejectment the issue, the entry of it does not prevent defendant applying for security for costs; *Crowe et al* v. *McGuire*, 3 U. C. L. J. 205.

(*r*) The power to stay a suit until payment of the costs of a previous suit is not in general exercised unless where the previous suit has been brought down to trial and tried: see note *m* to this section.

JURISDICTION OF THE COURT OVER PROCEEDINGS.

Court may exercise the same jurisdiction as formerly over proceedings in ejectment.

77. (*s*) The several Courts and the Judges thereof respectively, may and shall exercise over the proceedings in Ejectment under this Act, the like jurisdiction as formerly exercised in the old action of ejectment, (*t*) so as to ensure a trial of the title and of actual ouster when necessary, (*u*) and for all other purposes for which such jurisdiction might have been exercised. (*v*) 19 Vic. c. 43, s. 274.

Real actions abolished.

78. (*a*) No writ of right patent, writ of right *quia dominus remisit curiam*, writ of right close, writ of right *de rationabili parte*, writ of right upon disclaimer, writ of right of ward, writ of *cessavit*, *quod permittat*, formedon in descender, remainder, or in reverter, writ of Assize of novel disseisin, nuisance, or mort d'ancestor, writ of entry sur disseisin in the *quibus*, in the *per*, in the *per* and *cui*, or in the post, writ of entry *sur* intrusion, writ of entry *sur* alienation, *dùm fuit non compos mentis*, *dùm fuit infrà ætatem*, *dùm fuit in prisona*, *ad communem legem*, *in casu proviso*, *in consimili casu*, *cui in vita*, *sur cui in vita*, *cui ante divortium*, or *sur cui ante divortium*, writ of entry *sur* abatement, writ of entry *quare ejecit infrà terminum*, or *ad terminum qui præteriit*, or *causa matrimonii prælocuti*, writ of aiel, besaiel, tresaiel, cosinage, or *nuper obiit*, writ of waste, writ of partition, except such as authorized by Statute of this Province; writ of *disceit*, writ of *quod ei deforceat*, writ of covenant real, writ of *war-*

(*s*) Taken from C. L. P. Act, 1856, section 274, the origin of which was Eng. Stat. 15 & 16 Vic. cap. 76, s. 221.

(*t*) An action of ejectment stands on a different footing to an ordinary case: *Mobbs* v. *Vandenbrande*, 12 W. R. 405, *per* Blackburn, J.; s. c 33 L. J. Q. B. 177. The real defendant or real plaintiff, when unsuccessful, though not parties to the record, may be ordered to pay costs: *Hutchinson et al* v. *Greenwood et al*, 4 El. & B. 324; *Thornton* v. *Wilkinson*, 11 W. R. 916; *Mobbs* v. *Vandenbrande et ux.* 4 B. & S. 904.

(*u*) See section 30.

(*v*) The English C. L. P. Act continues, "and the provisions of all statutes not inconsistent with the provisions of this act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto." As to making parties substantially defending the action pay costs, though not parties to the record, see note *r* to section 26 of this act.

(*a*) Taken from our Real Property Act, 4 Wm. IV. cap. 1, section 39, the origin of which was Eng. Stat. 3 & 4 Wm. IV. cap. 27, s. 36.

rantia chartæ, writ of *curia claudenda*, (*b*) and no other action, real or mixed, (except a writ of dower, or writ of dower *undè nihil habet*, or an Ejectment); (*c*) and (except a plaint for dower,) no plaint in the nature of any such writ or action shall be brought. (*d*) 4 Wm. IV. c. 1, s. 39. Exceptions.

79. (*e*) When on the first day of January, one thousand eight hundred and thirty-six, any person whose right of entry to any land had been taken away, by any descent cast, discontinuance or warranty, might have maintained any such writ or action, as aforesaid, (*f*) in respect of such land, such writ or action may be brought after the said first day of January, one thousand eight hundred and thirty-six, but only within the period during which, by virtue of the provisions of the Act respecting the limitation of actions and suits relating to real property, &c., an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away. (*h*) 4 Wm. IV. c. 1, s. 41. Saving certain rights of persons whose right of entry had been taken away on the 1st January, 1836.

(*b*) By these actions, formerly, all disputes concerning real estate were decided, but they have been long since laid aside in practice, on account of the great nicety required in their management, and the inconvenient length of their process, and a much more expeditious method of trying titles having been since introduced by other acts, and particularly by ejectment: 3 Steph. Com. 6 ed. 395.

(*c*) The real and mixed actions which have escaped the general demolition of their class are, writ of dower, writ of dower *undè nihil habet*, and ejectment. The two first of these are applicable, and are the proper forms to be used, where the demandant claims lands or tenements by the particular title of dower; the first being applicable where a woman is endowed of part of her dower, and is deprived of the residue lying in the same town by the same tenant by whom she was endowed of part; and the second, in all other cases where she is entitled to dower: 3 Steph. Com. 6 ed. 521; but it is now by statute declared that an action of dower shall be commenced by writ of summons: Stat. Ont. 32 Vic. cap. 7.

(*d*) A writ of right by journeys accounts sued out after the time limited in the English act was held to be a nullity: *Davies* v. *Lowndes*, 2 D. & L. 272; s. c. Phill. C. C. 328. It seems that an action of debt does not necessarily lie for rent in consequence of the abolition of real actions: *Varley et al* v. *Leigh*, 2 Ex. 450, *per* Rolfe, B.

(*e*) Taken from our Real Property Act, 4 Wm. IV. cap. 1, s. 41, the origin of which was Eng. Stat. 3 & 4 Wm. IV. cap. 27, s. 38.

(*f*) *i. e.* Such as mentioned in the preceding section.

(*h*) This saving is still in operation, but the rights preserved by it, if any still existing, must be enforced within the time allowed by the section. By a will in 1789 an estate was devised to A. for life, with remainder as he should by deed

No descent, warranty, &c. to bar a right of entry.

80. (*i*) **No descent cast, discontinuance or warranty, which may have happened or been made since the first day of July, one thousand eight hundred and thirty-four, or which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land.** (*k*) 4 Wm. IV. c. 1, s. 42.

81. The following forms are those referred to in the foregoing sections of this Act.

FORMS.

No. 1.—(*Vide* Section 3.)

VICTORIA, &c.

To X., Y. and Z. and all persons entitled to defend the possession of (*describe the property with reasonable certainty,*) in the Township of , in the County of , to the possession whereof A. B., and C. some or one of them, claim to be (*or* to have been on and since the day of , A.D.) entitled, and to eject all other persons therefrom.

These are to will and command you or such of you as deny the alleged title within sixteen days of the service hereof, to appear in our Court of , to defend the said property or such part thereof as you may be advised, in default whereof Judgment may be signed, and you turned out of possession.

Witness, &c.

No. 2.—(*Vide* Section 15.)

In the Q. B. (*or* C. P.)

The day of , one thousand eight hundred and (*date of the Writ.*)

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or will appoint; and in default of appointment remainder to the heirs of his body, with remainders over. In 1790 A. levied a fine to the use of himself in fee, and afterwards died without issue. It was held in an ejectment by the lessors of the plaintiff claiming as heirs-at-law of A. that the fine created a discontinuance, and gave a tortious fee to A. and that his heir-at-law was consequently entitled to recover in ejectment, the remainders over being devested, and the rights of the remainder-men only being capable of being enforced by real action. In such a case the section here annotated preserves the right of the remainder-man to bring a formedon: see *Doe d. Gilbert et al* v. *Ross*, 7 M. & W. 102; *Seymor's Case*, 10 Rep. 96, *a*; *Doe d. Cooper* v. *Finch et al*, 4 B. & Ad. 288; *Doe d. Jones et al* v. *Jones*, 1 B. & C. 238; 2 Sug. V. & P. 11 ed. 613; 1 Hayes Conv. 5 ed. 237.

(*i*) Taken from our Real Property Act, 4 Wm. IV. cap. 1, s. 42, the origin of which was Eng. Stat. 3 & 4 Wm. IV. cap. 27, s. 39.

(*k*) In general a right of entry was taken away (or *tolled*) by the *descent so cast* (as the term was) upon the heir of an abator, intruder or disseisor, and yet if the claimant were under any legal disability during the life of the ancestor, by whom the ouster was effected, such as infancy or the like, the descent had no such operation: 3 Steph. Com. 6 ed. 515. It is now declared that no descent cast, &c. which may have happened or been since 1st July, 1834, or which may happen to be made, shall toll or defeat any right of entry or action for recovery of land.

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court in these words, that is to say:

Victoria, &c. (*copy the Writ,*) and as no appearance has been entered or defence made to the said Writ, therefore it is considered that the said (*insert the names of the persons in whom title is alleged in the Writ,*) do recover possession of the land in the said Writ mentioned, with the appurtenances.

No. 3.—(*Vide* Sections 15 and 16.)

In the Q. B. (*or* C. P.)

On the day of , one thousand eight hundred and (*date of the Writ.*)

County of , } On the day and year above written, a writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

Victoria, &c. (*copy the Writ,*) and C. D. has on the day of , appeared by , his Attorney (*or* in person), to the said Writ, and has defended for a part of the land in the Writ mentioned, that is to say, (*state the part*), and no appearance has been entered or defence made to the said Writ, except as to the said part; Therefore, it is considered that the said A. B., (*the claimant*), do recover possession of the land in the said Writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a Jury come, &c.

No. 4.—(*Vide* Section 16.)

In the Q. B. (*or* C. P.)

On the day of , one thousand eight hundred and (*date of the Writ.*)

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court in these words, that is to say:

Victoria, &c. (*copy the Writ,*) and C. D. has on the day of , appeared by , his Attorney, (*or* in person), to the said Writ, and defended for the whole of the land therein mentioned; Therefore, let a Jury come, &c.

No. 5.—(*Vide* Section 21.)

Afterwards on the day of , A. D., before Justice of our Lady the Queen, assigned to take the Assizes in and for the within County, came the parties within mentioned, and a Jury of the said County being sworn to try the matters in question between the said parties, upon their oath, say: That A. B. (*the claimant*), within mentioned, on the day of , A. D., was and still is entitled to the possession of the land within mentioned, as in the Writ alleged; Therefore, &c.

No. 6.—(*Vide* Section 42.)

In the Q. B. (*or* C. P.)

On the day of , one thousand eight hundred and , (*date of the Writ.*)

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court in these words, that is to say:

Victoria, &c. (*copy the Writ,*) and C. D. has on the day of , appeared by , his Attorney (*or* in person), to the said Writ, and A. B. has discontinued the action; Therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. $ (*or* £) for his costs of defence.

No. 7.—(*Vide* Section 44.)

In the Q. B. (*or* C. P.)

On the day of , one thousand eight hundred and , (*date of Writ.*)

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c. (*copy the Writ,*) and C. D. has on the day of , appeared by , his Attorney, (*or* in person), to the said Writ, and A. B., has failed to proceed to trial, although duly required so to do; Therefore it is considered that the said C. D. be acquitted, and that he do recover against the said A. B. $ (*or* £) for his costs of defence.

No. 8.—(*Vide* Section 45.)

In the Q. B. (*or* C. P.)

The day of , one thousand eight hundred and (*date of the Writ.*)

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court in these words, that is to say:

VICTORIA, &c., (*copy the Writ,*) and C. D. has on the day of , appeared by , his Attorney, (*or* in person), to the said Writ, and the said C. D. has confessed the said action (*or* has confessed the said action as to part of the said land) that is to say: (*state the part*); Therefore, it is considered that the said A. B. do recover possession of the land in the said Writ mentioned, (*or* of the said part of the said land) with the appurtenances, and $ (*or* £) for costs.

No. 9.—(*Vide* Section 59.) - L 565

In the Q. B. (*or* C. P.)

The day of , one thousand eight hundred and , (*date of Writ.*)

County of , } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, with a notice thereunder written, the tenor of which Writ and notice follows in these words, that is to say:

(*Copy the Writ and Notice, which latter may be as follows:*)

Take notice that you will be required, if ordered by the Court or a Judge, to give bail by yourself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in the action.

And C. D. has appeared by , his Attorney, (*or* in person), to the said Writ, and has been ordered to give bail pursuant to the Statute, and has failed so to do; Therefore, it is considered that the said (*landlord's name*) do recover possession of the land in the said Writ mentioned, with the appurtenances, together with $ (*or* £) for costs of suit.

COMMON LAW PROCEDURE AMENDMENT ACTS.

STAT. CAN. 29 & 30 VICTORIA, CAP. 42.

An Act to amend the Common Law Procedure Act of Upper Canada.

[*Assented to 15th August*, 1866.]

Preamble. Whereas it is desirable to make certain amendments in the Common Law Procedure Act of Upper Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Additional cases in which the defendant may obtain security for costs. **1.** In addition to any cases in which a defendant in any suit is now entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any suit or proceeding in which it is made to appear satisfactorily to the Court in which such suit or proceeding has been instituted or taken, or to any Judge in chambers, that the plaintiff has brought a former suit or proceeding for the same cause which is pending either in Upper Canada or in any other country, or that he has judgment or rule or order passed against him in such suit or proceeding, with costs, and that such costs have not been paid, and such Court or Judge may thereupon make such rule or order staying such proceedings until such security be given as to such Court or Judge shall seem meet. (*a*)

Interest allowed from the rendering of the verdict in certain cases. **2.** In any suit or action in which any verdict is rendered for any debt or sum certain, on any account, debt, or promises, such verdict shall bear interest at the rate of six per cent. per annum from the time of the rendering of such verdict, if judgment is afterwards entered in favour of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended by

(*a*) See R. G. Pr. 23, and notes thereto.

As to damages.

the operation of any rule or order of Court which may be made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict. (*b*)

Doubts as to the effect of judgments on equitable defences removed.

3. Whereas doubts exist as to the effect of equitable defences pleaded in suits at law, and it is desirable to remove such doubts;—if the defendant in any suit at law shall plead any equitable defence, and judgment shall be given against such defendant upon such equitable plea, such judgment shall be pleadable as a good bar and estoppel against any bill filed by such defendant in equity against the plaintiff or representative of such plaintiff at law, in respect to the same subject matter which has been brought into judgment by such equitable defence at law; but nothing in this section shall apply to any suit or action commenced and pending before the passing of this Act, which shall be decided upon as if this Act had not been passed, and this Act shall not be construed as declaring that such judgment at law on an equitable defence has not been heretofore a good bar to a suit in equity on the same subject matter. (*c*)

Not to apply to pending cases, &c.

Stay of proceedings if suit for same cause is pending out of U. C.

4. If any suit or action is brought in any Court of Law or Equity for any cause of action for which any suit or action has been brought and is pending between the same parties and their representatives in any place or country out of Upper Canada, such Court or any Judge thereof may make a rule or order to stay all proceedings in such first mentioned Court of Law or Equity, until satisfactory proof is offered to such Court or Judge that the suit or action so brought in such other place or country out of Upper Canada is determined or discontinued. (*d*)

5. [Repealed by Stat. Ont. 31 Vic. c. 25, s. 1.]

6. [Repealed by Stat. Ont. 31 Vic. c. 25, s. 1.]

(*b*) It is to be observed that all verdicts do not bear interest, but only such as are rendered "for any debt or sum certain, or any account, debt, or promises: see note *n* to section 15 C. L. P. Act.

(*c*) See C. L. P. Act, section 124, notes p. 175.

(*d*) See notes to R. G. Pr. 23.

STAT. ONT. 31 VICTORIA, CAP. 24.

An Act to Amend the Common Law Procedure Act.

[*Assented to 4th March*, 1868.]

Whereas, it is desirable to amend the Common Law Procedure Act; Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows: (*e*) Preamble.

1. The three hundred and twenty-fourth section of the Common Law Procedure Act is hereby repealed, and the following section shall be substituted for and stand in lieu thereof: Sec. 324, Com. Law Procedure Act, repealed.

"If the Plaintiff, in any action of trespass or trespass on "the case, recovers by the verdict of a Jury, less damages "than eight dollars, such plaintiff shall not be entitled to "recover, in respect of such verdict, any costs whatever, "whether the verdict be given on an issue tried, or judgment "has passed by default, unless the Judge or presiding officer, "before whom such verdict is obtained, immediately after- "wards, or at any future time to which he may postpone the "consideration of the matter, certifies on the back of the "Record in the form hereinafter prescribed, to entitle the "plaintiff to full costs; and in case such certificate be not "granted, then the defendant in such action shall be entitled "to set off his costs against such verdict and recover Judg- "ment and issue execution against the plaintiff for the balance "of such costs as between attorney and client. unless the "said Judge or presiding officer shall certify as hereinafter "provided upon the Record, in manner aforesaid, that the "defendant is not entitled to recover his costs in the cause "against the plaintiff." In trespass or case, plaintiff to recover no costs if verdict be less than $8, unless Judge certifies certain facts. If Judge do not certify, defendant to set off his costs, unless Judge certifies that he is not entitled.

(*e*) See C. L. P. Act, section 324, and notes thereto.

Sec. 328, Com. Law Procedure Act, repealed.

2. The three hundred and twenty-eighth section of the Common Law Procedure Act is hereby repealed, and the following shall stand in the place thereof: (*f*)

In inferior court actions brought in superior courts:

"1. In case a suit of the proper competence of a County "Court be brought in either of the Superior Courts of the "Common Law, or in case a suit of the proper competence of "a Division Court be brought in either of such Superior "Courts, or in a County Court, the costs shall be taxed in the "manner following:

If Judge certifies certain facts plaintiff to recover full costs.

"2. In case the Judge, who presides at the trial of the "cause, certifies in open Court, immediately after the verdict "has been rendered, or at any future time to which he may "then postpone the consideration of granting or refusing the "certificate, that it is a fit cause to be withdrawn from the "County Court or Division Court, as the case may be, and "brought in the Superior Court or a County Court, as the "case may be, the plaintiff shall recover his costs of suit "according to the practice of the Court in which the action "is brought, in like manner and subject to the like deduction "or set-off for costs of issues upon which the defendant may "have succeeded, as he would have done and would have "been subject to in case his suit had been of the proper com-"petence of the Court in which the action is brought.

If Judge certifies certain facts, plaintiff to recover costs of Court in which action should have been brought.

"3. In case the Judge, who presides at the trial of the cause "certifies at the time aforesaid that the plaintiff had reason-"able ground for believing he had the right of withdrawing "his cause from the County Court, or Division Court, as the "case may be, and bringing it in the Superior Court, or a "County Court, as the case may be, and that the defendant, "without just reason, defended the same, the plaintiff shall "recover his costs of suit according to the practice of the "Court in which the action should have been brought in like "manner, and subject to the like deduction or set-off for "costs of issues upon which the defendant may have suc-"ceeded, as he would have done, and would have been "subject to in case he had brought his action in such inferior "court.

(*f*) See C. L. P. Act, section 328, and notes thereto.

"4. In case the Judge, who presides at the trial, shall not "certify as aforesaid, the plaintiff shall recover only County "Court costs, or Division Court costs, as the case may be, "and the defendant shall be entitled to tax his costs of suit "as between attorney and client, and so much thereof as ex- "ceeds the taxable costs of defence which would have been "incurred in the County Court or Division Court, shall, on "entering judgment, be set off and allowed by the taxing "officer against the plaintiff's County Court or Division Court "costs to be taxed, or against the costs to be taxed, and the "amount of the verdict if it be necessary, and if the amount "of the costs so set off exceeds the amount of the plaintiff's "verdict and taxed costs, the defendant shall be entitled to "execution for the excess against the plaintiff."

If Judge do not certify, plaintiff to recover inferior court costs only, and defendant entitled to set off his costs.

3. The certificates may be as follows: (*g*)

"I certify to entitle the plaintiff to full costs."

"Or,

"I certify to prevent the defendant deducting costs."

"Or,

"I certify to entitle the plaintiff to County or Division "Court costs."

Form of certificates.

4. The two hundred and seventy-first section of the said Common Law Procedure Act is repealed, and the following shall be substituted therefor: (*h*)

Sec. 271, Com. Law Procedure Act, repealed.

"1. In case a part only be made by the Sheriff on, or by "force of any execution against goods and chattels, the "Sheriff shall be entitled, besides his fees and expenses of "execution, to poundage only upon the amount so made by "him whatever be the sum endorsed upon the writ, and "in case the personal estate, except chattels real, of the de- "fendant or defendants be seized or advertised on, or under "an execution, but not sold by reason of satisfaction having "been otherwise obtained, or from some other cause, and no "money be actually made by the Sheriff on, or by force of "such execution, the Sheriff shall be entitled to the fees and

In what cases Sheriffs entitled to poundage.

(*g*) See note *w* to section 324 of C. L. P. Act.

(*h*) See C. L. P. Act, section 271, and notes thereto.

"expenses of execution and poundage only on the value of "the property seized not exceeding the amount endorsed on "the Writ or such less sum as a Judge of the Court out of "which the Writ issued may deem reasonable under the cir- "cumstances of the case; Provided, also, in cases of Writs "of execution upon the same judgment to several Counties "wherein the personal estate of the judgment debtor or "debtors, has been seized or advertized, but not sold by rea- "son of satisfaction having been obtained under or by virtue "of a Writ in some other County, and no money has been "actually made on such execution, the Sheriff shall not be "entitled to poundage, but to mileage and fees only for the "services actually rendered and performed by him, and the "Court out of which the Writ issued or any Judge thereof, "may allow him a reasonable charge for such services, in case "no special fee therefor be assigned on any table of costs.

When Sheriff entitled to mileage and fees only.

"2. In case any person liable on any execution shall be "dissatisfied as to the amount of poun age fees and expenses "of execution that any sheriff may claim under the tariff of "fees and allowances now in force, or under this Act, he "may before or after payment thereof, apply to the Court out "of which such Writ issued, or to any Judge thereof, and "if, upon a statement of the whole facts, the said Court or "Judge, after notice to the Sheriff, is of opinion that such "amount is unreasonable, notwithstanding it may be accord- "ing to the tariff, or this Act, the same shall be reduced or "ordered to be refunded upon such terms as to costs or other "wise, as the Court or Judge may think fit to impose."

If party dissatisfied, he may apply to the Court, who may reduce the amount.

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EXECUTIONS AGAINST GOODS AND LANDS.

31 Victoria, Cap. 25. on M.S. 1877. 6-h 77

An Act as to Executions Against Goods and Lands.

[*Assented to 4th March*, 1868.]

Preamble. Whereas, by an Act passed in the session of Parliament, held in the twenty-ninth and thirtieth years of Her Hajesty's reign, chapter forty-two, intituled "An Act to amend the Common Law Procedure Act of Upper Canada," the principle is recognized of allowing persons who have priority executions in regard to goods, to retain the same in regard to lands; but difficulties exist in applying the said Act by reason of its enactment that the Sheriff shall return writs against goods only, in the order of priority in which they come to his hands, whilst, nevertheless, a person having a first execution against goods is entitled to renew the same indefinitely without any return thereof: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

29 & 30 V., c. 42.

29 & 30 V., c. 42, ss. 5, 6, and C. L. P. Act, 252, repealed. **1.** Sections five and six of the said Act, and the two hundred and fifty-second section of the Common Law Procedure Act, are hereby repealed and the following substituted therefor: (*i*)

Writs against lands may issue at same time as writs against goods. "Any person who now is or hereafter may become entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the Sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof; Provided, always, that the Sheriff shall not expose

(*i*) See C. L. P. Act, section 252, and notes thereto.

Proviso—Lands not to be sold within a year.

the lands for sale, or sell within less than twelve months from the day on which the writ against the lands is delivered to him."

No sale of lands until return of *nulla bona*.

2. No sale shall be had under any execution against lands until after a return of *nulla bonâ*, in whole or in part, with respect to an execution against goods in the same suit or matter by the same Sheriff. (*j*)

When *nulla bona* not to be returned.

3. No Sheriff shall make any return of *nulla bonâ*, either in whole or in part, to any writ against goods until the whole of the goods of the execution debtor in his county have been exhausted. (*k*)

If the debt is realized under writ against goods.

4. If the amount authorized to be made and levied under the writ against goods be made and levied thereunder, the person issuing the writ against lands shall not be entitled to the expenses thereof, or of any seizure or advertisement thereunder; and the return to be made by the Sheriff to the writ against lands shall be to the effect that the amount has been so made, and levied, as aforesaid.

Writs to have same effect as heretofore.

5. The said writs against lands and goods shall have the same operation and binding effect as heretofore, and the law applicable heretofore on executions shall continue applicable, except so far as variance is requisite, by reason of the enactments hereof.

(*j*) A more simple procedure would have been to have authorized the *fi. fa.* to issue against both goods and lands at once, with a stay of proceedings against lands till the goods were exhausted: see *Gleason* v. *Gleason et al*, 4 Prac. R. 119, *per* Adam Wilson, J.

(*k*) Though the sheriff may be prevented by this provision from returning of his own mere motion a second or subsequent writ in cases within the act, until he returns the first writ the court is not necessarily excluded from directing or controling its own process, and may, where the first execution practically exhausts the goods, order the second to be returned *nulla bona* while the first is in the sheriff's hands: *Gleason* v. *Gleason et al*, 4 Prac. R. 117. But now that a *fi. fa.* against lands may, under section 1 of this act, be issued at or after the time of the issue of the *fi. fa.* against goods, and before or after any return thereof, there will be no need to make this extraordinary jurisdiction in order to enable a subsequent execution creditor to have execution against goods and lands in the sheriff's hands at the same time.

THE LAW REFORM ACT.

32 VICTORIA, CAP. 6.

The Law Reform Act of 1868.

[*Assented to 19th December*, 1868.]

Preamble.

Whereas the multiplicity of Courts of inferior jurisdiction entails great and unnecessary expense upon the country, and it is advisable to amend the laws relating thereto, and to make certain other provisions with a view to lessen such expense: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Secs. 13 and 15, chap. 15, Con. Stat. U. C. repealed.

1. Sections thirteen and fifteen of chapter fifteen of the Consolidated Statutes of Upper Canada respecting County Courts, are hereby repealed from the time this Act shall take effect; but nothing herein contained shall invalidate any proceeding theretofore had or taken in any of the County Courts of this Province.

County Court terms.

2. The several County Courts of this Province from the time this Act shall take effect, shall hold two terms in each year, to commence respectively on the first Monday in July and January in each year, and end on the Saturday of the same week; except the County Court of the County of York, which last mentioned Court shall hold three terms in each year, to commence respectively on the first Monday in the months of January and April and the last Monday of August, in each year, and end on the Saturday of the same week.

Sittings for trial of issues, &c.

3. The sittings of the said County Courts for the trial of issues of fact and assessment of damages, shall thenceforth be held semi-annually, to commence on the second Tuesday in the months of June and December in each year; except the County Court of the County of York, which last mentioned Court shall hold three such sittings in each year, to commence respectively on the second Tuesday in the months of March, July and December in each year.

COUNTY COURTS' EQUITY JURISDICTION—REPEAL.

County Courts' equity jurisdiction abolished.

4. Sections thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six and sixty-nine of the said statute, chapter fifteen, respecting the equity jurisdiction of the County Courts, are hereby repealed from the time this Act shall take effect, except as to any suit or proceeding then pending; but any suit or proceeding then pending may be prosecuted and proceeded with as if this Act had not passed.

How costs regulated.

2. In any suit or proceeding, which, before the passing of this Act, might have been brought, instituted or carried on under the equity jurisdiction of the County Courts, and which may hereafter be brought or carried on in the Court of Chancery, the stamps required, and the fees, costs and charges payable in respect thereof, shall be on a scale bearing, as far as practicable, the same proportion to the stamps, fees, costs and charges payable in other suits or proceedings in the said Court of Chancery, as the stamps, fees, costs and charges in actions in County Courts bear to the stamps, fees, costs and charges in actions in the Superior Courts of Common Law; and it shall be lawful for the Judges of the said Court of Chancery to prepare a table of fees, costs and charges applicable to all such proceedings.

5. [Repealed by 33 Vic. c. 7, s. 13.]

GENERAL SESSIONS.

Sec. 3, chap. 17, Con. Stat. U.C. repealed.

6. Section three of chapter seventeen of the Consolidated Statutes of Upper Canada, relating to Courts of Quarter Sessions of the Peace, is hereby repealed from the time this Act shall take effect.

General Sessions to be held semi-annually, except in County of York.

7. The Courts heretofore known as the Courts of General Quarter Sessions of the Peace in and for the several counties and union of counties in this Province, shall, after this Act takes effect, be called and known as the Courts of General Sessions of the Peace of the respective counties, and shall

thenceforth be held semi-annually to commence on the second Tuesday in the months of June and December in each year; except in the County of York, in which County the said Courts of General Sessions of the Peace shall be held three times in the year, to commence on the second Tuesday in the months of March, July and December in each year, so that said sittings may come as nearly as may be midway between the sittings of the Courts of Oyer and Terminer and General Gaol Delivery in and for the several Counties of this Province.

Fees not to be increased.

8. The fees and charges payable and pertaining to officers of the County Court, the Jury fees, the Law Stamps of fees of office, and the dues and duties payable to the Crown upon all actions, suits or proceedings, brought in the County Courts and tried or assessed in the Superior Courts, shall be chargeable and paid as if the same were being tried or assessed in the County Courts as hitherto; and no other fees, stamps or dues, shall be chargeable thereon, and the Clerk of the County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use.

23 Vic. chap. 8, sec. 2, amended.

9. In amendment of section two of chapter eight of the Act of the Parliament of the late Province of Canada, passed in the twenty-third year of Her Majesty's reign, it is hereby enacted that the appointment of constables and high constables may hereafter be made at any sitting or adjourned sitting of the said Courts of General Sessions of the Peace.

Sec. 1, chap. 121, Con. Stat. U.C. repealed.

2. Section one of chapter one hundred and twenty-one of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the expenditure of County Funds for certain purposes within Upper Canada," is hereby repealed; and in lieu thereof it is hereby enacted, that all accounts and demands preferred against the County, the approving and auditing whereof heretofore belonged to the Quarter Sessions, shall henceforth be audited and approved by the *Board of Audit hereinafter mentioned* (a) of the respective counties and union of counties; and in amendment of section three of the said

(a) The words in *italics* were not in the act as originally passed, but have been since added by amendment: see Stat. 33 Vic. c. 8, s 1.

Sec. 3, chap. 121, Con. Stat. U.C. amended.

Act; it is hereby enacted, that such accounts and demands shall henceforth be delivered to the Clerks of the Peace of the respective counties on or before the first day of each General Sessions of the Peace, and of each sitting of the Courts of Oyer and Terminer and General Gaol Delivery in the respective counties and union of counties.

County accounts how and when audited.

3. (*b*) Such of the said accounts and demands as shall be delivered on the first day of the sittings of the said Courts of General Sessions of the Peace or of Oyer and Terminer and General Gaol Delivery, shall be audited by a Board of Audit composed of the Chairman of the Court of General Sessions of the Peace and two other persons, who shall be appointed annually for that purpose by the County Council of such county or union of counties, at their first meeting in each year, not more than one of such persons being a member for the time being of such County Council; and such accounts and demand shall be taken into consideration in the week next succeeding the week in which such sittings ended, and disposed of as soon as practicable.

Secs. 1, 4 and 5, chap. 124, Con. Stat U.C. amended.

4. In amendment of sections one and four of chapter one hundred and twenty-four of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the returns of Convictions and Fines by Justices of the Peace, and of Fines levied by Sheriffs," it is enacted, that the returns of convictions and fines by Justices of the Peace therein mentioned, shall henceforth be made to the Clerks of the Peace instead of the Courts of Quarter Sessions, and shall be made quarterly on or before the second Tuesday in the months of March, June, September and December in each year, and shall embrace in every instance, all convictions not embraced in some previous returns, and shall be published and fixed up by the Clerks of the Peace in manner in the said fourth section provided, within two weeks after the times hereby limited for the making of such returns; and in amendment of section five of the said Act, the words "Minister of Finance of the Province" shall be struck out of the said section, and the words "Treasurer of Ontario" inserted in their place.

(*b*) This sub-section was substituted by Stat. 33 Vic. cap. 8, s. 2, for the original section.

RECORDERS' COURTS—REPEAL.

Recorders' Courts and commissions to Recorders to hold Division Courts abolished

10. Sections three hundred and sixty, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-three, three hundred and seventy-five, three hundred and seventy-six, three hundred and seventy-seven, three hundred and seventy-eight, three hundred and seventy-nine, three hundred and eighty-one, three hundred and eighty-two, three hundred and eighty-three, three hundred and eighty-four, three hundred and eighty-five, three hundred and eighty-six, three hundred and eighty-seven, three hundred and eighty-eight, and three hundred and ninety-four of the Act of the Parliament of the late Province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her Majesty's reign, entitled "An Act respecting the Municipal Institutions of Upper Canada," and all letters patent issued to any Recorder under the said section three hundred and eighty-one, are hereby repealed from the time this Act shall take effect; and the several Recorders' Courts of the cities of Toronto, Hamilton, London, Kingston and Ottawa, as well as also the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery for the County of the City of Toronto, are from thenceforth abolished; and the said cities shall thenceforth, for judicial purposes, be respectively united to and form part of the several counties in which they are respectively situate.

Cities united to counties for judicial purposes.

11. In lieu of the said section three hundred and seventy-three, it is hereby enacted, that every Police Magistrate shall *ex officio* be a Justice of the Peace for the city or town for which he holds office, as well as also for the county or union of counties in which such city or town is situate; and no other Justice of the Peace shall adjudicate upon, admit to bail, discharge prisoners or otherwise act, except at the Courts of General Sessions of the Peace, in any case for any town or city where there is a Police Magistrate, except in case of the illness or absence, or at the request in writing, of the Police Magistrate.

Police magistrates *ex officio* justices of the peace.

Investigations to be by County Judge in

12. Section three hundred and eighty of the said Act is hereby amended by substituting the words "Judge of the County Court" for the words "Recorder of the City," and

place of Recorder.

the words "Judge of the said County Court" for the word "Recorder," wherever they respectively occur throughout the said section.

No ratepayer, etc., incompetent as a witness, but liable to challenge as a juror, etc.

13. In lieu of section three hundred and eighty-seven of the said Act, it is hereby enacted, that in any prosecution, suit, action, or proceeding in any civil matter to which a corporation is a party, no ratepayer, member, officer, or servant of the corporation shall, on account of his being such, be incompetent as a witness; but they and every of them shall be liable to challenge as a juror, except where the municipal corporation, the party to such prosecution, suit, action or proceeding, be a county.

Indictments, etc., pending in Recorders' Courts to be transferred to General Sessions.

14. From the time this Act shall take effect all indictments, suits, proceedings and matters then pending, or commenced in any of the said Recorders' Courts, and not tried and finally determined, ended and completed, shall appertain and be transferred to the several Courts of General Sessions of the Peace of the respective counties in which the said cities are respectively situate; and the said Courts of General Sessions of the Peace shall have full jurisdiction and cognizance of all such indictments, proceedings and matters; and all such indictments, proceedings and matters shall be tried, proceeded with, conducted, done, performed and completed in and by the said last mentioned Courts, as if such indictments, proceedings, and matters had originated in or been pending therein.

County Court Judge substituted for Recorder in board of police.

15. In amendment of the three hundred and ninety-fourth section of the said last mentioned Act, respecting the Municipal Institutions of Upper Canada, it is hereby enacted, that the board of police in every city shall consist of the Mayor, the Judge of the County Court of the county in which the city is situate and the Police Magistrate; and if there be no Police Magistrate, the council of the city shall appoint a person resident therein, to be a member of the board of police of such city.

All matters heretofore done by Recorders, to be done by

16. After this Act shall take effect, the several powers duties, matters and things which theretofore appertained to or were authorised, or required to be exercised, done or per-

formed in or by the said Recorders' Courts respectively, are hereby transferred, and shall appertain to and be exercised, done and performed by the Courts of General Sessions of the Peace of the counties in which the said cities are respectively situate, and the several duties, powers, acts, matters and things theretofore authorized, or required to be exercised, done or performed by the said Recorders shall thenceforth be exercised, done and performed by the Judges of the County Courts of the said respective counties. County Court Judges.

TRIALS AND ASSESSMENTS.

17. All issues of fact and assessments of damages in the Superior Courts of common law relating to debt, covenant and contract, where the amount is liquidated or ascertained by the signature of the defendant, (*a*) may be tried and assessed in the County Court of the county where the *venue* is laid, if the plaintiff desire it, unless a Judge of such Superior Court shall otherwise order, and upon such terms as he may deem meet, in which case an entry shall be made in the issue and subsequent proceedings in words, or to the effect of form A in the schedule to this Act, in place of the *venire facias;* and in the roll the *postea* shall be entered in words, or to the effect of form B in the said schedule. (*b*) Certain cases in Superior Courts to be tried in County Courts.

2. All issues of fact and assessments of damages in actions in any County Court, may be tried and assessed, at the election of the plaintiff, at any sittings of Assize and *Nisi Prius* for the county in which the *venue* is laid, without any order for that purpose, in which case an entry shall be made in the issue and subsequent proceedings in words, or to the effect of County Court cases to be tried in Superior Courts.

(*a*) "Where the amount is liquidated or ascertained *by the signature of the defendant.*" The words of the County Courts Act, Con. Stat. U. C. cap. 15, s. 17, sub-s. 2, are "where the amount is liquidated or ascertained by *the act of the parties.*" Bearing this distinction in mind, reference may be made to the following cases: *McMurtry* v. *Munro*, 14 U. C. Q. B. 166; *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158; *Miller* v. *The Beaver Mutual Fire Insurance Co.* 15 U. C. C. P. 75; *In re Furnival* v. *Saunders*, 26 U. C. Q. B. 119, decided under the County Courts Act. The signature of the defendant is necessary in all cases under this section: *MacPherson et al* v. *MacPherson*, Chambers, June, 1870. A note made in the United States and payable in American currency is not an amount "liquidated or ascertained," within the meaning of the act: *Cushman et al* v. *Reid*, 5 Prac. R. 121; s. c. 20 U. C. C. P. 147.

(*b*) The entry is sufficient if made on the issue book in place of the *venire facias: Walkem* v. *Donovan*, 5 Prac. R. 118; s. c. 5 U. C. L. J. N.S. 181.

the form C in the said schedule, and in the roll the *postea* shall be entered in words, or to the effect of form D in the said schedule. (*c*)

Notice of trial, etc., in such cases.

3. In any of the said cases, the notice of trial or assessment shall state that the cause will be tried, or the damages assessed, at such sittings according to the fact; and in cases in the Superior Courts, where the trial or assessment is intended to be had in the County Court, the issue shall be delivered, and the notice of trial or assessment served, ten clear days before the sittings of such County Court: Provided always, that nothing herein contained shall prevent a Judge of the Court in which the action is brought, or after the record is entered for trial or assessment, the Judge before whom the trial or assessment is intended to be had, from entertaining applications to postpone such trials or assessments. (*d*)

Proviso.

How record made up and judgment entered.

4. Subject to the provisions herein contained, the record shall be made up, and entered and tried as in other cases; and in any of the said cases, judgment may be entered on the fifth day after verdict rendered or damages assessed, unless the Judge who tried the cause shall certify, on the record under his hand, that the case is one which, in his opinion, should stand to abide the result of a motion that may be made therein in term, or unless a Judge of one of the Superior Courts shall otherwise order: Provided always, that in any such case the Judge may certify for immediate execution.

Proviso.

Motion against verdict, etc., to be in the Superior Court.

5. Any motion to be made in respect to any *nonsuit*, verdict or assessment of damages in any County Court *cause had*, tried or assessed at any sittings of Assize and Nisi Prius shall be made, heard and determined in the Superior Court of law at Toronto, which the party moving or applying shall

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(*c*) The words of this sub-section embrace partition suits: *Symonds* v. *Symonds et al*, 20 U. C. C. P. 271.

(*d*) This section enables a plaintiff, at any time after the act came into operation, to take down to the County Court for trial the issues joined in any of the specified cases of action where the amount is liquidated or ascertained by the signature of the defendant, whether the issues were joined before or after the act came into effect; provided only, that notice of trial should be served and the issue be delivered as prescribed by this sub-section: *Cushman et al* v. *Reid*, 20 U. C. C. P. 147.

elect, and according to the practice of that Court; and any rule or order made in such cause by such Court shall be valid and binding. (*e*)

Books for Judge's notes of trial, etc.

6. The Clerks of the several County Courts shall provide books in which the Judges sitting in the Courts of Assize and *Nisi Prius*, where cases brought in any County Court shall be tried or assessed under this Act, may enter their notes of such trials and assessments; which books, immediately after such trials or assessments, shall be returned to and remain in, the offices of such Clerks.

Certified copy of notes of cases.

7. On the application of any of the parties, the County Court Clerks shall, at the cost of such party, forward to the Clerk of the Crown and Pleas at Toronto of such of the Superior Courts as such party shall designate, a certified copy of the Judge's notes of the trial or assessment of any such cases, together with the record and exhibits, to enable such Superior Court properly to dispose of any application made, or to be made in or respecting such cases.

Costs in such cases.

8. The costs on all such proceedings in the said several Courts, shall be the usual costs of such cases in the Court in which the action is brought.

Sec. 2, chap. 31, Con. Stat. U. C. amended.

18. In amendment of the second section of chapter thirty-one of the Consolidated Statutes of Upper Canada, entitled *An Act respecting Jurors and Juries*, it is enacted:—

Issues to be tried and damages assessed by Judge alone.

1. That all issues of fact in any civil action when brought in either of the Superior Courts of common law, or in any of the County Courts in Ontario, and every assessment or enquiry of damages in every such action, may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a Judge of the said Courts without the intervention of a Jury: Provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of, by a Jury, he shall give notice to the Court in which such action is pending,

Proviso.

(*e*) The words in italics were not in the act as originally passed, but have been since added by amendment: see Stat. 33 Vic. cap. 7, s. 8. The decision under this section is final: Stat. 33 Vic. cap. 7, s. 5.

and to the opposite party, by filing with his last pleading and serving on the opposite party, a notice in writing to the effect following, that is to say: "The Plaintiff (*or one or more of them*) (*or* the Defendant *or one or more of them, as the case may be,*) requires that the issues in this cause be tried, (*or* the damages assessed) by a Jury;" and a copy of such notice shall be attached to the record. (*f*)

Verdict of Judge to have like effect as verdict of jury.

2. That the verdict or finding of the Judge by whom any such issues shall be tried or damages assessed, shall have the like effect, as the verdict or finding of a jury, and the like fees and charges shall be payable in respect of the same:

Proviso.

Provided that the parties shall be entitled to move against such verdict or finding by motion for non-suit, new trial or otherwise, within the same time, and on the same grounds (including objections against the sufficiency or the erroneous view taken of the evidence) as allowed in cases of trial or assessment by a jury. (*g*)

Effect of notice requiring a jury.

3. That whenever any one one or more of the parties to any such action shall have given such notice, requiring a jury as hereinbefore provided, the cause shall be carried down to trial in the same manner and with the like effect as if this

Proviso.

section had not been passed: Provided always, that it shall be competent for the parties present at the trial to consent that the said notice shall be waived, and the case tried or damages assessed, by the Judge, and to endorse a memorandum of such consent upon the record, and thereupon the said Judge shall proceed to the trial of the issues or assessment of the damages without the intervention of a jury: Provided

Proviso as to Judge directing trial by jury.

always, that it shall be competent for the Judge in his dis-

(*f*) Action on a promissory note; special plea on equitable grounds; issue taken thereon by plaintiff. Joinder of issue by defendant with notice for a jury. *Held* regular: *Quebec Bank* v. *Gray*, 5 Prac. R. 31. Where a joinder of issues had been filed before the Law Reform Act, leave was given to plaintiff to withdraw his replication joining issue, and to file a similar replication with a notice requiring a jury: *Synge* v. *Aldwell*, 5 Prac. R. 94. The act applies to ejectment: *Humphreys et al* v. *Hunter*, C. P. E. T. 1870.

(*g*) Judges of County Courts may try causes brought down from superior courts without the intervention of a jury: *Cushman et al* v. *Reid*, 5 Prac. R. 121. A judge's decision on facts is to be regarded differently from the finding of a jury: *Smith* v. *Hamilton*, 29 U. C. Q. B. 394. The court afterwards, on motion, may pronounce the verdict which in their judgment the judge who tried the cause ought to have pronounced: Stat. Ont. 33 Vic. cap. 7, s. 6.

cretion to direct, that notwithstanding anything hereinbefore contained, any such action shall be tried or the damages assessed by a jury.

Clauses of chap. 31, Con. Stat. U. C., repealed.

19. Sections ten, one hundred and thirty-two, one hundred and thirty-three, one hundred and thirty-four, one hundred and thirty-five, one hundred and thirty-six and one hundred and thirty-seven of the said Act, entitled *An Act respecting Jurors and Juries*, are hereby repealed.

29 Vic. chap. 54, sec. 51, amended.

20. Section fifty-one of the said Act as amended by the Act passed in the twenty-sixth year of Her Majesty's reign, chapter forty-four, entitled "An Act to amend the Consolidated Act of Upper Canada intituled An Act respecting Jurors and Juries," is hereby further amended by inserting next after the words "Deputy Sheriff of the county" in the fifth section of the said last mentioned Act, the words "and the Junior Judge of the County Court, and the Mayor of any city situate in such county."

Interpretation of certain words.

21. The words "The Governor" in section fifty-eight of the said Act, shall be held to mean "The Lieutenant-Governor of this Province, and the words "The Official *Gazette* of the Province" and "The *Gazette*" in the said section, shall be held to mean "The Ontario *Gazette*."

CITY OF TORONTO RE-UNITED TO THE COUNTY OF YORK.

Certain sections of 24 Vic., chap. 53, and of 25 Vic., chap. 24, repealed.

22. Sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen, of the Act of the Parliament of the late Province of Canada, passed in the twenty-fourth year of Her Majesty's reign, chapter fifty-three, entitled "An Act to provide for the separation of the City of Toronto from the United Counties of York and Peel for certain judicial purposes," and also the Act passed in the twenty-fifth year of Her Majesty's reign, chapter twenty-four, entitled "An Act to explain the Act to provide for the separation of the City of Toronto from the United Counties of York and Peel," are hereby repealed from the time this Act shall take effect; and the City of Toronto shall thenceforth, for judicial purposes, be re-united to and be part of, the County of York.

Condition of existing recognizances.

2. All recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any Recorder's Court of any city, to be held next after the time this Act shall take effect, shall be obligatory to compel the appearance of such party at the Court of General Sessions of the Peace of the county in which the city is situate, to be held next after this Act shall take effect, and the conditions of all such recognizances shall be construed as if so expressed; and all recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any sitting of the Court of Oyer and Terminer and General Gaol Delivery for the County of the City of Toronto, to be held next after this Act shall take effect, shall be obligatory to compel the appearance of such party at the sitting of the Courts of Oyer and Terminer and General Gaol Delivery for the County of York, which shall be held next after the passing of this Act, and the condition of all such recognizances shall be construed as if so expressed.

Former proceedings not to be invalid.

23. Nothing herein contained shall render invalid any indictment, information, action or proceedings heretofore prosecuted, had, taken or pending in any sitting of the Courts of Assize and *Nisi Prius*, Oyer and Terminer or General Gaol Delivery for the County of the City of Toronto; but all such indictments, informations, actions and proceedings shall be transferred to, and may be continued, prosecuted and proceeded with, in the Courts of Assize and *Nisi Prius*, Oyer and Terminer and General Gaol Delivery for the County of York.

Existing gaol arrangements not affected.

24. Nothing in this Act contained shall alter or affect the existing arrangements between the City of Toronto and the County of York respecting the use of the gaol.

Inconsistent enactments repealed.

25. All enactments inconsistent with any of the provisions of this Act are hereby rspealed, but no Act previously repealed shall be thereby revived.

Commencement.

26. This Act shall take affect from and after the first day of February next.

FORM A.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (*or* assess the damages *or* as well to try the issues as to assess the damages, *as the case may be*) at the sittings of the County Court of the County of to be held at in the said County on the day of , 18 , the said issues will be tried (*or* the said damages will be assessed, *or both, as the case may be*) at the said sittings accordingly.

FORM B.

And the Jury (*or* Judge) at the said County Court found that (*stating the finding on the issues, or*) and the Jury (*or* Judge) at the said County Court assessed the damages of the plaintiff at over and above his costs; therefore it is considered &c. (*as the case requires.*)

FORM C.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (*or* assess the damages, *or both, as the case may be*) at the sittings of Assize and *Nisi Prius* to be holden at in and for the County of on the day of , 18 , the said issues will be tried (*or* the said damages will be assessed, *or both, as the case may be*) at the said sittings accordingly.

FORM D.

And the Jury (*or* Judge) at the said sittings of Assize and *Nisi Prius* found that (*stating the finding on the issues or*) and the Jury (*or* Judge) at the said sittings of Assize and *Nisi Prius* assessed the damages of the plaintiff at over and above his costs; therefore, &c. (*as the case requires.*)

THE LAW REFORM AMENDMENT ACTS.

33 VICTORIA, CAP. VII.

An Act to make further provisions for carrying out the Act intituled "The Law Reform Act of 1868," and to regulate proceedings on Writs of Error and Certiorari.

[*Assented to 24th December*, 1869.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Powers of Judge of Assize as to County Court causes tried before him.

1. In any action in the County Court entered for trial at any sittings of assize and *nisi prius*, under the said Act passed in the thirty-second year of Her Majesty's Reign, intituled The Law Reform Act of 1868, the Judge presiding at the sittings shall have the same powers as to amendment of the record, adding and amending pleadings, putting off the trial, reference to arbitration, and making the cause a remanet, and otherwise dealing with the cause and proceedings therein, as if the action had been commenced in a Superior Court of Common Law.

When such Judge marks record as a remanet, &c., it may be tried at subsequent sitting or assize.

2. Whenever the said Judge endorses on the record in any such action the word "remanet," and adds any words to the effect following: "And the within cause may be entered and tried at any County Court or Assizes," such cause may be entered at any subsequent sittings of the County Court, or of Assize and *nisi prius*, without any further entry or suggestion whatever relative thereto, and may be tried and disposed of in the same way as any other case entered at such sittings.

Entry of remanet on the record.

3. In the cases named in the next prior section, an entry shall be made on the record next after the suggestion in the form C. of the said Act, as follows: "And at the said sittings the presiding Judge endorsed, or caused to be endorsed on the record that this cause was a remanet, and might be entered and tried at any County Court or Assize;" and the *postea*

shall then be adapted to the finding of the issues, as they may be tried and determined before a Judge or a jury in the County Court, or at the sittings of Assize and *nisi prius*.

Powers of County Court as to awards when Judge of Assize refers to arbitration.

4. Whenever any such cause is referred to arbitration by the presiding Judge at such sittings, the County Court in which the action is brought, and the Judge thereof, shall have the same power to enforce the award, and make orders and rules relating thereto, and to setting aside of the award, as if the order referring the case to arbitration had been made by the County Judge.

Decision under sub-s. 5, s. 17, to be final.

5. The decision of the Superior Court of Law, at Toronto, on any motion made under sub-section five of section seventeen, of the said statute, as amended by section eight of this Act, shall be final, and shall not be subject to appeal to the Court of Error and Appeal, or to any writ of error to that or any other Court.

Sec. 18, sub-sec. 2, amended; the Court, on motion against verdict, &c., may give a verdict.

6. Whenever the verdict or finding of the Judge is moved against under sub-section two, of section eighteen of the said statute, it shall not be obligatory on the Court before which such motion is made to grant a new trial when the objections taken are against the sufficiency of the evidence, or the erroneous view taken thereof by the Judge, or on a mistaken view of the law of the case; but the Court may pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced, and amend the *postea*, and enter the verdict accordingly, subject nevertheless to appeal on the same grounds as if the decision of the Court had been to grant a new trial, instead of ordering the *postea* to be amended.

County Court sittings without a jury in April and October.

7. There shall be sittings of the several County Courts of this Province (except for the County of York), on the first Monday in the months of April and October in each year, whereat all issues of fact in any civil action brought in the Court wherein the sittings shall be, and every assessment and enquiry of damages in any such action may be heard, tried and assessed by the Judge of such Court without the intervention of a jury in those cases where no jury is required;

and on any such finding, assessment or enquiry, the *postea* shall be to meet the facts.

Sec. 17, sub-sec. 5, amended.

8. Sub-section five, of section seventeen, of the said Act, is hereby amended by inserting the word "non-suit" after the word "any" in the first line, and inserting the words "cause, had" after the word "court" in the second line.

On removal by *certiorari* proceedings stand, and shall not begin *de novo*.

9. In any case removed from the County Court to either of the Superior Courts of Common Law by a writ of *Certiorari*, it shall not be necessary to declare *de novo*, but the case shall proceed on the record as it stands when removed into the Superior Court, and all subsequent proceedings may be had and taken in the cause in the same way as if it had been originally commenced and prosecuted in such Superior Court. (*h*)

When County Court jurisdiction ousted, the case may be removed by *Certiorari*.

10. Whenever it shall appear in any action otherwise of the proper competency of the County Court that such Court has not cognizance thereof from the title to land being brought in question, or from the validity of any devise, bequest, or limitation under any will or settlement being disputed, it shall be lawful for any Judge of either of the Superior Courts of Common Law or the Judge of the County Court before whom such cause is pending, to order a writ of *Certiorari* to issue out of one of the Superior Courts of Common Law to remove such cause into such court: and the Judge making such order may in his discretion make and impose such terms on the party applying for such *Certiorari* as to costs and otherwise as the Judge may make under section eleven of this Act; (*i*) Provided always when such writ shall be issued on the order of a Judge of a County Court, a Judge of either of the Superior Courts of Common Law sitting in Chambers at Toronto, may rescind such order, or vary the terms thereof or

Imposition of terms on granting *Certiorari*.

Superior Court Judge may review order for *Certiorari* of Co. Court Judge.

(*h*) Before this act it was decided that after a cause had been removed by *certiorari* it was necessary to begin *de novo*: see *Fulton* v. *The Grand Trunk Railway Co.* 17 U.C. Q.B. 428; *Hankey* v. *The Grand Trunk Railway Co. Ib.* 472; *Patterson* v. *Smith*, 14 U. C. C. P. 525.

(*i*) So it was decided that where the jurisdiction of a County Court was ousted by title to lands coming in question, there could be no *certiorari*: *O'Brien* v. *Welsh et al*, 28 U. C. Q. B. 394.

imposed thereby; and the cause when removed into the Superior Court shall be proceeded with in the said court in the manner pointed out in section nine of this Act.

Error not to lie on Co. Court judgment unless for over $100, and only on leave.

11. No writ of error from either of the Superior Courts of Common Law shall be issued upon any judgment entered, or in any suit instituted in any County Court of the Province of Ontario, unless the debt or damages recovered or claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a judge of one of the said Superior Courts in cases in which the said Judge shall think it proper to issue the said writ, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit.

Proceedings on writs of error to conform to English practice,

power to make rules as to.

12. The law and practice as to writs of error, and the proceedings thereon, shall hereafter be the same as the law and practice now in force in England in respect to writs of error from the Superior Courts of Common Law to Inferior Courts; Provided always that the Judges of the Superior Courts of Common Law in this Province may from time to time alter or amend the same by rules of Court to be made and signed by any four of the said Judges, whereof one shall be a Chief Justice. (*j*)

32 Vic. ch. 6, s. 5, repealed.

Practice on appeal from Co. Court.

13. The fifth section of the said Act is hereby repealed, and it is hereby enacted that under the sixty-seventh and sixty-eighth sections of chapter fifteen of the Consolidated Statutes of Upper Canada, parties suing or being sued in the name of others, though not named on the Record, and parties for whose benefit any suit is prosecuted or defended, and parties suing or defending in the name of others, though not mentioned on the Record as parties so named, shall, and may be considered and construed as "a party wishing to appeal" under the said sections of the Consolidated Statute above referred to, and may give, or cause to be given, to the opposite party, the security referred to in the said sixty-eighth section of the statute, by a bond executed by two persons, whether

(*j*) This section is not retrospective so as to affect a writ of error in respect of costs issued before its passing: *Pope* v. *Reilly*, 29 U. C. Q. B. 495.

named as sureties or as parties interested, or otherwise, in such sum as the Judge of the Court appealed from directs; conditioned that the plaintiff or defendant in whose name the appeal is made, shall abide by the decision of the cause by the Court to be appealed to, and to pay all sums of money and costs as well of the suit as of the appeal awarded and taxed to the opposite party; in which bond the parties executing the same, shall justify to the amount of the penalty of the bond by affidavit annexed thereto in like manner as bail are required to justify; and if such bond or affidavit of justification, duly proved as the bond required under the said section of the statute, are produced to the Judge of the Court appealed from, to remain with the Clerk of the Court until the opinion of the Court appealed to has been given, and then to be delivered to the successful party, then, at the request of the person or persons on whose behalf the appeal is made, the Judge of the Court appealed from shall certify under his hand to either of the Superior Courts of Common Law, named by or on behalf of such appellant, the pleadings and other papers in the cause in the manner pointed out by the said sixty-eighth section of the said statute, and the cause shall then be treated and disposed of as appeals are directed to be disposed of under the said section: and the time which the Judge may stay proceedings, at the request of either party, under the sixty-seventh section of the said statute, to enable the appellant to perfect the necessary bond to appeal, is hereby extended to ten days instead of four, as mentioned in the statute. (*k*)

(*k*) The Con. Stat. U. C. cap. 15, s. 68, provided that in "case the party wishing so to appeal gives security to the opposite party by a bond executed by himself and two sureties, &c." Much difficulty had arisen on the construction of these words. They were originally construed as applicable only to the actual parties to the record, and as excluding persons beneficially interested. It was then provided by the 27 Vic. cap. 14, s. 2, that the words "party wishing to appeal" should be taken to mean, "as well parties *sueing* in the names of others though not named on the record, as parties so named." This was held to apply to beneficial plaintiffs only, and to exclude beneficial defendants: *Darling* v. *Sherwood*, 2 U. C. L. J. N.S. 130; see further *In re Tozer qui tam.* v. *Preston*, 23 U. C. Q. B. 310; *Pentland* v. *Heath*, 24 U.C. Q.B. 464. The sixty-eighth section was again amended by the Stat. 32 Vic. cap. 6, s. 5, which provided that the words "party wishing to appeal" should be held to mean "as well parties on whose behalf or for whose benefit any suit is prosecuted or defended, and parties suing or defending in the name of others, though not named on the record as parties so named." But a question was raised as to the sufficiency of these words to extend the meaning of the words of

14. The junior Judge of the County Court of the County of York is hereby authorized to transact such business in Chambers, in the absence therefrom of the County Judge, as relates to matters over which the said Court has jurisdiction, and as may according to the course and practice thereof, be transacted by the Judge of the said Court. Junior Judge of Co. Court in York may sit in Chambers.

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section sixty-eight to all beneficial parties: see *Penton* v. *The Grand Trunk Railway Co.* 28 U. C. Q. B. 367; and though no decision was given, the legislature have by the clause here enacted endeavoured to make plain their apparently original intention by declaring in express terms that parties suing or being sued in the name of others, though not named on the record, *and* parties for whose benefit any suit is prosecuted or defended, *and* parties suing or defending in the name of others, though not mentioned on the record as parties so named, shall be construed as "a party wishing to appeal." Mr. Justice Wilson, in *McLellan* v. *McClellan*, 2 U. C. L. J. N.S. 297, notwithstanding decisions apparently to the contrary, (see *Pentland* v. *Heath*, 24 U. C. Q. B. 464, and *Darling* v. *Sherwood*. 2 U. C. L. J. N.S. 130, the latter of which was not cited in the argument,) refused to go behind the judge's certificate certifying the proceedings, for the purpose of entertaining an objection to the sufficiency of the appeal bond on a motion to strike out the appeal, and this ruling was afterwards sustained by the court of Queen's Bench in *Penton* v. *The Grand Trunk Railway Co.* 28 U. C. Q. B. 367.

An Act to amend sub-sections two and three of section nine of the Act passed in the thirty-second year of Her Majesty Queen Victoria, chaptered six, entitled "The Law Reform Act of 1868," and to repeal section two of chapter one hundred and twenty-one of the Consolidated Statutes for Upper Canada.

[*Assented to 24th December*, 1869.]

Preamble.

Whereas it is desirable to amend sub-sections two and three of section nine of the Act passed in the thirty-second year of Her Majesty Queen Victoria, chaptered six, entitled "The Law Reform Act of 1868," and to repeal section two of chapter one hundred and twenty-one of the Consolidated Statutes for Upper Canada entitled "An Act respecting the expenditure of County Funds for certain purposes within Upper Canada:" Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

32 Vic. ch. 6, s. 9, sub-s. 2, amended.

1. That from and after the passing of this Act the word "Magistrates," in the eighth line of sub-section two of section nine of the first recited Act shall be struck out, and the words "Board of Audit hereinafter mentioned" substituted instead thereof."

32 Vic. ch. 6, s. 9, sub-s. 3, repealed.

2. That sub-section three of section nine of the first recited Act shall be repealed from and after the passing of this Act, and the following substituted in lieu thereof:

County accounts how and when audited.

"Such of the said accounts and demands as shall be delivered on the first day of the sittings of the said Courts of General Sessions of the Peace, or of Oyer and Terminer and General Gaol Delivery, shall be audited by a Board of Audit, composed of the Chairman of the Court of General Sessions of the Peace, and two other persons, who shall be appointed annually for that purpose by the County Council of such county or union of counties at their first meeting in each

year, not more than one of such persons, being a member, for the time being of such County Council; and such accounts and demands shall be taken into consideration in the week next succeeding the week in which such sittings ended, and disposed of as soon as practicable."

Fees to auditors.

3. That it shall and may be lawful for the County Council of any county or union of counties to pay the persons appointed by them to serve on the Board of Audit constituted by this Act, any sum not exceeding two dollars each for their attendance at such audit.

Con. Stat. U. C. ch. 121, s. 2, repealed.

4. That from and after the passing of this Act section two of chapter one hundred and twenty-one of the Consolidated Statutes of Upper Canada (now Ontario), entitled "An Act respecting the expenditure of County Funds for certain purposes in Upper Canada" be and the same is hereby repealed.

REGULÆ GENERALES. (a)

REGULÆ GENERALES AS TO ATTORNEYS. (b)

1. (c) It is ordered that every person applying to be admitted a member of either of the said Courts, shall leave or cause to be left with the Clerk of the Crown and Pleas, at least seven days before he shall apply to such Court for admission, his articles of clerkship, and also any assignment that may have been made thereof, (d) together

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(a) These rules were framed under section 313, C. L. P. Act, 1856 (section 333 of present C. L. P. Act), the notes to which fully explain the powers conferred upon the judges. The rules are of two classes: the one relating to practice, the other to pleading. The former came into operation when first made; but the latter took effect only when laid before the legislature. Preceding the new rules, two old rules with regard to the admission, &c., of attorneys are given.

(b) An attorney is an authorized agent who conducts the litigation of parties in the courts, and is treated in many respects as a *quasi* officer of the courts. He is often dealt with summarily. He has some privileges now, but not so many as formerly, and is subject to certain disabilities. His admission to practice is now regulated by Con. Stat. U. C. cap. 35, as amended by Stats. of the late Province of Canada 23 Vic. cap. 48; 28 Vic. cap. 21, and Stat. Ont. 32 Vic. cap. 19. It has been decided in England that an attorney cannot practise in an inferior court unless admitted to practice in a superior court: *Evans* v. *P.* an attorney, 2 Wils. 382. This is the reason why the superior courts will proceed against an attorney for malpractice in an inferior court or elsewhere: *Ib.*; see also *Carruthers* v. ——, &c. Tay. Rep. 243.

(c) This rule is the same as our old rule 51 of H. T. 1850.

(d) It is now provided by Con. Stat. U. C. cap. 35, s. 3, sub-s. 4, as amended by Stat. 28 Vic. cap. 21, s. 5, that no person shall be admitted and enrolled as an attorney or solicitor unless "at least *fourteen* days next before the first day of the term in which he seeks admission, he has left with the secretary of the Law Society his contract of service, and any assignment thereof, &c." So far as the rule under consideration is inconsistent with the statute, it is doubtless superseded: see *In re MacGachen*, 20 U. C. Q. B. 321. It is, it will be perceived, inconsistent not only as to the time within which the contract of service must be deposited, but as to the person with whom the deposit should be made. The time is now at least fourteen days next before the first day of the term in which application is to be made, and not seven days as under the rule. The person is the secretary of the law society of this Province, and not the clerk of the crown and pleas. It may be held under the statute that where, owing to peculiar circumstances, such as loss of articles, &c., a strict compliance with its provisions is impossible, a *cy pres* compliance will be sufficient. Such was

with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship. (*c*)

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the practice in England and in this Province under *rules* hitherto in force and corresponding with the statute. Such also is the practice to a great extent under existing rules of the Law Society: see *In re Loring*, M. T. 2 Vic. *MS* R. & H. Dig. "Attorney," i. 3; *Ex parte Radenhurst*, Tay. Rep. 138; *Ex parte Herbert*, 2 Dowl. P. C. 172; *Ex parte Hulme*, 4 Dowl. P. C. 88; *Ex parte Blunt*, 5 Dowl. P. C. 231; *Ex parte Cooper*, *Ib.* 703; *Ex parte Lyons*, 6 Dowl. P. C. 517; *Ex parte Horner*, 5 Jur. 463; *Ex parte Jackson*, 6 Jur. 35; *Ex parte Guteris*, 7 Jur. 1039; *Ex parte Estcourt*, 8 Jur. 985; *Ex parte Udall*, *Ib.* 1007; *Ex parte Chandler*, 1 Dowl. N.S. 814; *Ex parte Cunliffe*, 3 D. & L. 348; *Ex parte Young*, 13 Q. B. 662: *Ex parte Makinson*, 18 C. B. 661; *Ex parte Bushe*, 4 Ir. C. L. R. 434. It is expressly declared that the society may, under certain circumstances, dispense with the production of the contract, &c.: Con. Stat. U. C. cap. 35, s. 5, as amended by 28 Vic. cap. 21, s 6. Every person duly admitted, sworn, and enrolled an attorney or solicitor of either of the Courts of Queen's Bench, Common Pleas or Chancery, is entitled, upon the production of a certificate of his admission to either one of the said courts, and that the same still continues in force, and upon signing the roll of the other court, to be admitted as an attorney or solicitor in any other of the said courts: Con. Stat. U. C. cap. 35, s. 20. In England it has been held under Stat. 6 & 7 Vic. cap, 73, s. 15, that a person admitted as a solicitor of the court of Chancery, upon service with a solicitor, who had not been admitted an attorney of a court of law, might be admitted an attorney of a court of law: *In re Lucas*, 2 Jur. N.S. 65.

(*c*) The Con. Stat. U. C. cap. 35, s. 7, does not make necessary the filing of answers to questions such as those above mentioned. The Law Society is, however, empowered to make such rules as they consider necessary for conducting the examination of persons applying to be admitted as attorneys or solicitors, as well touching the articles and service, and the several certificates hereinbefore mentioned, as the fitness and capacity of such persons to act both as attorneys and solicitors: *Ib* s. 8. The judges of the courts of Queen's Bench, Common Pleas and Chancery are also empowered to make rules and regulations: *Ib.* s. 25. Under the authority of these sections a regulation has been made requiring a given number of questions to be answered both by the applicant and the attorney or solicitor with whom he served his time. In England it has been held that an attorney refusing to answer questions of this nature may be called upon by rule to show cause why he should not do so: *Ex parte Lewis*, 7 Jur. 442; and be made to pay the costs of the application: *Ex parte Holland*, 5 Dowl. P. C. 681. It has also been held under the old rules that the answers may not only be received a day later than that fixed for the receipt of them (see cases in preceding note), but may in certain cases be entirely dispensed with. Thus where an attorney has left the country for his health: *Ex parte Cross*, 2 Dowl. N.S. 692; or is unexpectedly absent: *Ex parte Lyons*, 6 Dowl. P. C. 517. How far the courts will undertake to relax the provisions of the statute is a question. Every person before being admitted an attorney or solicitor must prove by an affidavit of himself, as well as of the attorney or solicitor to whom he was bound, or his agent, that he hath actually and really served and been employed by such attorney or solicitor, &c.: Con. Stat. U. C. cap. 35. ss. 3, 4; 28 Vic. cap. 21, s. 5. It has been held that an articled clerk can serve only one year with the agent of the attorney in this Province: *In re Gilkison*, H. T. 7 Wm. IV. *M.S.* R. & H. Dig. "Attorney," i. 1. If the clerk carry on business in a place where the attorney does not reside, the service will not be allowed: *In re McIntosh* v. *McKenzie*, M. T. 7 Vic. *Ib.* i. 2; *Ex parte McIntyre*, 10 U. C. Q. B. 294. Where the clerk during the

QUESTIONS TO BE ANSWERED BY THE CLERK.

1. What was your age on the day of the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attorneys, to whom you were articled or assigned, carried on his or their business? If not, state the reason.

3. Have you at any time, during the term of your articles, been absent, without the permission of the attorney or attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

QUESTIONS TO BE ANSWERED BY THE ATTORNEY.

1. Has A. B. served the whole time of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B., at any time during the term of his articles, been absent without your permission? and if so, state the length and various occasions of such absence.

3. Has the said A. B. during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articled clerk?

4. Has the said A. B. during the whole time of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney and solicitor?

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entire period of service was a salaried clerk attending a public office, the service was not allowed: *In re Ridout*, T. T. 2 & 3 Vic. *M.S.* R. & H. Dig. 1. 4. Absence from ill health allowed: *In re Hagarty*, 6 O. S. 188; *In re Holland*, *Ib.* 441; but not for other causes: *In re Hume*, 19 U. C. Q. B. 373; *In re McGregor*, 15 U. C. C. P. 54. Where there is good reason for discharging a clerk from his articles, the court has power to allow the same to be done: *In re Patterson*, 18 U. C. Q. B. 250. There cannot be a legal partnership between an attorney and his articled clerk: *Dunne* v. *O'Reilly*, 11 U. C. C. P. 404. The court will not grant to the Law Society the costs incurred in opposing, even successfully, the application of persons to be admitted attorneys: *In re Kennedy*, 3 Ir. Jur. N. S. 120.

5. Has the said A. B. since the expiration of his articles, been engaged or concerned, and for how long a time, in any and what profession, business, or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be) bearing date, &c., for the term therein expressed; and that he is a fit and proper person to be admitted an attorney. Rule 51, H. T. 13 Vic.

2. (*ee*) It is ordered, that whenever hereafter any attorney of this Court shall be struck off the roll of attorneys, or be prohibited from practising as an attorney therein, by order of this Court, for malpractice or misconduct as an attorney, or other sufficient cause, (*f*) the clerk of this Court shall forthwith certify such dismissal or prohibition, and the

(*ee*) The origin of this is our rule of Q. B. T. T. 15 Vic.; and though placed here among the general rules, it seems still to be restricted to the Queen's Bench; for it reads "Whenever hereafter any attorney of *this* court, &c. the clerk of this court shall," &c. To the rule is added a memorandum to the effect that "a similar rule exists in the Common Pleas." It seems that independently of any rule the courts, out of courtesy the one to the other, may do all that this rule prescribes: *In re Collins*, 18 C. B. 272; *In re* ——, 1 Ex. 453; *In re Smith*, 1 B. & B. 522; *In re Whytehead*, 4 M. & G. 768.

(*f*) If an attorney disgrace himself by misconduct, so as to be an unfit person to practice as an attorney, he may be struck off the rolls. In such a case the courts exercise a discretion as to whether a man whom they have formerly admitted is a proper person to be *continued* on the roll: *Ex parte Brounsall*, 2 Cowp. 829. An attorney convicted of a disgraceful indictable offence: *Stephens* v. *Hill*, 1 Dowl. N.S. 669; *In re King*, 8 Q. B. 129; such as larceny: *Ex parte Brounsall*, 2 Cowp. 829; or of seditious practices: *Ex parte Frost*, 1 Chit. Rep. 558, *n*; or of a conspiracy to extort money by means of libels: *In re Hawdone*, 9 Dowl. P. C. 970; is not a proper person to be continued on the rolls as an attorney; but a conviction for a conspiracy, unless aggravated, is not, it seems, of sufficient turpitude to justify the summary interference of the court: *Anon.* 1 Dowl. P. C. 174; *In re King*, 8 Q. B. 129. If an attorney misconduct himself under circumstances affecting his professional character or course of business as an attorney, though the circumstances do not constitute an indictable offence, such attorney may be struck off the rolls: *Re Aitkin*, 4 B. & Al. 47; *Ex parte Bodenham*, 8 A. & E. 959; *In re Smith and Henderson*, 13 U. C. C. P. 262; *In re Wright*, 12 C. B. N. S. 705; or suspended from practising for a certain time; thus, where he sends a threatening letter to extort money: *Rex* v. *Southerton*, 6 East, 126; or conceals himself to avoid service of a rule for an attachment: *In re* ——— ———, 1 D. & R. 529; or refuses to answer interrogatories as to misconduct imputed to him: *Re Holmes*, 12 Jur. 657. So an attorney may be struck off the rolls for irregularities in his articles of clerkship or admission as an attorney: *In re Holland*, 6 O. S. 441; but the application to be successful must be made within twelve months from the time of the admission of the attorney or enrolment of his articles: Con. Stat. U. C. cap. 35, s. 19. The summary interference of the court is not allowed if the matter of complaint, supposing it to be true, be indictable, especially if the charge be contradicted on

grounds thereof, expressed in general terms, under the seal of this Court, (*g*) and shall transmit such certificate to each of the other Superior Courts of Upper Canada, (*h*) and that this Court, on receipt of any similar certificate from the Court of Chancery or the Court of Common Pleas, of any attorney or solicitor of either of the said Courts respectively, having been struck off the roll of such Court, or prohibited from practising therein, shall thereupon take proceedings for striking such person, being an attorney of this Court, from the roll of attorneys, or for prohibiting his practising therein, according to the course and practice (and in like manner and under like circumstances) observed in similar cases in the Superior Courts in England. T. T. 15 Vic. *Mem.* A similar rule exists in the Common Pleas. (*i*)

REGULÆ GENERALES AS TO PRACTICE.

TRINITY TERM, 20TH VIC. (*j*)

WHEREAS the practice of the Courts of Queen's Bench and Common Pleas in and for Upper Canada has been to a great extent, superseded or altered by the Common Law Procedure Act, 1856, and it is expedient that the written rules of practice of the said Courts should be consolidated: (*k*) It is therefore ordered that all existing rules of practice in either of the said Courts in regard to civil actions (*l*)—save and except as regards any step or proceeding taken before these rules came into force—shall be, from and after the first

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affidavit: *In re Patterson* v. *Miller*, 1 U. C. Q. B. 256; or if an action or other proceeding in respect of the same subject matter be pending and undetermined: *Anon.* 5 Jur. 678.

(*g*) *This court*: *i. e* Q. B.: see note *ee* on preceding page.

(*h*) *i. e.* Common Pleas and Chancery.

(*i*) The certificate should show the grounds on which he was struck off the rolls: *In re Tremayne*, 14 U. C. C. P. 257. The application should be for a rule to shew cause, and should not be moved on the last day of term: *Ib.*

(*j*) Here follow the rules of practice framed by the judges under C. L. P. Act, 1856. They are for the most part copied from the English rules of Hilary term, 1853, framed by the English judges pursuant to the English C L. P. Acts.

(*k*) *Written rules of practice*, &c. The object of these rules is to repeal all existing written rules of practice and to consolidate them—such, for example, as our rules of T. T. 2 Geo. IV.; M. T. 4 Geo. IV.; H. T. 7 Geo. IV.; E. T. 9 Geo. IV.; H. T. 10 Geo. IV.; E. T. 11 Geo. IV.; H. T. 1 Wm. IV.; T. T. 3 & 4 Wm. IV.; E. T. 4 Wm. IV.; T. T. 5 Wm. IV.; M. T. 3 Vic.; E. T. 5 Vic.; H. T. 13 Vic.; T. T. 15 Vic. Unwritten rules, if any such there be, remain in force, except so far as inconsistent with the rules here annotated: *Begg* v. *Forbes*, 13 C. B. 614.

(*l*) See *Tolson* v. *Bishop of Carlisle et al*, 3 C. B. 41.

day of Trinity Term, 1856, annulled, (*m*) and that the practice, to be thenceforth observed in the said Courts with respect to the matters hereafter mentioned, shall be as follows, that is to say: (*n*)

APPEARANCE. (*o*)

1. (*p*) The clerks and deputy clerks of the Crown shall enter, in books to be kept by them for that purpose, (*q*) every appearance of which a memorandum according to the statute shall be delivered to them respectively, and shall file such memorandum on the day they receive the same. (*r*)

2. (*s*) If two or more defendants in the same action shall appear

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(*m*) *Shall be annulled* This is a very strong expression. The meaning of it as used in this order is that all written rules of practice in regard to civil actions in force when the rules here annotated took effect, shall be made void and of no effect.

(*n*) In construing these rules of practice, the rules used in the construction of acts of parliament, so far as applicable, ought to be applied: see *Calvert* v. *Gandy*, 14 L. J. Cy. N.S. 141.

(*o*) It is the duty of a defendant who has been regularly served with process to appear thereto. Such is the command of the writ, viz. "that within ten days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you:" Sch. A, No. 1, C. L. P. Act. Where the writ, specially endorsed, was served on 31st December, 1856, and execution in default of appearance issued on 17th January, 1857, *held* too soon, and therefore irregular: *Kerr et al* v. *Bowie*, 3 U. C. L. J. 111. And *per judicem*, "The summons was served on 31st December, and by it the defendant was told that he must cause an appearance to be entered for him *within* ten days after the service of the writ, *inclusive* of the day of such service. We must therefore count 31st December as one of the ten days, and besides that day defendant had the first nine days of January to enter his appearance. It would be impossible to hold that he had the ten days, if he were obliged to enter his appearance on 8th January at latest. Having, therefore, 9th January as his tenth day, he has all that day on which to enter his appearance, and judgment could not be legally signed on that day:" *Ib.* In computing the ten days for appearing, the day of service is reckoned inclusive, not exclusive, so that if the writ be served on Saturday, judgment may be signed one week from the following Tuesday: *Ross et al* v. *Johnstone et al*, 4 U. C. L. J. 21. A defendant by appearing not only waives any irregularity in the writ, copy, or service, but by so doing may waive even the total want of a writ: see note *k* to section 51 C. L. P. Act.

(*p*) This rule is original, but in effect the same as repealed section 23 of 12 Vic. cap. 63.

(*q*) Where an appearance filed by defendant was by mistake indorsed with letters "C. C." which misled the deputy Clerk of the Crown, who was also clerk of the county court, and caused him to file the appearance among his county court papers, and plaintiff finding no appearance, signed judgment, the judgment was set aside upon payment of costs by defendant: *Dickie et al* v. *Elmslie*, 3 U. C. L. J. 107.

(*r*) See section 53, C. L. P. Act, and notes thereto.

(*s*) Taken from Eng. R. G. No. 2 of H. T. 1853.

by the same attorney and at the same time, (*t*) the names of all the defendants so appearing shall be inserted in one memorandum of appearance. (*u*)

ATTORNEY AND GUARDIAN. (*v*)

3. (*w*) An attorney not entering an appearance in pursuance of his undertaking, shall be liable to an attachment.

4. (*x*) No attorney shall be changed without the order of a Judge. (*y*)

5. (*z*) A special admission of *prochein amy* or guardian to prosecute or defend for an infant shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified. (*a*)

(*t*) Where an attorney without authority entered an appearance and defendant had not received any notice of the writ, on his application the appearance and all subsequent proceedings were set aside: *Wright et al* v. *Hull et al*, 2 Prac. R. 26.

(*u*) As to the form and mode of appearance: see section 53, C. L. P. Act, and notes thereto.

(*v*) At one time all appearances were in person, but it is now the practice, with a few exceptions, to appear by attorney.

(*w*) Taken from Eng. R. G. No. 3 of H. T. 1853, the origin of which was Eng. R. G. No. 31 of H. T. 2 Wm. IV.: Jervis N. R. 66. An attorney by accepting service of a writ of summons undertakes to enter an appearance for defendant: *Starratt* v. *Manning*, 3 U. C. L. J. 10. Where an attorney undertakes to appear, the court will compel him to do so although imposed upon when he gave the undertaking: *Lorymer* v. *Hollister*, 2 Str. 693. The appearance must be in a manner agreeable to the situation of the defendant; thus, if the defendant be an infant, the appearance must be by guardian: *Stratton* v. *Burgis*, 1 Str. 114. The punishment for non-appearance after an undertaking to appear is, as ordered by this rule, attachment. Before, however, moving for the attachment, a request should be made of the attorney to enter the appearance: *Jacobs* v. *Magnay*, 7 Jur. 326. It seems the undertaking need not be in writing: *Anon.* 2 Chit. R. 36; *Lorymer* v. *Hollister*, 2 Str. 693.

(*x*) Taken from R. G. No. 4 of H. T. 1853.

(*y*) This rule, it is apprehended, only applies where the attorney acting has authority to do so, and his authority has not expired: see *Doe d. Bloomer et al* v. *Bransom*, 6 Dowl. P C. 490; *May* v. *Pike*, *Ib* 667; and does not apply where a party defends in person and afterwards appears by attorney: *Jones* v. *King*, 5 D. & L. 412; *Kerrison* v. *Wallingborough*, 5 Dowl. P. C. 564. An order under this section has been granted without an affidavit: *In re Glasse* v. *Glasse*, 2 U. C. L. J. 213.

(*z*) Taken from Eng. R. G. No. 5 of H. T. 1853, the origin of which was Eng. R. G. No. 2 of H. T. 2 Wm. IV.: Jerv. N. R. 57.

(*a*) In the English court of Common Pleas the admission was special to prosecute or defend a particular action, or general to prosecute and defend all actions whatsoever; but it was said that the practice of the English court of King's Bench, to which the practice of our Queen's Bench was made to conform, a

JOINDER OF PARTIES. (*b*)

6. (*c*) Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a non-joinder, (*d*) by virtue of the Common Law Procedure Act, 1856, section 69, (*e*) he shall file a consent in writing of the party or parties whose name or names are to be added, (*f*) together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the Court or a Judge. (*g*)

PLEADINGS. (*h*)

7. (*i*) No side bar rule for time to declare shall be granted. (*j*)

8. (*k*) The defendant shall not be at liberty to waive his plea, or enter a *relicta verificatione*, (*l*) after a demurrer, without leave of the Court or of a Judge, unless by consent of the plaintiff or his attorney.

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special admission would be sufficient in all actions: *Archer* v. *Frowde*, 1 Str. 305; Jervis N. R. 57. In the rule here annotated the practice of the Common Pleas has been adopted.

(*b*) A consideration of the right of two or more persons to be joined as plaintiffs, or the liability of two or more persons to be joined as defendants in an action either upon contract or for tort, often presents questions of great nicety. The subject is discussed in sections 63 and 64, C. L. P. Act, and notes thereto.

(*c*) Taken from Eng. R. G. No. 6 of H. T. 1853.

(*d*) As to pleas in abatement: see note *w* to section 67, C. L. P. Act.

(*e*) As to when and under what circumstances the amendments may be made: see notes *x* to section 67 C. L. P. Act.

(*f*) The consent may be in this form—"*Title of court and cause.* I consent to be joined as a defendant in the above cause together with the above-named defendant. Dated," &c.

(*g*) *Relative powers:* see note *w* to section 48, C. L. P. Act.

(*h*) See C. L. P. Act, section 90 *et seq.* and notes thereto.

(*i*) Taken from Eng. R. G. No. 7 of H. T. 1853.

(*j*) It is necessary for a plaintiff liable to judgment of *non pros.* and desiring further time to declare, to make application to a judge in chambers for that purpose.

(*k*) Taken from Eng. R. G. No. 8 of H. T. 1853. This rule, so far as it prevents a defendant waiving his plea after demurrer without leave, is a re-enactment of Eng. R. G. No. 46 of H. T. 2 Wm. IV. Jervis N. R. 71, from which our old rule No. 11 of E. T. 5 Vic. Cam. R. 22, was copied.

(*l*) In the Common Pleas and Exchequer of England the defendant could not waive his plea: Chit. Prac. 136; but in the King's Bench it was necessary to rule the defendant to abide by his plea, which occasioned delay and expense, and afforded an opportunity to plead sham pleas: Jervis N. R. 71. Our practice being that of the King's Bench, the object of our rule 11 of E. T. 5 Vic. and of the rule here annotated, is to put an end to the practice of defendants plead-

9. (*m*) In case the time for pleading to any declaration or for answering any pleading, shall not have expired before the first day of July in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the twenty-first day of August, (*n*) as if the declaration or preceding pleading had been delivered or filed on the twenty-first day of August. (*o*)

10. (*p*) When a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll (if any) on which such proceedings are entered, and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea, (*q*) and in case the same be falsely stated by the defen-

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ing, and often purposely so, a bad plea, which on being demurred to, he could withdraw by entering a *relicta verificatione*, and upon which he would not have to pay any costs unless the plaintiff afterwards got judgment in the action, when they would be allowed to him as costs in the cause. Such cannot now be done "without leave of the court or of a judge, unless by consent of the plaintiff or his attorney: see *Davidson* v. *Bohn*, 5 C. B. 170; see further *Cooper* v. *Painter*, 13 M. & W. 734, n. The application to withdraw one plea and plead another, if made *bona fide* and appearing to be reasonable, will be granted at any stage of the cause: *Free* v. *Hawkins*, 7 Taunt. 278. It is usual, however, for the court or judge to impose terms, such as short notice of trial, &c.: *Taylor* v. *Joddrell*, 1 Wils. 254; *Wilkes* v. *Wood*, 2 Wils. 204. It seems that if a defendant without leave, in violation of this rule, withdraw his plea, plaintiff may sign judgment: *Palmer* v. *Dixon*, 5 D. & R. 623.

(*m*) Taken, with modifications, from Eng. R. G. No. 9 of H. T. 1853, the origin of which is Eng. R. G. No. 12 of M. T. 3 Wm. IV: Jervis N. R. 97.

(*n*) See section 59 C. L. P. Act.

(*o*) This rule applies as well where a defendant has further time to plead, which does not expire before the commencement of vacation, as where the original time to plead does not so expire: *Wilson et al* v. *Bradslocke*, 2 Dowl. P. C. 416; *Trinder* v. *Smedley*, 3 Dowl. P. C. 87. If the time for pleading expire *before* 1st July, plaintiff may sign judgment whenever he chooses afterwards; but if it expire on 1st July, he cannot sign judgment until the expiration of the time limited for pleading after vacation: *Morris* v. *Hancock*, 1 Dowl. N.S. 320; *Savery* v. *Lister*, 6 D & L. 257; *Severin* v. *Leicester*, 12 Q. B. 949. A plea filed or served between 1st July and 21st August is a nullity: *Mills* v. *Brown*, 9 Dowl. 151. So if 30th June be a Saturday, and a plea be filed and served after three o'clock on that day, it will be considered as filed and served on 2nd July and so a nullity: see *Sharp* v. *Roe*, 1 H. & N. 496; and R. G. Pr. 135.

(*p*) Taken from Eng. R. G. No. 10 of H. T. 1853, the origin of which was R. G. No. 8 of 4 Wm. IV: Jervis N. R. 107.

(*q*) This rule does not seem to apply to a plea by an executor of a judgment recovered, for that is in effect only a plea of *plene administravit*: *Power* v. *Fry*, 3 Dowl. P. C. 140. Indeed it is known that the rule when first passed was only intended to apply to the usual sham plea of a judgment recovered by plaintiff against defendant for the same demand: *Brokenshir* v. *Monger*, 9 M. & W. 112,

dant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea.

PAYMENT OF MONEY INTO COURT. (*r*)

11. (*s*) No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the master. (*t*)

12. (*u*) When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues, in respect of other causes of action; (*v*) and if the defendant succeeds in defeat-

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per Parke, B. It does not apply to a plea that a cause of action was set off in a previous action: *Ib.* 111.

(*r*) As to when and under what circumstances money may be paid into Court see section 99 C. L. P. Act, and notes thereto. And as to the effect thereof, see notes to section 102 C. L. P. Act.

(*s*) Taken from Eng. R. G. No. 11 of H. T. 1853.

(*t*) This it is believed was the well understood practice before this rule was made.

(*u*) Taken from Eng. R. G. No. 12 of H. T. 1853.

(*v*) Hitherto when money was paid into court in satisfaction of part only of plaintiff's demand, there being other issues upon which the parties were proceeding to trial, plaintiff was not held upon taking the amount out of court to be entitled to costs: *Cauty* v. *Gyll*, 4 M. & G. 907. In general, where plaintiff replies by accepting the sum paid into court on a specific plea, he is entitled to his costs of suit (section 102 of C. L. P. Act) on that plea, whatever becomes of the other issue or issues, if others there be: *Rumbelow* v. *Whalley*, 16 Q. B. 397. So plaintiff is entitled to the general costs of the cause when defendant pays money into court on a new assignment and it is accepted: *Benn* v. *Bateman*, 8 M. & W. 666. A plaintiff brought an action for £12 5s. 7½d. for goods sold and delivered. The defendant paid £10 on account, and before declaration took out a summons calling on the plaintiff to show cause why the proceedings should not be stayed on payment of the further sum of 6s. 4½d. and costs. The plaintiff claiming more, no order was made. A declaration was afterwards delivered, and the defendant paid 7s. into court, which plaintiff accepted. Held, *dissentiente* Cresswell, J., that the plaintiff's acceptance of 7s. after his refusal of 6s. 4½d. did not disentitle him to the costs incurred subsequently to the offer: *Shaw* v. *Hughes*, 15 C. B. 660. To an action for more than £20, defendant paid into court a less sum than £20, which plaintiff took out in full satisfaction, and

ing the residueof the claim, he will be entitled to the costs of the cause in respect of such defence commencing at "Instructions for Plea," but not before.

13. (*w*) Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court. (*x*)

DEMURRER. (*y*)

14. (*z*) The party demurring may give a notice to the opposite party to join in demurrer in four days, (*a*) which notice may be

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entered a *nolle prosequi* as to the residue. *Held* that the money so paid into court and taken out entitled plaintiff to his costs of suit without the order of a judge: *Chambers* v. *Wiles*, 24 L. J. Q. B. 267. Where a plaintiff refused a sum of money tendered through the medium of a judge's summons in satisfaction of his claim, and afterwards took out of court a sum slightly exceeding that so tendered, his conduct was held not to be such *prima facie* evidence of oppression as to deprive him of costs: *Shaw* v. *Hughes*, 15 C. B. 660. To inquire whether the sum ultimately accepted is *substantially* the sum which was offered would be to introduce in many cases a very inconvenient discussion: *Ib.* 665, *per* M. J. When money is paid into court after issue joined and plaintiff elects on with the action for the residue of the claim and fails at the trial, he entitled on taxation of costs to the costs of preparation for trial, even although partly incurred before the payment into court: *Harold* v. *Smith*, 5 H. & N. 381.

(*w*) Taken from Eng. R. G. No. 13 of H. T. 1853, the origin of which is Eng. R. G. No. 104 of H. T. 2 Wm. IV. Jervis N. R. 89, from which our Rule No. 27 of E. T. 5 Vic. Cam. R. 31, was taken.

(*x*) Where several actions are consolidated, plaintiff is generally made to pay the costs of the application: see *Cecil* v. *Brigges*, 2 T. R. 639.

(*y*) A demurrer in pleading is an admission by one party of the fact or facts charged in the pleading of his opponent, but referring the law arising on such fact or facts to the judgment of the court. The only cause of demurrer now allowable is that the pleading of the opposite party does not contain sufficient ground of action, defence, &c.: C. L. P. Act, section 120. Either party may with leave plead and demur to the same pleading at the same time: *Ib.* section 109. Where a demurrer was signed "A. B. defendant's attorney," A. B. being both the counsel and attorney of the defendant, the signature was considered sufficient, as the words "defendant's attorney" might be rejected as surplusage: *Lemoine* v. *Raymond*, H. T. 5 Vic. *MS.* R. & H. Dig. "Demurrer," 7. However, it is now enacted that the signature of counsel shall not be required to any pleading: C. L. P. Act, section 90. A demurrer commencing, "and the defendant says that the said declaration is not sufficient in law," and then proceeding to assign separate causes to each count, is in form a demurrer to the whole declaration: *Parrett Navigation Co.* v. *Stower et al*, 6 M. & W. 564.

(*z*) Taken from Eng. R. G. No. 14 of H. T. 153, the origin of which is Eng. R. G. No. 3 of H. T. 4 Wm. IV: Jervis N. R. 106.

(*a*) Neither party can be compelled to join in the demurrer before the expiration of the four days: *Hall* v. *Popplewell*, 5 M. & W. 341.

delivered separately, or endorsed on the demurrer, (*b*) otherwise judgment. (*c*)

15. (*d*) No motion or rule for a *concilium* shall be required, but demurrers as well as all special cases, (*e*) special verdicts, (*f*) and appeals from county courts (*g*) shall be set down for argument at the request of either party with the proper officer, (*gg*) four days before the day on which the same are to be argued, and notice thereof shall be given forthwith by the party setting the same down to the opposite party. (*h*)

(*b*) The notice may be in this form—*Title of Court and Cause.* Take notice that unless you join in the demurrer in this cause in four days' judgment will be signed against you. Dated, &c.

(*c*) If either party obtain a rule which operates as a stay of proceedings after the time for joining in demurrer has expired, but before judgment is signed, he has the whole of the day on which the rule is discharged to join in the demurrer: *Vernon* v. *Hodgins*, 4 Dowl. P. C. 665; *Hall* v. *Popplewell*, 5 M. & W. 341. In trespass the defendant pleaded two pleas, upon one of which the plaintiff joined issue, and replied to the other; the defendant rejoined and the plaintiff demurred to the rejoinder; the defendant did not join in demurrer, but gave notice to the plaintiff that he should take no further steps in respect of his second plea; the court set aside for irregularity a judgment signed upon the whole record: *Hitchcock* v. *Walter*, 6 Dowl. P. C. 457; see also *McIntyre* v. *Miller et al*, 2 D. & L. 708.

(*d*) Taken from Eng. R G. No. 15 of H. T. 1853, the origin of which was Eng. R. G. No. 6 of H. T. 4 Wm. IV. Jervis N. R. 106, with which our old Rule No. 20 of E. T. 5 Vic. Cam. R. 28 corresponded.

(*e*) As to special cases: see notes to section 154 of C. L. P. Act.

(*f*) As to special verdicts: see notes to section 25 of the Ejectment Act.

(*g*) As county court appeals must be set down for argument for the first or second paper days of each term, such day being the first paper day next after the date of the appeal bond, unless leave be granted by the court upon special affidavit to set it down for a subsequent paper day: R. G. H. T. 30 Vic. 26 U. C Q. B. 421.

(*gg*) Either party may set down a demurrer for argument: *Jones* v. *Dunn*, 1 U. C. C. P. 204. A demurrer was set down by the plaintiff before the opening of the court on the first day of Michaelmas Term for argument on the second paper day, and afterwards about twelve o'clock on the same day it was set down by defendant for argument on the first paper day. During the same term in Practice Court a rule to strike out the demurrer entered by the defendant was discharged, on the ground that the plaintiff's entry was improperly made before the court met. The court, however, heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the court *Moody* v. *Dougall*, 3 Prac. R. 145.

(*h*) The notice may be in this form — *Title of Court and Cause.* Take notice that the demurrer to be argued in this cause was this day set down for argument for the day of instant.—In ordinary cases the notice should be given a sufficient time to enable the opposite party to prepare for the argument: *Britten* v. *Britten et al*, 2 Dowl. N. S. 239. Where a demurrer is manifestly for

16. (*i*) The party whose pleading has been demurred to shall, with his joinder in demurrer, or at any time within the time allowed for joining in demurrer, (*j*) or within such further time as a judge on application may allow, deliver to such opposite party a notice in writing of all exceptions, intended to be taken on the argument to any preceding pleading of the party demurring, and in default of such notice, shall be precluded from arguing any such exception, (*k*) and all exceptions whereof notice has been so given shall be entered on the demurrer books, to be delivered to the judges, and if the party setting down the case for argument shall omit to enter on the demurrer book any exception made by the opposite party, of which he has had due notice, the court may, in its discretion, either give judgment in favor of such

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delay, the court may allow it to be set down for argument even on the last day of term: *Wilson* v. *Tucker*, 2 Dowl. P. C. 83; *Cooper* v. *Hawkes*, 1 C. & J. 219. The demurrer cannot be set down for argument before the opposite party has joined in demurrer, and consequently notice that the demurrer has been set down cannot be served at the time of the delivery of the joinder in demurrer: *Gibbons* v. *Mottram*, 1 D. & L. 815; *Hall* v. *Popplewell*, 5 M. & W. 341; *Howorth* v. *Hubbersty*, 3 Dowl. P. C. 457. Where a rule with a stay of proceedings has been taken out and served to show cause why a verdict rendered should not be set aside for irregularity, a notice of argument of demurrer and the setting down the same demurrer subsequent to the rule, will be set aside with costs: *City Bank* v. *Eccles*, 5 U. C. Q. B. 633. The demurrers are to be set down for argument "four days *before* the day on which the same are to be argued. This apparently *excludes* the day on which the argument is to take place. But the practice is to include it as one of the four days.

(*i*) Taken from our Rule No. 27 of H. T. 13 Vic.

(*j*) See R. G. pr. 14.

(*k*) After judgment has been once given on the record against a defendant upon a demurrer to his pleas, and he has been allowed to add another plea which when demurred to he abandons, he cannot be allowed on his second demurrer to take exceptions to the declaration, the court having already adjudged it to be good: *Hobson* v. *Wellington District Mutual Fire Insurance Co.* 7 U. C. Q. B. 19. Where defences were severally pleaded to the several counts of a declaration, and demurred to and not supported, and on the argument of the demurrer an exception was taken to the whole declaration that it was bad for a misjoinder of counts, the first and third counts being in assumpsit and the third in case, the court though admitting the declaration to be bad for the reason assigned would not give judgment against the plaintiff—the question upon the consistency of the declaration as a whole not having been raised under the demurrer: *McLeod* v. *Eberts et al*, *Ib.* 251. Where no notice of exceptions to the declaration after demurrer to a plea is given, the court will refuse to entertain the exceptions of their own accord, unless the declaration shew that on the facts stated the plaintiff really has no ground of action: *Shouldice* v. *Fraser*, *Ib.* 60; see also *Ferrie et al* v. *Lockhart*, 4 U. C. Q. B. 477. Where there is a demurrer to a plea and exceptions are taken to the declaration, if the plaintiff on the argument abandons the demurrer to the plea, the court will not give judgment on the exceptions: *Martin* v. *Arthur*, 16 U. C. Q. B. 483.

opposite party, or may strike the case out of the paper, and allow the opposite party reasonable costs for attending to argue the demurrer. (*l*)

17. (*m*) Four days (*n*) before the day appointed for argument, the party setting down the case for argument (*o*) shall deliver a copy of the demurrer book, special case, or special verdict to each of the judges, otherwise the case shall not be heard. (*p*)

18. (*q*) When there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates, shall be copied into the demurrer books, and if any other parts shall be copied, the master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client. (*r*)

CHANGE OF VENUE. (*t*)

19. (*u*) No venue shall, unless upon consent of the parties, be

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(*l*) Notice of exceptions to the declaration having been duly served by the defendant were omitted by the plaintiff in the demurrer books entered by him. The court refused to give judgment in favor of the defendant as allowed by the rule of court, the plea being clearly bad, but allowed the exceptions to be argued: *Curry* v. *McLeod*, 12 U. C. Q. B. 545. *Semble*, that such cases will in future be struck out of the paper: *Ib.*

(*m*) Taken from our old Rule No. 28 of H. T. 13 Vic.

(*n*) Sunday to be included unless the last of the four days: *Hodgins* v. *Hancock*, 14 M. & W. 120.

(*o*) Either party may in this Province set down a demurrer for argument: R. G. pr. 15. The English practice is different: R. G. No. 16 of H. T. 1853, taken from R. G. No. 7 of H. T. 4 Wm. IV: Jervis N. R. 107.

(*p*) And the demurrer may be struck out: *Abraham* v. *Cook*, 3 Dowl. P. C. 215; *Watson* v. *Scarlett*, 1 D. & L. 810; see also *Fisher* v. *Snow*, 3 Dowl. P. C. 27; *Sandall* v. *Bennett*, 2 A. & E. 204; *Sanghurst* v. *Haynes*, 13 W. R. 291.

(*q*) Taken from Eng. R. G. No. 17 of H. T. 1853.

(*r*) The object of this rule is a good one, viz., to save expense in the copying of unnecessary pleadings.

(*t*) The county where the action is brought must be specified, so that there may be process to the sheriff of that county to bring a jury to try the cause: see *Mostyn* v. *Fabrigas*, 1 Cowp. 176. This county which is made to appear on the face of the declaration is called the venue (*vicenetium*). If there be good reason for having the trial in a county other than that specified, there must be a "change of venue." The change is always made "according as it shall appear to the court or judge that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or that in which the venue has been laid."

(*u*) Taken in part from Eng. R. G. No. 18 of H. T. 1853. The rule applies to actions commenced before the C. L. P. Act came into force, when the application to change the venue is made after that time: *Smythe et al* v. *Tower*, 2 U. C. L. J. 183.

changed, (*v*) without an order of the court or of a judge, made after a rule to show cause or a judge's summons; (*w*) but such order may nevertheless be made before issue joined in those cases in which it could have been so made before this rule; (*x*) and in all cases the venue may or may not be changed, according as it shall appear to the court or judge, that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or in that in which the venue has been laid. (*y*)

PARTICULARS OF DEMAND OR OF SET-OFF. (*z*)

20. (*a*) With every declaration (unless the writ has been specially endorsed under the provisions contained in the 41st section of the Common Law Procedure Act, 1856) (*b*) delivered, containing causes of action, such as those set forth in schedule B of that Act, numbered from one to eleven inclusive, or of a like nature, (*c*) the plaintiff shall

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(*v*) The rule is prohibitory. It means that an order to change the venue shall not be made of course, but only after a summons to show cause: *Begg* v. *Forbes et al*, 13 C. B. 616, *per* Maule, J.

(*w*) Formerly there were cases in which defendant might change the venue as a matter of course, reserving to plaintiff the right to bring it back upon undertaking to give material evidence. Now, to prevent the delays arising from such a practice, no change can be made without the knowledge of plaintiff, and then only after an opportunity afforded him to show cause. As to when, in an application to change the venue, a common affidavit is sufficient and when a special affidavit is required: see note *h* to section 89, C. L. P. Act.

(*x*) It is a common practice to impose terms when granting the application, so as to protect plaintiff from disadvantageous results: *Bowring* v. *Bignold*, 1 Dowl. P. C. 685; *Keys* v. *Smith*, 10 Bing. 1; *Attwood* v. *Ridley et al*, 2 M. & G. 893; see further note *h* to section 89, C. L. P. Act.

(*y*) An order to change the venue was refused when applied for on the common affidavit, though defendant had proceeded by summons in a case where plaintiff showed that he could give evidence in the county where the venue was laid, and defendant did not show any special circumstances for a change: *Carruthers* v. *Dickey*, 2 U. C. L. J. 185. The practice is now to change the venue to the county where it can be most conveniently tried: see note *h* to section 89, C. L. P. Act.

(*z*) The object of particulars of demand or of set-off is to explain respectively the declaration and plea, where, by reason of generality, the exact demand or defence is doubtful. Hence particulars are more especially required when the declaration is on the common counts. It would seem that courts of common law, independently of any statute or rule, have power to order particulars of demand and of set-off: *Bulnois* v. *Mackenzie*, 4 Bing. N. C. 132, *per* Tindal, C. J.

(*a*) Taken from Eng. R. G. No. 19 of H. T. 1853, the origin of which was Eng. R. G. No. 6 of T. T. 1 Wm. IV. Jervis N. R. 43, with which our old Rule No. 7 of E. T. 6 Vic. corresponded: Cam. R. 19.

(*b*) Now section 15 of C. L. P. Act, which see, and notes thereto.

(*c*) *i. e.* Common counts or counts of a like nature. It may, however, be laid down as a rule that although the declaration contain only special counts, yet

deliver full particulars of his demand under such claim, where such particulars can be comprised within three folios, and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; (*d*) and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver particulars, the defendant shall, in like manner, deliver particulars of his set-off; (*e*) and to secure the delivery of particulars in all such cases, it is ordered that, if any such declaration shall be delivered, or if any plea of set-off shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons, for the purpose of obtaining such order, or of the particulars he may afterwards deliver, (*f*) and a copy of the particulars of the demand and set-off

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where the cause of action is not fully and specifically disclosed in the declaration, and whenever it appears necessary for the furtherance of justice that the defendant should have some more specific information, particulars will be ordered to be given and the proceedings in the mean time stayed. Thus in an action for not repairing, particulars of non-repair may be ordered: *Sowter* v. *Hitchcock*, 5 Dowl. P. C. 724; see also *Roberts* v. *Rowlands*, 3 M. & W. 543. But in an action for the breach of the warranty of a horse, an order for particulars of the unsoundness was refused: *Pylie* v *Stephen*, 8 Dowl. P. C. 771. In actions for torts or wrongs unconnected with contract the practice is in general to refuse particulars, but under certain circumstances even in these actions particulars have been ordered: see *Ives* v. *Calvin*, 1 Cham. R. 8. Thus particulars have been ordered in an action for injury to the person by negligent driving: *Wicks* v. *Macnamara et al*, 3 H. & N. 568.

(*d*) Notwithstanding this rule, when plaintiff made a statement of his claim, averring that particulars exceeded three folios, a judge in chambers ordered further and better particulars. The rule does not debar a judge from ordering such particulars as he sees fit: *Hall* v. *Bowes*, 2 U. C. L. J. 208.

(*e*) Particulars ordered of a plea of fraud: *McCreight O. M.* v. *Stevens*, 31 L. J. Ex. 455. So where in an insurance case the plea simply alleged that the proposal which was the basis of the policy was untrue: *Marshall* v. *The Emperor Life Assurance Society*, L. R. 1 Q. B. 35. A judge's order requiring the defendant to deliver a particular of his set-off, and ordering "that in default thereof defendant shall be precluded from giving evidence in support of such set-off on the trial," was held to render the evidence inadmissible at the trial: *Swain et al* v. *Roberts*, 1 Moo. & R. 452. Where particulars are delivered but not under a judge's order it is no objection to the use of them that they are headed in a different court from that in which the action is brought: *Lewis* v. *Hilton*, 5 Dowl. P. C. 267.

(*f*) This rule is not compulsory upon the plaintiff. The only consequence of disobeying the rule is that mentioned in it, viz., that plaintiff will not be allowed costs in respect of particulars afterwards delivered: Jervis N. R. 43, note *a*. A

shall be annexed by the plaintiff's attorney to every record at the time it is entered for trial with the proper officer. (*g*)

21. (*h*) A summons for particulars and order thereon, may be obtained by a defendant before appearance, (*i*) and may be made, if the judge think fit, without the production of any affidavit. (*j*)

22. (*k*) A defendant shall be allowed the same time for pleading, after the delivery of particulars, under a judge's order, which he had at the return of the summons, (*l*) unless otherwise provided for in such order.

SECURITY FOR COSTS. (*m*)

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judgment of *non pros.* cannot it seems be signed for disobedience: *Sutton* v. *Clarke*, 1 Dowl. P. C. 259. Unless an order for particulars be expressly made with a stay of proceedings, it does not so operate: *Doe d. Roberts et al* v. *Roe*, 13 M. & W. 691; and defendant cannot, at least until the order is rescinded, sign judgment of *non pros.*: *Burgess* v. *Swayne*, 7 B. & C. 485; *Sutton* v. *Clarke*, 1 Dowl. P. C. 259; *Somers* v. *King*, 7 D. & R. 125. The court cannot compel a plaintiff to deliver his particulars: *Kirby* v. *Snowden*, 4 Dowl. P. C. 191.

(*g*) Annexing the particulars to the record dispenses with the necessity of proof of delivery: *Macarthy* v. *Smith*, 8 Bing. 145. If the plaintiff annex to the record particulars varying from those delivered, and the defendant is prepared at the trial to prove the delivery, plaintiff may be non-suited: *Morgan* v. *Harris*, 1 Dowl. P. C. 570. Defendant if not prepared with such proof may be entitled to a new trial: *Ib.*; and plaintiff's attorney be made to pay the costs of the former trial: *Ib.*

(*h*) Taken from Eng. R. G. No. 20 of H.T. 1853, the origin of which was Eng. R. G. No. 47 of H. T. 2 Wm. IV: Jervis N. R. 71.

(*i*) The order is generally obtained before plea pleaded, but may under special circumstances be obtained afterwards. The order when obtained is to the effect that plaintiff's attorney or agent shall deliver to the defendant's attorney or agent the particulars required, and that in the mean time all further proceedings be stayed.

(*j*) The affidavit is however usually required.

(*k*) Taken from Eng. R. G. No. 21 of H. T. 1853, the origin of which was Eng. R. G. No. 48 of H. T. 2 Wm. IV: Jervis N. R. 72.

(*l*) Some of the Judges in England adopted the practice of directing the particulars to be delivered within a certain time. They had no power to do this, for the court cannot by rule or order compel the plaintiff to deliver his particulars: *Kirby* v. *Snowdon*, 4 Dowl. P. C. 191; Jervis N. R. 72 note *a*. The only consequence of his non-compliance with the order for particulars is the delay of his suit: *Ib.*

(*m*) The application for security for costs is in general one in the discretion of the court or a judge: *McCullock* v. *Robinson*, 2 B. & P. N. R. 352; *Fletcher* v. *Lew*, 5 N. & M. 351; *Roper* v. *Phillips*, 3 M. & R. 84; *Bristowe* v. *Needham*, 2 Dowl. N.S. 658. Security may be ordered where the plaintiff is an infant or other irresponsible person: *Doe d. Selby* v. *Alston*, 1 T. R. 491, *per* Buller, J.: *Van Winkle* v. *Chaplin*, 2 Ch. Cham. R. 98; *Stinson* v. *Martin*, *Ib.* 86; *Leishman* v. *Eastwood*, *Ib.* 88; *Lees* v. *Smith*, 5 H. & N. 632; or where the plaintiff, whether suing in his own right or in right of another, permanently resides out of the jurisdiction of the court: *Lloyd* v. *Davis*, 1 Tyr. 533; *Pray*

et al v. *Edie*, 1 T. R. 267; *Fitzgerald* v. *Whitmore*, *Ib.* 362; *Chevalier et al* v. *Finnis*, 1 B. & B. 277; *Chamberlain* v. *Chamberlain*, 1 Dowl. P. C. 366; *Baker* v. *Hargreaves*, 6 T. R. 597; *DeMarneffe* v. *Jackson*, 13 Price 603; *Baxter* v. *Morgan*, 6 Taunt. 379; *Henschen* v. *Garvis*, 2 H. Bl. 383; *Foss* v. *Wagner*, 2 Dowl. P. C. 499; *Bryan* v. *Ejector*, Ir. T. R. 385; *Drummond* v. *Tillinghist*, 16 Q. B. 740; *Youde* v. *Youde*, 3 A. & E. 311; *Mahony* v. *Kelcher*, 6 Ir. Jur. O.S. 235; *Habgood et ux.* v. *Paul*, 8 Ir. C. L. R. App. xxxiii.; and this although the action be directed to be tried by a court of equity: *Lilly* v. *Stafford*, 3 Ir. L. R. 300; and on such an application the court is bound to take judicial notice of the territorial divisions of the Province: *McDonald* v. *Dicarie*, 1 Ch. Cham. R. 34. If plaintiff's domicile be within the jurisdiction of the court temporary absence is no ground for the application; *Kusten* v. *Plaw et al*, 1 M. & P. 30; *Henschen* v. *Garves*, 2 H. Bl. 383; *Ford* v. *Boucher*, 1 Hodges, 58; *Nelson* v. *Ogle*, 2 Taunt. 253; *Jacobs* v. *Stevenson*, 1 B. & P. 96; *Anon.* 2 Chit. 152; *Cole* v. *Beale*, 7 Moore, 613; *Boustead* v. *Scott*, 2 Dowl. P. C. 622, *n*; *Frodsham* v. *Myers*, 4 Dowl. P. C. 280; *LeNormand* v. *Prince of Capua*, 6 Jur. 64; *Foss* v. *Wagner*, 2 Dowl. P. C. 499. There are cases which show that a plaintiff who comes within the jurisdiction of the court merely for the purpose of attending to the suit is bound to give security for costs: *Oliva* v. *Johnson*, 5 B. & Al. 908; *Gill* v. *Hodgson*, 1 Prac. R. 381; *Gurney* v. *Key*, 3 Dowl. P. C. 559. But the weight of authority seems to be against ordering security in such a case: *Dowling* v. *Harman et al*, 8 Dowl. P. C. 165; *Tambisco* v. *Pacifico*, 7 Ex. 816; *Hawkins* v. *Paterson et al*, 8 Prac. R. 253; *O'Grady* v. *Munro*, 7 Grant, 106; *Wilder* v. *Hopkins*, 4 Prac. R. 350; *Allain* v. *Chambers*, 8 Ir. C. L. R. App. vii.; *Redmond* v. *Mooney*, 7 Ir. Jur. N.S. 277; where the security has been ordered and plaintiff afterwards comes within the jurisdiction of the court merely to get rid of the order, the court will decline to interfere: *Marsh* v. *Beard*, 1 Ch. Cham. R. 390; *Knott* v. *Fitzgibbon*, 4 Ir. Jur. O.S. 192. But if the absence be shown only to have been temporary, or the coming within the jurisdiction to have been with an intention permanently to reside, relief may be granted: *Harvey* v. *Smith*, 1 Ch. Cham. R. 392; *Woodley* v. *Woodley*, 3 Ir. L. R. 86; *Palmer* v. *Lord Ashbrook*, 4 Ir. Jur. O.S. 193; *Eyre* v. *Baldwin*, 4 Ir. C. L. R. 270. The ownership of real estate or other property of a permanent character within the Province is in general an answer to the application: *White* v. *White*, 1 Ch. Cham. R. 48; *Limerick and Waterford Railway Co.* v. *Fraser*, 4 Bing. 394; *Edinburgh and Leith Railway Co.* v. *Dawson*, 7 Dowl. P. C. 573; *Kilkenny and Great Southern and Western Railway Co.* v. *Feilden et al*, 6 Ex. 81; *Swinbourne* v. *Carter et al*, 23 L. J. Q. B. 16; *Galt* v. *Spenser*, 2 Ch. Cham. R. 92; *Nagle* v. *Power*, 1 Jones Ir. R. 420; *Sisson* v. *Cooper*, 4 Ir. L. R. 401. Foreign corporations are bound to give security for costs: *Limerick and Waterford Railway Co.* v. *Fraser*, 4 Bing. 394; *Kilkenny and Great Southern and Western Railway Co.* v. *Feilden et al*, 6 Ex. 81; *The North American Colonial Association of Ireland* v. *Archer*, 6 Ir. L. R. 509. So plaintiffs living abroad under sentence of transportation: *Harvey* v. *Jacob*, 1 B. & Al. 159; *Barrett* v. *Power*, 9 Ex. 338. But the court refused to compel a prisoner of war suing for wages on an English ship to give security: *Maria* v. *Hall*, 2 B. & P. 236. Though peers of the realm and foreign ambassadors are exempt from the operation of the rule: *Earl Ferrars* v. *Robins*, 2 Dowl. P. C. 636; *Lord Nugent* v. *Harcourt*, 2 Dowl. P. C. 578; *Duke de Montellano* v. *Christin*, 5 M. & S. 503; *Marquis of Donegal* v. *Ingram*, 3 Ir. Jur. O.S. 395; *The Earl of Kingston* v. *Sheehy*, Hay & Jon. Ir. R. 358; but see *Lord Aldborough* v. *Burton*, 2 Mylne & K. 401; foreign potentates are not so: *Emperor of Brazil* v. *Robinson et al*, 5 Dowl. P. C. 522; *King of Greece* v. *Wright*, 6 Dowl. P. C. 12. The mere fact of the plaintiff being an officer of the service of the crown is not sufficient to exempt him from giving security for costs: *Dickenson* v. *Duffill*, 1 Ch. Cham. R. 108. It must be shewn that his domicile is within the jurisdiction, and that his absence in the

service of the crown is compulsory: *Chappell* v. *Watts*, 2 E. & E. 879; *Garwood* v. *Bradburn*, 9 Dowl. P. C. 1031; *Whittall* v. *Campbell*, 5 H. & N. 601; *Miller* v. *Young*, 1 Ir. L. Rec. O.S. 338; *Dawes* v. *Magrath*, 3 Ir. L. Rec. O.S. 30; *Thorpe* v. *Murphy*, 10 Ir. L. R. 332, *Perry* v. *Maloney*, Bl. D. & O. Ir. R. 257. The foreign master of a foreign ship trading to and from England held bound to give security: *Nylander* v. *Barnes*, 6 H. & N. 509; see further: *Keller* v. *Slattery*, Hay & Jon. Ir. R. 577; *Kerr* v. *Perry*, 6 Ir. Jur. N.S. 239. Where plaintiff is resident within the jurisdiction of the court, mere poverty or insolvency is not of itself any ground for asking for security: *Gregory q. t.* v. *Elvidge*, 2 Dowl. P. C. 259; *Ross* v. *Jacques*, 8 M. & W. 135; *Armitage* v. *Grafton*, 10 Jur. 377; *Mylett* v. *Hucker*, 5 Dowl. P. C. 647; *Pentland* v. *Carroll*, 1 Hud. & Br. Ir. R. 332; *Field q. t.* v. *Carron*, 2 H. Bl. 27; *Golding q. t.* v. *Barlow*, 1 Cowp. 24; *Evans* v. *Reily*, Jones & Car. Ir. R. 152; *Arbuthnot* v. *Leslie*, Hay & Jon. Ir. R. 191; *McCaffrey* v. *Brennan*, 10 Ir. C. L. R. 159; *Sutton* v. *Purdon*, 7 Ir. Jur. N.S. 324; *Stead* v. *Williams et al*, 5 C. B. 528. But see Eng. Stat. 30 & 31 Vic. cap. 142, s. 10, and *Wood et al* v. *Riley*, L. R. 3 C. P. 26, and *Kimbray* v. *Draper*, L. R. 3 Q. B. 160, decided thereunder. Where the plaintiff, being insolvent, has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, security may be ordered: *Goatley* v. *Emmott*, 15 C. B. 291; *Reid* v. *Cleal*, 1 Cham. R. 128; *Coatsworth* v. *Wellington*, 11 Ir. L. R. 54. The mere fact that the plaintiff is a nominal plaintiff, unless insolvent, is not sufficient: *Larssen* v. *The Monmouthshire Railway and Canal Co.* 16 L. T. N.S. 289. Where the plaintiff is an official assignee, and as such bound to collect the accounts for the benefit of the estate, security will not be required: *Denston* v. *Ashton et al*, L. R. 4 Q. B. 590. If there be no assets, and the assignee is suing for his own benefit, the rule is different: *Mason* v. *Jeffrey*, 1 Ch. Cham. R. 379. Security not ordered in an action by two executors, one of whom was insolvent and the other out of the jurisdiction: *Sykes et al* v. *Sykes et al*, L. R. 4 C. P. 645; see further *McConnell* v. *Johnston*, 1 East. 431; *Acton* v. *Grant*, 12 Ir. L. R. 358; *Smith* v. *Sandford*, 3 Ir. Jur. O.S. 253. In an action by husband and wife for personal injury to the wife, plaintiff, resident abroad, was required to give security, although his wife was within the jurisdiction of the court: *Hanmer et ux.* v. *Mangles*, 12 M. & W. 313. It was at one time held that except in ejectment there was no power to compel a plaintiff in a second suit to give security to pay the costs of the former suit: *Danvers* v. *Morgan*, 17 C. B. 530; *Prowse* v. *Loxdale*, 3 B. & S. 896; *Cobbett* v. *Warner*, L. R. 2 Q. B. 108. But as the law on the point was not free from doubt: see *Hoare* v. *Dixon*, 7 C. B. 164; *Follis* v. *Todd*, 1 Ch. Cham. R. 288; it is now expressly provided that security for costs may be granted to the defendant or applicant in any suit or proceeding in which it is satisfactorily made to appear to the court or a judge that plaintiff has brought a former suit or proceeding for the same cause, which is pending in this Province, or in any other country, or that he has judgment, or rule, or order, passed against him in such suit or proceeding, with costs, and that such costs have not been paid: Stat. 29 & 30 Vic. cap. 42, s. 1; and apparently the statute is not confined to cases where the action is brought against the same defendant, but extends to cases where a second action for the same cause is brought against another, whose liability is identical with that of the former defendant: *Elliott* v. *Pinkerton*, 4 Prac. R. 86. A plaintiff suing in *forma pauperis* is not liable to have his suit stayed until he has paid the costs of a suit at law or former suit in Chancery, touching the same subject matter, unless it be shown that the proceedings are vexatious: *Casey* v. *McColl*, 3 Ch. Cham. R. 24. If any suit be brought by an informer for the recovery of a penalty, the court or a judge, upon affidavit made by the defendant, showing, among other things, that plaintiff is not possessed of property sufficient to answer the costs, and that defendant has a good defence upon the merits, may order security for costs to be

23. (*n*) An application to compel the plaintiff to give security for costs, (*o*) must, in ordinary cases, (*p*) be made before issue joined. (*q*)

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given: Stat. 27 & 28 Vic. cap. 36. The law was formerly otherwise: *Gregory q t* v. *Elvidge*, 2 Dowl. P. C. 259; see further *Powell* v. *Reynolds*, 3 Ir. Jur. O.S. 59; *Browne* v. *Redmond*, 11 Ir. C. L. R. App. xxvi.

(*n*) Taken from Eng. R. G. No. 22 of H. T. 1853, the origin of which was R. G. No. 98 of H. T. 2 Wm. IV.: Jervis N. R. 87.

(*o*) A *defendant* cannot be compelled to give security for costs: *Baxter* v. *Morgan*, 6 Taunt. 379; *Ford* v. *Stock*, 1 Dowl. N.S. 763; *Weston* v. *Sheehan*, 12 Ir. L. R. 311. But this does not apply to defendants in replevin when substantially plaintiffs: *Selby* v. *Cruchley*, 1 B. & B. 505; *Hiskett* v. *Biddle*, 3 Dowl. P. C. 634; *Macnamara* v. *Booth*, 1 Cr. & Dix. 84; *Corscaden* v. *Stewart*, 1 Ir. L. R. 110; or to defendants in interpleader issues when substantially plaintiffs: *Benazech* v. *Bessett*, 1 C. B. 313; *Williams* v. *Crossling*, 4 D. & L. 660; *Ridgway* v. *Jones*, 29 L. J. Q. B. 97; or to overholding tenants in ejectment, where application is made for security under section 58 of Con. Stat. U.C. cap. 27: see *Doe d. Vaughan et al* v. *Thrustout*, 2 Hud. & B. Ir. R. 117; *Doe d. Greer et al* v. *Kelly*, *Ib.* 118; *Henderson* v. *Hughes*, 1 Ir. L. R. 231, n; *O'Brien* v. *Dwyer*, 4 Ir. L. R. 380.

(*p*) Security may be ordered in proceedings by *audita querela*: *Holmes* v. *Pemberton*, 1 E. & E. 369; or *scire facias*: *Archdall* v. *Supple*, 3 Ir. L. R. 287; but see *Webber* v. *Fitzgerald*, *Ib.* 509.

(*q*) The application cannot be made until after appearance: *De la Preuve* v. *Duc de Biron*, 4 T. R. 697; *Carr* v. *Shaw et al*, 6 T. R. 496; *O'Reilly* v. *Vanevery et al*, 2 Prac. R. 184; *Cole* v. *Beardy*, 5 Dowl. P. C. 161; and must generally be made before issue joined: *Grace* v. *Meighan*, Dra. Rep. 196; *O'Bierne* v. *Gowin*, 1 Cham. R. 16; *Mancilly* v. *Hays*, *Ib.* 222; and this rule applies as much to ejectment as to other forms of action: *Crowe et al* v. *McGuire*, 3 U. C. L. J. 205. If after issue joined the application will be allowed only in cases where defendant applies promptly, after being first made aware of his right to security: *Wainwright* v. *Bland et al*, 2 C. M. & R. 740; *Young* v. *Rishworth*, 8 A. & E. 479, n; *Doe d. Somers et al* v. *Brood*, 1 Dowl. N.S. 857; *Torrance* v. *Gross*, 2 U. C. L. J. 212; *Morgan* v. *Hellems*, 1 Prac. R. 363; *McDade d. O'Connors* v. *Dafoe*, 1 Cham. R. 18; *Wood* v. *Bellisle et al*, *Ib.* 130; *O'Grady* v. *O'Connell*, 2 Ir. Jur. O.S. 94; *Knott* v. *Fitzgibbon*, 4 Ir. Jur. O. S. 192; *Hodson* v. *McQueen*, 7 Ir. C. L. R. 288; *Green* v. *McClintock*, 1 Ir. Law Rec. N.S. 153; *Tucker* v. *Horseman*, Smythe, 90. The defendant does not waive his right to security by obtaining leave to plead, or taking a step in the cause, provided he applies before issue joined: *Dowling* v. *Harman*, 6 M. & W. 131; *Fletcher* v. *Lew*, 3 A. & E. 551; *Fry* v. *Wills*, 3 Dowl. P. C. 6; *Edinburgh & Leith R. Co.* v. *Dawson*, 7 Dowl. P. C. 573; *King of Greece* v. *Wright*; 6 Dowl. P. C. 12; *West* v. *Cooke*, 1 C. B. 312; *Shaw* v. *Whitty*, 3 Ir. Law Rec. N.S. 57; *Stewart* v. *Ballance*, 10 Ir. C. L. R. App. i. In one case security was ordered even after a cause had been referred: *Gell* v. *Lord Curzon*, 4 Ex. 813; when a defendant in Chancery being entitled to security for costs, has waived or lost his right against the original plaintiff, he is not in the event of the suit being reversed thereby, prevented from obtaining security against the new plaintiff, if without the jurisdiction: *Jackson* v. *Davenport*, 29 Beav. 212; *Thompson* v. *Callagan*, 3 Ch. Cham. R. 15. If all the costs have been incurred, the application may be refused, *Kemble* v. *Mills*, 1 M. & G. 565. It was at one time held that an affidavit of information and belief as to residence was *prima facie* sufficient: *Dowling* v. *Harman*, 6 M. & W. 131; *Morgan* v. *Hellems*, 1 Prac. R. 363; *Cardwell* v. *Baynes*, 23 L. T. Rep. 179; *Pessenaux* v. *Hench*, Hay & Jon. Ir. R. 483. But as a defendant has only under section 50 of the C. L. P. Act, to make a demand to be furnished with the plaintiff's residence, the better opinion appears to be that a

DISCONTINUANCE. (*r*)

24. (*s*) To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, (*t*) but the rule (*u*) shall contain an undertaking on the part of the plaintiff to

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a positive affidavit must be filed: *Joynes* v. *Collinson*, 2 D. & L. 449; *Sandys* v. *Hohler*, 6 Dowl. P. C. 274; *Noad et al.* v. *The Provincial Ins. Co.* 2 Prac. R. 281. The affidavit should show the stage of the proceedings: *Huntley* v. *Bulwer et al*, 6 Dowl. P. C. 633; *Torrance* v. *Gross*, 2 Cham. R. 55. But see *Cole* v. *Beardy*, 5 Dowl. P. C. 161; *Jones* v. *Jones*, 2 C. & J. 207; *Maneilly* v. *Hays*, 1 Cham. R. 222. The affidavit need not, except when the application is made in a penal action under 27 & 28 Vic. cap. 36, state the defence or show a good defence on the merits: *The Edinburgh and Leith Railway Co.* v. *Dawson*, 7 Dowl. P. C. 573; *Eyre* v. *Sparks*, 3 Ir. C. L. R. 542; *Anon.* 4 Ir. C. L. R. 15; *Fitzpatrick* v. *Dooley*, 1 Ir. Jur. N.S. 333; but see *O'Loughlin* v. *Eyre*, 7 Ir. Jur. O.S. 118; *Limonius* v. *Mitchelli*, *Ib.* 397; *Spencer* v. *Campion*, 3 Ir. C. L. R. 231; *Pordage* v. *Carter*, 6 Ir Jur. O.S. 236; *Nunn* v. *Gossen*, *Ib.* 268; *Martin* v. *Titmarsh*, *Ib.* 269; *Bell* v. *Shannon*, 7 Ir. Jur. O S. 23; *Lockwood* v. *Lindsey*, *Ib.* 39; *Caldwell* v. *Lord Kilworth*, 9 Ir. C. L. R. App. vii.; *Dickson* v. *Buller*, *Ib.* App. xiii.; *Fox* v. *Atkinson*, 7 Ir. Jur. O S. 259; *Coveney* v. *Gibson*, 6 Ir. C. L. R. 130; *Shepperd* v. *Beamish*, 8 Ir. C. L. R. lix. In order to entitle a defendant to a stay of proceedings in his summons, a demand of security should be made before the application: *Baille* v. *De Bernales*, 1 B. & Al. 331; *Hancock* v. *Smith*, 2 Chit 150; *Jones* v. *Jones*, 1 Dowl. P. C. 313; *Fountain* v. *Steele*, 5 Dowl. P. C. 331; *King of Greece* v. *Wright*, 6 Dowl. P. C. 12; *Huntley* v. *Bulwer et al*, 6 Dowl. P. C. 633; *Fletcher* v. *Lew*, 3 A. & E. 551. It was at one time supposed that a demand was in all cases necessary before making the application: *Bass* v. *Clive*, 3 M. & S. 283; *Adams* v. *Brown*, 1 Dowl. P. C. 273. The application, if refused for defective materials, cannot, it seems, be renewed upon amended affidavits: *Torrance* v. *Gross*, 2 U. C. L. J. 212.

(*r*) If plaintiff after the commencement of a suit do not desire to proceed further therein from any cause whatever he may discontinue and afterwards begin *de novo*: *Pott et al.* v. *Hirst*, 1 D. & L. 910.

(*s*) Taken from Eng. R. G. No. 23 of H. T. 1853, the origin of which was R. G. No. 106 of H. T. 2 Wm. IV.: Jervis N. R. 89.

(*t*) The court has refused leave to discontinue during a stay of proceedings: *Murray* v. *Silver*, 3 D. & L. 26. Where an administratrix was made defendant in an action commenced against the intestate by a suggestion under the 138th section of Eng. C. L. P. Act, 1852 (section 134 of ours), and pleaded to the suggestion, the court refused her leave to discontinue unless she paid all the costs of the cause: *Benge* v. *Swaine*, 15 C. B. 784. And where the plaintiff took out a judge's order to discontinue "on payment of costs," and afterwards acted upon the order by attending taxation under it, the court refused to allow him to abandon it: *Ib.* Where plaintiff discontinues as to issues of fact after he has succeeded upon issues at law, he is entitled to the costs of the demurrer and defendant to the costs of the discontinuance: *Elwood* v. *Bullock*, 6 Q. B. 411; see also *The Mayor &c. of Macclesfield* v. *Gee*, 13 M. & W. 470.

(*u*) It would seem that the rule, if obtained before verdict or argument of a demurrer, may be had at side bar: see *Benton et al* v. *Polkinghorne*, 16 M. & W. 8. In other cases a motion is necessary. The service of the rule is not of itself a stay of proceedings: *Beeton* v. *Jupp*, 15 M. & W. 149. Until payment of costs there is no discontinuance: *Edgington* v. *Proudman*, 1 Dowl. P. C. 152.

pay the costs, (*v*) and a consent, that if they are not paid within four days after taxation, (*w*) the defendant shall be at liberty to sign judgment of *non pros.* (*x*)

STAYING PROCEEDINGS. (*y*)

25. (*z*) In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings, on payment of the debt and costs in that action only. (*a*)

(*v*) The defendants in an action of replevin having obtained a verdict, a rule for a new trial was granted on the ground that certain evidence had been improperly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance, and the cause was not again tried. On the taxation of costs, the costs of searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge for drawing and copying old briefs. *Held*, that as these matters would have been available if the cause had been again tried, such costs were properly allowed: *Daniel* v. *Wilkin et al*, 8 Ex. 156. The rule would be different if the discontinuance were after notice of countermand: *Hester* v. *Hall*, Barnes, 307; see further, as to apportionment of costs after discontinuance: *Doe d. Postlethwaite* v. *Neale*, 6 Dowl. P. C. 166; *Kivis* v. *Hatton*, 8 Dowl. P. C. 164. If it be made clearly to appear that the discontinuance was rendered necessary by the conduct of defendant, the court may relieve plaintiff from payment of costs: *Poensgen et al* v. *Chanter et al*, 6 Scott, 300; *Ames et al* v. *Ragg et al*, 2 Dowl. P. C. 35; *Hernamann et al* v. *Barber*, 15 C. B. 774. Where the first trial has been set aside without costs, a plaintiff discontinuing will not have to pay the costs of the first trial: see *Jolliffe* v. *Mundy*, 4 M. & W. 502.

(*w*) The taxed costs must be actually paid in order to comply with the conditions of the rule: *Edgington* v. *Proudman*, 1 Dowl. P. C. 152.

(*x*) The plaintiff is not, it appears, liable to attachment for non-payment of the costs: *Stokes* v. *Woodeson*, 7 T. R. 6. Defendant's remedy is that mentioned in the rule, viz. judgment of *non pros.* Before this rule, where the discontinuance was before plea, defendant's only course was to proceed in the action: *Whitmore* v. *Williams*, 6 T. R. 765. Where a defendant moved for judgment as in case of a nonsuit, which was a special remedy given by statute under peculiar circumstances only, his rule was discharged: *Cooper* v. *Holloway*, 1 Hodg. 76; and where the plaintiff, instead of paying the costs, took the cause to trial and obtained a verdict, the court refused to set it aside: *Edgington* v. *Proudman*, 1 Dowl. P. C. 152.

(*y*) A rule to stay proceedings operates, not merely from the time it is served but from the time it is made: *Patterson* v. *Attrill et al*, 4 U. C. Q. B. 395. When a rule was made in term that on payment of a certain sum and costs further proceedings should be stayed on the verdict given in the cause at the assizes preceding the term, and the rule, with an appointment to tax costs, was served on the plaintiff's attorney during the second Friday in term, it was *held* that the rule did not stay proceedings till the money was paid or tendered: *Forster* v. *Hodgson*, 6 U. C. Q. B. 16.

(*z*) Taken from Eng. R. G. No. 24 of H. T. 1853, the origin of which was Eng. R. G. of T. T. 1 Vic.: Jervis N. R. 154.

(*a*) This was formerly the practice when the action was brought against any

COGNOVIT; WARRANT OF ATTORNEY; JUDGE'S ORDER FOR JUDGMENT. (*b*)

26. (*c*) No warrant of attorney to confess judgment (*d*) in any action (*e*) or *cognovit actionem*, given by any person, (*f*) after the first day of next Michaelmas term, (*g*) shall be of any force, (*h*) unless there shall be present some attorney (*i*) on behalf of such

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party to a bill or note other than the acceptor or maker: *Smith* v. *Woodcock*, 4 T. R. 691; *Vaughan* v. *Harris*, 3 M. & W. 542. Where the holder of a bill brought an action against the acceptor, and at the same time commenced proceedings against him in bankruptcy, and the action was afterwards stayed on payment of the debt and costs, *held* not to include the costs in bankruptcy: *Cows* v. *Taylor*, 18 Jur. 963.

(*b*) Neither a cognovit nor warrant of attorney can be given by an infant: *Oliver* v. *Woodruffe*, 7 Dowl. P. C. 166; nor a married woman: *Faithorne* v. *Blaquire*, 6 M. & S. 73. No action will lie on a warrant of attorney: *Sherborn* v. *Lord Huntingtower*, 13 C. B. N.S. 742. Nor in general on a judge's order: *Hookpayton* v. *Bussell*, 10 Ex. 24; *Thames Iron Works Co.* v. *Patent Derrick Co.*: 1 John. & H. 93. Unless there be in the order something in the shape of an agreement or undertaking on the part of the defendant: *Lievesley* v. *Gilmore*, L. R 1 C. P. 570.

(*c*) The first part of this rule is taken from Eng. Stat. 1 & 2 Vic. cap. 110, s. 9. It is a substitute for our old Rule of E. T. 9 Geo. IV.: Cam. R. 5. The object of the Eng. Stat. of Victoria, as recited in the preamble, is "that provision should be made giving to every person executing a warrant of attorney to confess judgment or *cognovit actionem* due information of the nature and effect thereof." The enactment has been held to apply to warrants and cognovits wherever executed, if attempted to be enforced in England: *Davis* v. *Trevanion*, 2 D. & L. 743.

(*d*) A writ of summons having been issued but not served on the defendant, who signed a document intitled in the cause and prepared by plaintiff's attorney, whereby the defendant consented to a judge's order for payment of the debt and costs, with liberty to the plaintiff's attorney to enter an appearance for him and sign judgment and issue execution, no attorney attended on behalf of defendant when this consent was given; a judge's order having afterwards been obtained on this consent, final judgment signed, and execution issued, it was held that the consent did not require the presence of an attorney: *Thorne et al* v. *Neal*, 2 Q. B. 726; see also *Bray* v. *Manson*, 8 M. & W. 668, and R. G. pr. 125.

(*e*) *In any action*, &c. The English statute reads "in any *personal* action,' &c.; in consequence of which it was held not to apply to a cognovit in ejectment: *Doe d. Kingston* v. *Kingston*, 1 Dowl. N.S. 263; see further *Doe d. Rees Howell*, 12 A. & E. 696.

(*f*) The rule does not apply when defendant is himself an attorney: *Downes* v. *Garbutt*, 2 Dowl. N.S. 939; *Chipp* v. *Harris*, 5 M. & W. 430.

(*g*) M. T. 1856.

(*h*) *i. e.* Shall be null and void.

(*i*) An attorney though uncertificated may attest: *Holgate* v. *Slight*, 2 L. M. & P. 662; see further *Price* v. *Carter et al*, 7 Q. B. 838; *Cox* v. *Cannon*, 6 Dowl. P. C. 625; and though not it seems an attorney of the court in which the judgment is to be signed: *Vilmott* v. *Barry*, Barnes, 44. An attorney's clerk cannot attest: *Barnes* v. *Ward*, *Ib.* 42; *Paul* v. *Cleaver*, 2 Taunt. 360. Nor a person not

person expressly named by him, and attending at his request, (*j*) to inform him of the nature and effect of such warrant or cognovit, before the same is executed, (*k*) which attorney shall sub-

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an attorney, though *bona fide* believed to be one; *Wallace* v. *Brockley*, 5 Dowl. P. C. 695. But when defendant *mala fide* represented a person to be an attorney who was not, the court refused to set aside the judgment: *Cox* v. *Canonn*, 6 Dowl. P. C. 625; *Jeyes* v. *Booth*, 1 B. & P. 97.

(*j*) There must be a separate attorney other than the plaintiff's, employed by defendant: *Mason* v. *Kiddle*, 5 M. & W. 513; *Rice* v. *Linsted*, 7 Dowl. P. C. 153; *Durrant* v. *Blurton et al*, 9 Dowl. P. C. 1015; although defendant consent that plaintiff's attorney shall act for him, defendant: *Hutson* v. *Hutson*, 7 T. R. 7; *Mason* v. *Riddle*, 8 Dowl. P. C. 207; *Pryor et al* v. *Swaine*, 2 D. & L. 37; *Sanderson* v. *Westley et al*, 6 M. & W. 98; *Joel* v. *Dicker*, 5 D. & L. 1; *Cooper* v. *Grant*, 21 L. J. C. P. 197; *Hirst* v. *Hannah*, 17 Q. B. 383. The attorney must in general attend at the request of defendant, or there must be facts from which an exercise of defendant's discretion can be inferred: *Gripper et al* v. *Bristow*, 6 M. & W. 807; *Rice* v. *Linsted*, 7 Dowl. P. C. 153. If a defendant finding an attorney present adopt him as his attorney, this is sufficient: *Walton* v. *Chandler*, 2 D. & L. 802; *Hale* v. *Dale*, 8 Dowl. P. C. 599; *Taylor et al* v. *Nicholls*, 6 M. & W. 91; *Levinson* v. *Syer*, 2 L. M. & P. 557; *Hale* v. *Dale*, 8 Dowl. P. C. 599; *Walton* v. *Chandler*, 2 D. & L. 802. But where a defendant in custody having agreed to give a cognovit sent for his attorney to attest it, but the attorney being from home his clerk procured another attorney who attended, the court was of opinion that this attorney was not named by defendant and did not attend upon his request: *Fisher* v. *Nicholas*, 2 Dowl. P. C. 251. So where plaintiff's attorney proposed another attorney whom he brought with him, and the defendant acquiesced, but the attorney so introduced was not known to defendant or sent for by him, this was holden insufficient: *Walker* v. *Gardner*, 4 B. & Ad. 371; *Barnes* v. *Pendrey*, 7 Dowl. P. C. 747. So where a warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on a former occasion acted for the plaintiff and who afterwards acted as plaintiff's attorney on entering up the judgment; the court set it aside: *Cooper* v. *Grant*, 12 C. B. 154. Where, however, the defendant's attorney being from home, the plaintiff's attorney suggested to him another attorney, and defendant went to his office and said he wished him to attest the execution as his attorney, this was holden to be an express naming within the meaning of the statute: *Bligh et al* v. *Brewer*, 3 Dowl. P. C. 266. Too much reliance must not be placed on the earlier cases, such as *Fisher* v. *Nicholas*, 2 Dowl. P. C. 251; *Walker* v. *Gardner*, 4 B. & Ad. 471; *Barnes* v. *Pendrey*, 7 Dowl. P. C. 747. These cases appear to hold that unless there be an express nomination *originating* with the party the attestation is insufficient. The later cases relax the rule, and decide that if an attorney be present, no matter how procured, if defendant adopt him as his attorney the attestation will be sufficient: see *Taylor et al* v. *Nicholls*, 6 M. & W. 91; *Joel* v. *Dicker*, 5 D. & L. 1; *Walton* v. *Chandler*, 2 D. & L. 802; *Oliver* v. *Woodroffe*, 4 M & W. 650; *Bligh et al* v. *Brewer*, 3 Dowl. P. C. 266; *Levinson* v. *Syer*, 2 L. M. & P. 557; *Case* v. *Benson et al*, 3 U.C L J. 132. An express adoption by defendant of the attorney present not being plaintiff's attorney must be clearly made to appear: *Gripper et al* v. *Bristow*, 6 M. & W. 807.

(*k*) The cognovit or warrant need not be read over to defendant if he be informed of its nature and effect: *Oliver* v. *Woodroffe*, 4 M. & W. 650. It is not necessary that the information should be given in private: *Joel* v. *Dicker*, 5 D. & L. 1. If defendant be very illiterate the safer course is to read over the instrument: see *Taylor* v. *Parkinson*, 2 H. Bl. 383; *James* v. *Harris*, 6 Dowl. P. C.

scribe (*l*) his name as a witness to the due execution thereof, (*m*) and thereby declare himself to be attorney for the person executing the same, (*n*) and state that he subscribes as such attorney, (*o*) [and in the affidavit of execution, the attendance of such attorney, and the fact of his being a subscribing witness, shall be plainly stated, which affidavit and the warrant of attorney or cognovit, shall be filed at the time of entering judgment thereon.] (*p*)

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184. The neglect of an attorney expressly chosen by defendant to explain the instrument to him will not vitiate it: *Haigh* v. *Frost et al*, 7 Dowl. P. C. 743; *Case* v. *Benson et al*, 3 U.C. L. J. 132; unless there be fraud or collusion: *Taylor et al* v. *Nicholls*, 6 M. & W. 91.

(*l*) Subscription and not mere attestation is required: *Bailey et al* v. *Bellamy et al*, 9 Dowl. P. C. 507. Therefore where a warrant of attorney was properly attested, and was afterwards altered in a material particular by consent, and the defendant retraced his signature with a dry pen and re-delivered the instrument, and the attorney who was present wrote his initials opposite to the alteration and drew a dry pen over the alteration and over each letter of his own signature, held insufficient: *Ib.*

(*m*) In the affidavit of execution the attendance of such attorney and the fact of his being a subscribing witness must be plainly stated: see end of Rule here annotated.

(*n*) The word "thereby" requires that the declaration should be made in writing in the attestation: *Poole* v. *Hobbs*, 8 Dowl. P. C. 113; *Potter* v. *Nicholson*, 8 M. & W. 294.

(*o*) The requirements of the rule must be expressly stated in the attestation clause: *Hibbert* v. *Barton*, 2 Dowl. N.S. 434; or appear by necessary implication: *Elkington* v. *Holland*, 1 Dowl. N. S. 643; *Lewis* v. *Lord Kensington*, 3 D. & L. 637; *Phillips* v. *Gibbs*, 16 M. & W. 208; *Pocock* v. *Pickering et al*, 18 Q. B. 789. An attestation has been held sufficient, though it did not expressly state that the attorney was appointed by the defendant: *Oliver* v. *Woodruffe*, 7 Dowl. P. C. 166; or attended at his request and was named by him: *Gay* v. *Hall*, 5 D. & L. 422; and did not expressly declare him to subscribe as defendant's attorney: *Knight* v. *Hasty*, 12 L. J. Q. B. 293; *Phillips* v. *Gibbs*, 16 M. & W. 208; *Holt et al* v. *Kershaw*, 5 D. & L. 419. An attestation, however, not showing expressly that the party attending was defendant's attorney and attending as such, has been held insufficient: *Hibbert* v. *Barton*, 2 Dowl. N.S. 434; *Everard et al* v. *Poppleton et al*, 5 Q. B. 181. Had the courts given a form of attestation, much doubt and trouble would have been saved. The following is in general use and has been held sufficient—"Signed by the above named C. D. in my presence. And I declare myself to be attorney for the said C. D., and that I subscribe my name as such his attorney:" see *Gay* v. *Hall*, 18 L. J. Q. B. 12; *Lord et al* v. *Thompson*, 11 M. & W. 40. It is not essential that the attesting attorney sign his name at the foot of the attesting clause: *Lewis* v. *Lord Kensington*, 2 C. B. 463. If the attestation be insufficient, a second may be added: *Ledgard et al* v. *Thompson*, 11 M. & W. 40. The provision requiring attestation, &c., is for the benefit of defendant only. A third party cannot object to a judgment that it is entered up on a cognovit or warrant not formally executed: see *Chipp* v. *Harris*, 5 M. & W. 430; *Cocks et al* v. *Edwards*, 2 Dowl. N. S. 55; *Lewis* v. *Lord Tankerville*, 11 M. & W. 109; *Charlesworth* v. *Ellis*, 7 Q. B. 678; *Price* v. *Carter et al*, 7 Q. B. 888; *Hume* v. *Lord Wellesley*, 8 Q. B. 521.

(*p*) The latter provision of this rule, placed in brackets, is new, and not to be found in the English Statute from which the rule is taken.

27. (*q*) Leave (*r*) to enter up judgment upon any cognovit or warrant of attorney (*s*) above one and under ten years old, is to be obtained by order of a judge made *ex parte* (*t*) and if ten years old or more upon a summons, to show cause. (*u*)

28. (*v*) Every person who shall prepare any cognovit or warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the cognovit or warrant is written, (*w*) or cause a

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(*q*) Taken from Eng. R. G. No. 26 of H. T. 1853, the origin of which was Eng. R. G. No. 73 of H. T. 2 Wm. IV.: Jervis N. R. 79.

(*r*) The application for leave must be made to a judge in chambers and not to the court: *Handley* v. *Roberts*, 17 Jur. 440. The defeasance may, it appears, be so prepared as to dispense with the necessity of making the application: *Sherran* v. *Marshall et al*, 1 D. & L. 689. It is, however, irregular to sign judgment without leave where leave is necessary: *Jones* v. *Jones*, 1 D. & R. 558; but no one besides the defendant or his representative can take advantage of the objection.

(*s*) Leave is required to enter up judgment against husband and wife on a warrant given by the wife *dum sola*: *Hubbard* v. *Haggart et ux.* 6 Jur. 950. Filling in the date of a warrant when it is left in blank after execution is not such an alteration as avoids the instrument: *Keane* v. *Smallbone*, 17 C. B. 179. The judgment must be entered on the original instrument and not on a copy: *Anon.* 2 Jur. 944; *Jacobs* v. *Neville*, 8 Dowl. P. C. 125; but leave to sign judgment on a copy may under special circumstances be obtained: *Doe d. Beaumont* v. *Beaumont*, 2 Dowl. N.S. 972.

(*t*) This order may be obtained though the defendant be insane: *Piggot* v. *Killick*, 4 Dowl. P. C. 287; and under special circumstances, notwithstanding this rule, the judge may refuse an *ex parte* order though the instrument be not ten years old: *Lushington* v. *Walter*, 1 H. Bl. 94; *Edwards* v. *Holiday et al*, 9 Dowl. P. C. 1023.

(*u*) Where the instrument is more than ten years old the summons to show cause cannot be dispensed with, though defendant shortly before application acknowledge the debt to be due: *Nicholas et al* v. *Merit*, 9 Dowl. P. C. 101; or is resident abroad: *Fletcher* v. *Everard*, 13 L. J. Q. B. 44. In cases where defendant keeps out of the way to avoid service of the summons, service may be dispensed with: *Croft* v. *Lord Egmont*, 8 Dowl. P. C. 95; *Wortham* v. *Tuck*, 9 Dowl. P. C. 335. It should be shown that the defendant is alive: *Stocks et al* v. *Willes*, 5 Dowl. P.C. 221. If abroad greater latitude may be allowed: *Johnson* v. *Fry*, *Ib.* 215. If defendant show a bar *prima facie* valid as a certificate of discharge by bankruptcy it is for the plaintiff to shew sufficient ground for avoiding or defeating the same: *Sherburne* v. *Lord Huntingtower*, 11 W. R. 145; see further note *b* to section 236, C. L. P. Act.

(*v*) Taken from Eng. R. G. No. 27 of H. T. 1853, the origin of which was Eng. Rule of Q. B. & C. P. 42 Geo. III.

(*w*) If an attorney neglect to comply with this rule the omission will not avoid the instrument, but only render the attorney liable to punishment on motion for neglect of duty imposed by the court: *Shaw* v. *Evans*, 14 East. 576; *Partridge* v. *Fraser et al*, 7 Taunt. 307; see further *Sansom et al* v. *Goode*, 2 B. & Al. 568;

memorandum in writing to be made on such cognovit or warrant containing the substance or effect of such defeasance. (*x*)

(*y*) EVIDENCE; ADMISSION AND INSPECTION OF DOCUMENTS; SUBPŒNA TO PRODUCE RECORDS; DEPOSITIONS ON INTERROGATORIES.

29. (*z*) The form of notice to admit documents referred to in the Common Law Procedure Act, 1856, section 165, (*a*) may be as follows: (*b*)

In the Q. B. or C. P. } A. B., *Plaintiff*, *v.* C. D., *Defendant*

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, (*c*) and that the same may be inspected by the plaintiff (or defendant, his attorney or agent, at ——, on ——, between the hours of ——. And the defendant (or plaintiff) is hereby required, within forty-eight hours from the last mentioned hour, (*e*) to admit that such of the documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, (*f*) that such as are specified as copies are true copies, and such copies as are stated to have been served, sent, or delivered, were so sent, served, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. (*g*) Dated, &c.

Barber v. *Barber et al*, 3 Taunt. 465. Part of the defeasance may be written on a separate paper annexed: *Burdekin* v. *Potter et al*, 1 Dowl. N.S. 134.

(*x*) Where a defeasance stated that the instrument was given to secure a specific sum, and the plaintiff nevertheless issued execution for a further sum, the court at the instance of the assignees of the defendant who became a bankrupt after the execution was executed, ordered the plaintiff to refund such last mentioned sum, although the plaintiff swore that it was understood between him and the defendant that the instrument was given as a security for it: *Bell* v. *Tidd*, 9 Dowl. P. C. 949.

(*y*) See C. L. P. Act, section 198, and notes thereto.

(*z*) Taken from Eng. R. G. No. 29 of H. T. 1853, the origin of which was Eng R. G. No 20 of H. T. 4 Wm. IV.: Jervis N. R. 110; with which our rule No 28 of E. T. 5 Vic. corresponded: Cam. R. 32.

(*a*) Section 198 of present C. L. P. Act.

(*b*) It is apprehended that some latitude may be allowed when circumstances render a departure from this form necessary: *Rutter* v. *Chapman*, 8 M. & W. 393, *per* Parke, B.

(*c*) *Documents*, &c. See note *l* to section 198, C. L. P. Act.

(*e*) The limit as to time here made makes good the omission pointed out in note *n* to section 198, C. L. P. Act.

(*f*) See *Freeman* v. *Steggall* in note *m* to section 198, C. L. P. Act.

(*g*) *Saving all just exceptions*, &c. See note *m* to section 198, C. L. P. Act.

G. H.

Attorney or agent for (plaintiff or defendant).

Here describe the documents, the manner of doing which may be as follows :—

ORIGINALS.

DESCRIPTION OF DOCUMENTS.	DATE.
Deed of Covenant between A. B. and C. D. of the first part, and E. F. of the second part	1st January, 1856.
Indenture of Lease from A. B. to C. D.....	1st February, 1856.
Indenture of Release between A. B., &c., of the first part, C. D., &c., of the second part, &c.....	2nd February, 1856.
Letter, defendant to plaintiff	3rd February, 1856.
Policy of Insurance on ——.....	1st January, 1856.
Memorandum of Agreement between C. D. and E. F....	2nd January, 1856.
Bill of Exchange for £100, at three months, drawn by A. B., on and accepted by C. D., endorsed by E. F. & G. H.	3rd January, 1856.

COPIES.

DESCRIPTION OF DOCUMENTS.	DATE.	ORIGINAL OR DUPLICATE SERVED, SENT, OR DELIVERED, WHEN, HOW, AND BY WHOM.
Register of Baptism of A. B., in the Parish of ——	1st January, 1808.	
Letter, plaintiff to defendant...	1st February, 1838	Sent by post, 2nd February, 1838.
Notice to produce papers.....	1st March, 1856.	Served 2nd March, 1856, on defendant's attorney, by E. F. of ——.
Record of Judgment of the Court of Queen's Bench, in an action J. S. v. J. N.....	Trinity Term, 15 Victoria.	
Letters Patent of King George III	1st January, 1800.	

30. (*h*) In all cases of trials, assessments, or inquisitions of any kind, (*i*) either party may call upon the other party by notice, to admit documents in the manner provided by and subject to the provi-

(*h*) Taken from Eng. R. G. No. 30 of H. T. 1853. This rule is substantially the same as section 117 of Eng. C. L. P. Act, 1852 with which section 198 of our C. L. P. Act corresponds. If there be any difference between the rule and the statute, it is that the rule, which extends to "inquisitions of any kind" has a more extensive operation than the statute.

(*i*) *Or inquisitions of any kind, &c.* The extreme generality of these words may be held sufficient to embrace investigations before arbitrators or officers of the courts, or other persons deputed by the courts to hold inquisitions.

sions of the Common Law Procedure Act, 1856, (*k*) and in case of the refusal or neglect to admit, (*l*) after such notice given, (*m*) the costs of proving the documents shall be paid by the party so neglecting or refusing, (*n*) whatever the result of the trial may be, (*o*) unless, at the trial, assessment, or inquisition, the Judge or presiding Officer shall certify that the refusal to admit was reasonable, (*p*) and no costs of proving any document shall be allowed, unless such notice be given, (*q*) except in cases where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense. (*r*)

31. (*s*) No subpœna for the production of an original record, (*t*) [or of an original memorial from any registry office,] (*u*) shall be issued, unless a rule of court, or the order of a judge, shall be produced to the officer issuing the same, and filed with him, (*v*) and unless the writ shall be made conformable to the description of the document mentioned in such rule or order.

32. (*w*) All depositions of witnesses taken under the order of a

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(*k*) See section 198 C. L. P. Act.

(*l*) The admission may be signed by the attorney or his managing clerk: see *Taylor* v. *Willans*, 2 B. & Ad. 845.

(*m*) Time, forty-eight hours: see preceding rule.

(*n*) See note *o* to section 198, C. L. P. Act.

(*o*) See note *p* to section 198, C. L. P. Act.

(*p*) See note *q* to section 198, C. L. P. Act.

(*q*) See note *s* to section 198, C. L. P. Act.

(*r*) See note *r* to section 198, C. L. P. Act.

(*s*) Taken from Eng. R. G. No. 32 of H. T. 1853, the origin of which is Rule of Eng. Q. B., H. T. 11 Vic. (11 Q. B. 876.)

(*t*) A document in the Crown Lands department or any other public department is not an original record within the meaning of this rule: *McGuire* v. *Sneath*, 2 U. C. L. J. 184. An *ex parte* order was granted under this rule for a subpœna to issue to the registrar of the Surrogate Court of the United Counties of York and Peel for the production of the original last will and testament of A. B. deceased: *Sladden* v. *Smith*, 2 U. C. L. J. 233. The affidavit upon which the order is made is fully set forth in the report of the case: *Ib.*

(*u*) The words in brackets are not to be found in the corresponding English rule.

(*v*) *Shall be issued, &c., unless a rule of court, &c., shall be produced, &c.* It may be that these words are only directory, and that a subpœna, though issued in contravention of the rule, would, when issued, be *prima facie* good. At all events, there is nothing to say that a writ so issued shall be void. It may be irregular; but if so must be obeyed until moved against and set aside upon the ground of irregularity.

(*w*) Taken with modifications from Eng. R. G. No. 33 of H. T. 1853.

judge, rule of court or commission, shall be returned to, and filed in, the office of the clerk of the Crown and Pleas of the court in which the action or proceeding is pending.

ISSUE BOOKS. (*x*)

33. The Common Law Procedure Act, 1856, having dispensed with the sealing and passing of the Nisi Prius Record, (*z*) the practice in England as to making up and delivering paper books and issue books is to be followed in future. (*a*)

TRIAL; TRIAL BY PROVISO; ASSESSMENT; NOTICE OF TRIAL; (*b*) &c.

34. (*c*) The expression "Short notice of trial," or "Short notice of assessment," (*d*) shall in all cases be taken to mean four days' notice. (*e*)

35. (*f*) On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, (*g*) and instead thereof a

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(*x*) The issue book is a transcript of the pleadings with the dates of pleading and the order in which pleaded: see note *v* to section 203, C. L. P. Act; concluding ordinarily with the words "Therefore let a jury," &c.: see No. 1 in Schedule of Forms to these rules. An issue book served in a case where there were issues in fact and in law, and the latter had been decided in plaintiff's favor, contained no notice of the judgment and the usual *venire* only. The plaintiffs, under a judge's order, amended on payment of costs by inserting a suggestion of the decision on demurrer, and the usual stay of entry of judgment until the trial of the issues in fact; but it concluded with a *venire* only to try the issues. On motion to set aside a verdict taken for irregularity, it was held that the issue book having been amended before trial, and the nisi prius record being correct, no objection would lie on that ground, and that the defect in the *venire* in the amended issue was not fatal: *Welsh et al* v. *O'Brien et al*, 29 U. C. Q. B. 474; see further note *v* to section 203, C. L. P. Act.

(*z*) The record need not be sealed, but must now be signed and passed: section 203, C. L. P. Act.

(*a*) See note *v* to section 203, C. L. P. Act.

(*b*) See notes to section 201 of C. L. P. Act.

(*c*) Taken from Eng. R. G. No. 35 of H. T. 1853, the origin of which was Eng. R. G. No. 58 of H. T. 2 Wm. IV.: Jervis N. R. 74.

(*d*) The defendant is not bound to accept short notice of trial or of assessment unless under terms to do so by order of the court or a judge: see note *s* to section 202 of C. L. P. Act.

(*e*) It seems that a defendant cannot be compelled to take short notice of trial if the pleadings be incomplete: *Lawson* v. *Robinson*, 2 Dowl. P. C. 69.

(*f*) Taken from Eng. R. G. No. 38 of H. T. 1856.

(*g*) "On a replication, &c., denying the existence of a record pleaded by defendant, &c., a rule for the defendant, &c." This rule does not apply to a

four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment. (*h*)

36. (*i*) In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, (*j*) the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available, (*k*) but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of assessment of damages, such notice shall operate from the time that notice of trial was given as aforesaid; (*l*) and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of assessment on the back of the joinder in demurrer; (*m*) and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's

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notice by *plaintiff* that he will produce his own record: see *Maguire* v. *Kincaid*, 7 Ex. 608.

(*h*) The notice may be in this form — Take notice that you are required on, &c., to produce the record pleaded by you in this cause, otherwise judgment will be entered for the plaintiff.

(*i*) Taken from Eng. R. G. No. 40 of H. T. 1853, the origin of which was Eng. R. G. No. 59 of H. T. 2 Wm. IV: Jervis N. R. 75; with which our Rule No. 23 of 13 & 14 Vic. corresponded.

(*j*) In general, notice of trial, &c., cannot be given until issue is joined: *Ginger* v. *Pycroft*, 5 D. & L. 554. The exception under this rule is where *plaintiff's* pleading is in denial of the pleading of defendant, &c. Issue must be completely joined on the day for which notice of trial is given: *Poole* v. *Pain et al*, 2 L. M. & P. 609.

(*k*) This rule is framed with a view to the benefit of a plaintiff by enabling him to proceed to trial with as little delay as possible. The notice may be given either at the time of delivering plaintiff's pleading, or *afterwards* before issue joined: *Mullins et al* v. *Ford*, 4 D. & L. 765.

(*l*) The effect of this part of the rule is merely to throw the notice of assessment back to the time—not when the pleading is delivered, but when the notice of trial is given. This provision seems to uphold the construction mentioned in the preceding note, viz., that the notice of trial may be given at a time distinct from the delivery of the issue: *Mullins et al* v. *Ford*, 4 D. & L. 765.

(*m*) If the defendant demur and the demurrer be not set aside as frivolous, the notice of trial is nugatory: *Poole* v. *Pain et al*, 2 L. M. & P. 609. But if the demurrer be set aside as frivolous, the judge may order the issue to stand and the case to be tried according to the notice delivered: *Heyingbotham* v. *The Eastern and Continental Steam Packet Co.*, 8 C. B. 337.

attorney, or the defendant, if he plead in person, shall be obliged to accept notice of assessment on the back of such demurrer. (*n*)

37. (*o*) Notice of a trial at bar shall be given to the Clerk of the Crown and Pleas of the Court before giving notice of trial to the party. (*p*)

38. (*q*) No rule for a trial by proviso shall be necessary.

VIEW. (*r*)

39. (*s*) Upon any application for a view, there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the Sheriff's office; and the party obtaining the order for the view, shall deposit with the sheriff the sum of six pounds and five shillings in case of a common jury, and eight pounds and ten shillings in case of a special jury, if such distance do not exceed five miles, and seven pounds and fifteen shillings in case of a common jury, and ten pounds fifteen shillings in case of a special jury, if the distance be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the party who obtained the view, or his attorney, and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such party or his attorney to the Sheriff; (*t*) and the

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(*n*) This is in perfect keeping with the preceding provisions, the object of which is to facilitate trials, &c.

(*o*) Taken from Eng. R, G. No. 41 of H. T. 1853.

(*p*) Eight days' notice is sufficient in all cases whether at bar or at nisi prius: section 201, C. L. P. Act. The first and last days are now inclusive, so that Monday for Monday is sufficient: *Morell* v. *Wilmot*, C. P. E. T. 1870. The Attorney-General, acting for the Crown, has a right to demand a trial at bar: *Rex* v. *Hales*, 2 Str. 816; *Regina* v. *Banks*, 2 Salk, 652. In other cases the Court exercises its discretion: *Rex* v. *The Burgesses of Caermarthen*, Say, 79; *Holmes* v. *Brown*, 2 Doug. 437.

(*q*) This rule is in effect the same as the latter part of section 227 C. L. P. Act: see note *e* to that section.

(*r*) The practice of granting views as it now exists is founded upon Eng. Stat. 4 Anne, cap. 16 sec. 8; 3 Geo. II. cap. 25: and Con. Stats. U. C. cap. 31, secs. 124, 126: see note *b* to section 196, C. L. P. Act.

(*s*) Taken from Eng. R. G. No. 49 H. T. 1853, the origin of which was Eng. R. Q. B. of T. T. 7 Geo. IV.; 5 B. & C. 795.

(*t*) The order for a view in England is in this form: "It is ordered at the instance of the plaintiff (*or* defendant) that the sheriff of, &c, according to the form of the Statute in that case made and provided, shall cause the place in question to be shown to six or more of the jury (*or*, if special jury, "six or more of the first twelve jurors"), summoned and empanelled to try the issues

Sheriff shall pay and account for the money so deposited, according to the scale following, that is to say :—

For Travelling expenses to the Sheriff, Shewers, and Jurymen—expenses actually paid, if reasonable.

	£	s.	d.
Fee to the Sheriff, when the distance does not exceed five miles from his office	0	10	0
Where such distance exceeds five miles	0	15	0
In case he shall be necessarily absent more than one day—then for each day after the first, a further fee of	0	15	0
Fee to each of the Shewers, the same as to the Sheriff, calculating, &c.			
Fee to each common juryman, per diem	0	5	0
Fee to each special juryman, per diem	0	10	0
Allowance for refreshment to the Sheriff, shewers, and jurymen, common or special, each, per diem	0	5	0
To the Sheriff for summoning each juryman, whose residence is not more than five miles distant from the Sheriff's office	0	2	0
And for each whose residence exceeds five miles from Sheriff's office	0	3	0

NEW TRIALS—MOTIONS IN ARREST OF JUDGMENT—JUDGMENT NON OBSTANTE VEREDICTO. (*u*)

40. (*v*) No motion for a new trial or to enter verdict or non-suit, motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed, after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term; or when the cause is tried out of term, after the expiration of the first four days of the ensuing term, (*w*) unless in either case

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between the parties, or as many more of them as he shall think fit, to take a view of the place in question on, &c., at, &c., of the clock in the forenoon of the same day, which said jurors shall meet at the house of A. B., known by the name or sign of, &c., in, &c., and shall then and there be refreshed at the equal charges of the said parties; and that C. D. on the part of the plaintiff, and E. F. on the part of the defendant, shall show the place in question to the said jurors, but that no evidence shall be given to the said jurors on either side. And it is further ordered that the plaintiff (*or* defendant), his attorney or agent shall deposit in the hands of the sheriff of the said county the sum of, &c. for payment of the expenses of said view, to be accounted for by the said sheriff pursuant to the statute and the rule of this Court; the plaintiff (*or* defendant) hereby consenting that in case no view be had, or if a view shall be had by any of the said jurors, whether they shall happen to be six or any particular number, yet the said trial shall proceed and no objection shall be made on account thereof. By the Court, &c." Differences existing between ours and the English law pointed out in note *b* to section 196, C. L. P. Act, must, however, be observed in proceedings under the rule here annotated.

(*u*) The six following rules provide in detail for subjects of practice, for which provision is in some degree made in the C. L. P. Act. References hereafter made will point out places where these provisions may be found.

(*v*) Taken from Eng. R. G. No. 50 of H. T. 1853.

(*w*) The *power* of the court before the new rules to entertain a motion for a new trial at any time before judgment actually entered, was undoubted: *Bens* v.

entered in a list of postponed motions, by leave of the Court. (*x*)

Stover et al, 12 U.C.Q.B. 624, *per* Draper, J. It has since been thought that the rule being as it were a statutory rule, has left the court no discretion. In *Ellaby* v. *Moore*, 13 C. B. 908, Jervis, C. J., said, "The rule is imperative, and it is safest to adhere to it strictly;" see further *Pain* v. *Terry*, 34 L. J. Ex. 224; *Copcutt* v. *Great Western Railway Co.* L. R. 2 C. P. 465. But upon this argument being pressed on the court in *Johnson* v. *Warwick*, 17 C. B. 518, where the rule nisi had been granted after the time, subject to any objection being made on the ground of its being made out of time, Jervis, C. J., is reported to have said "It has never been the practice to make objections of this sort." And Cresswell, J., "I for one am very unwilling to suppose that my lord and my brothers at all exceeded their authority in allowing the rule to be moved under the peculiar circumstances." In a late case the Court of Exchequer were against the existence of the power: *Sutton* v. *Craig*, 4 L. T. N. S. 217. But it would still appear to be a matter of discretion exercised sparingly in particular cases. Reference therefore will here be made to cases decided as well before as since the rule. In *Willis* v. *Bennett*, Barnes, 443, decided in M. T. 11 Geo. II. the court granted a rule after the time limited, but declared "that for the future no such motion should be received after the four days, unless the foundation of the motion be a fact not disclosed to the party till after that time:" Byles, J., in *Gambert* v. *Mayne*, 14 C. B. N.S. 321, said "I believe this has never been allowed since Barnes' time, except where counsel has by mistake moved in the wrong court and so inadvertently let the time for moving slip by." In *Birt* v. *Barlow*, 1 Doug. 171, decided in 1779, where counsel erred as to the computation of the time, and the learned judge who tried the cause desired at the trial that the opinion of the court should be taken, the motion though late was allowed. In another case, the application was allowed after the time to set aside a verdict for a plaintiff, the learned judge at the trial being of opinion that the law was with defendants, but permitted the verdict to be entered for the plaintiff on condition that if the court above agreed with him it should be entered for the defendants, so that there should be an end of litigation: *Assignees of Smyth* v. *Sayers*, Rowe's Ir. R. 571. In a case tried before an undersheriff, who delayed to furnish his notes in the proper time, the matter having been mentioned within the four days the application was allowed afterwards: *Thomas* v. *Edwards*, 2 Dowl. P. C. 664. The application should be made within the time for further time: *Williams* v. *Andrews*, 9 Dowl. P. C. 122; *Wheeler* v. *Whitmore*, 4 Dowl. P. C. 235. So where by mistake the motion was within the four days made in the wrong court, the right court under the circumstances allowed the rule to stand good as of the right court: *Piggott* v. *Kemp*, 2 Dowl. P. C. 20; see also *Bens* v. *Stover et al*, 12 U. C. Q. B. 623; *Johnson* v. *Warwick*, 17 C. B. 516. The court by consent has enlarged the time for moving in arrest of judgment until after the determination of issues in law: *Harrison et al* v. *The Great Northern Railway Co.* 11 C. B. 542. But where a cause was tried on the last day but two of Easter Term, the court refused to allow a motion for a new trial to be suspended until after the first day of Trinity Term, on the ground that the attorney had not had time since the trial to prepare himself with affidavits of surprise: *Cooper* v. *Lloyd*, 6 C. B. N.S. 519. A suggestion of perjury on the part of the defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, is now held to afford no ground for asking for an extension of time: *Gambart* v. *Mayne*, 14 C. B. N.S. 321. Where the case is not one of much importance and the verdict in no way binds title to property, the rule will not be relaxed: *Price* v. *Duggan*, 2 M. & G. 641. The court will not break through a good rule for a party who has no merits: *Smith* v. *Robinson*, 2 Ir. L. Rec. O.S. 239; *Hunt* v. *Blomfield*, 3 Ir. L. Rec. O.S. 18.

(*x*) See R. G. pr. 41.

41. (*c*) No suitor who appears in person, shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the court. (*d*)

42. (*f*) No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making of such motion, (*g*) without the special permission of the court for that purpose. (*h*)

43. (*i*) If such motion as above mentioned (*j*) be entered in such list of postponed motions, the attorney, who has instructed counsel to make the motion, shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular, and every suitor who appears in person, shall give a similar notice. (*l*)

44. (*m*) If a new trial be granted without any mention of costs in

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(*c*) Taken from Eng. R. G. No. 51 of H. T. 1853.

(*d*) See note *w* to R. G. pr. 40.

(*f*) Taken from Eng. R. G. No. 52 of H. T. 1853, the origin of which was Eng. R. Q. B. of T. T. 5 Geo. IV.: 3 B. & C. 176.

(*g*) The English Court of Exchequer refused to allow an affidavit to be read which was sworn after the first four days of the term, in support of a rule obtained upon it for a new trial, although the rule had been in fact obtained after the affidavit was sworn, in consequence of the motions for new trials extending beyond the four days: *Williams* v. *Mortimer*, 11 M. & W. 104; and the English Court of Common Pleas has refused to allow additional affidavits to be filed in support of a motion for a new trial after the expiration of the time for moving: *Gibbs* v. *Tunaley*, 1 C. B. 640; see further, *Allum* v. *Boultbee*, 23 L. J. Ex. 208.

(*h*) Upon motions founded upon affidavits, either party may with leave file affidavits in answer upon any new matter arising out of such affidavit: C. L. P. Act, section 183.

(*i*) Taken from Eng. R. G. No. 53 of H. T. 1853, the origin of which was Eng. R. G. of M. T. 12 Vic.: 12 Q. B. 855.

(*j*) In rule R. G. pr. 40.

(*l*) If in such a case judgment be regularly signed, the party obtaining the rule cannot be heard until the judgment is set aside: *Doe d. Whitty et al* v. *Carr*, 16 Q. B. 117; see further *Emblin* v. *Dartnell*, 12 M. & W. 830. Leave was given to a defendant to move for a new trial after the first four days of term, but no notice was given to the plaintiff, and plaintiff signed judgment on the fifth day of term. A rule for a nonsuit or a new trial was afterwards served on the plaintiff's attorney. A rule was granted to discharge that rule, but was ordered to stand over till the merits of the first rule should be disposed of. Defendant's proper course in such a case would have been to have moved to set aside the judgment: *Lloyd* v. *Berkovitz*, 16 M. & W. 31.

(*m*) Taken from Eng. R. G. No. 54 of H. T. 1853, the origin of which was Eng. R. G. No. 64 of H. T. 2 Wm. IV.: Jervis N. R. 76.

the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed in the second. (*n*)

45. (*o*) No rule granting a new trial to a party, on condition of payment of costs, or other condition, shall be discharged, on account of default in performing such condition by a rule absolute in the first instance; (*p*) but a rule for such discharge shall issue, which shall make itself absolute, unless cause be shown on or before the day mentioned for that purpose in the rule, and which shall in no case be earlier than the fourth day inclusive, after service thereof. (*q*)

(*n*) This rule it appears only applies where a new trial is granted on the whole record: *Bower* v. *Hill et al*, 5 Dowl. P. C. 183. It extends to issues in prohibition: *Craven* v. *Sanderson et al*, 7 A. & E. 897, n. Where a cause was referred at nisi prius and an award made, which was set aside, and the cause tried a second time, it was held that the party ultimately succeeding was not entitled to the costs of the first trial: *Wood* v. *Duncan*, 5 M. & W. 87. A party objecting to a rule for a new trial on the ground of its not mentioning costs, should apply to the court to amend it before going to trial: *Earl of Romney* v. *The Inclosure Commissioners*, 2 C. L. R. 1651. If a new trial be granted on the ground that the verdict is against evidence, the costs of the first trial abide the event unless otherwise ordered: section 232 C. L. P. Act.

(*o*) Taken from our Rule No. 39 of H. T. 13 Vic.

(*p*) This was at one time our practice: *Drean* v. *Smith*, T. T. 1 & 2 Vic. *MS.* R. & H. Dig. "New Trial," ix. 2. The rule in England was absolute in the first instance in the Queen's Bench: *Champion* v. *Griffiths*, 1 Dowl. N.S. 319. In the Common Pleas it was a rule nisi only: *Lord* v. *Wardle*, 3 C. B. 295. But in the Exchequer it was as here provided a rule nisi, which made itself absolute if no cause were shown: *Phillips* v. *Warren*, 14 M. & W. 730; see also *Solly* v. *Lanford*, 13 M. & W. 151.

(*q*) It is the duty of a party obtaining a rule for a new trial on payment of costs to proceed with the taxation of costs and with the payment thereof, so as to enable the cause to be tried at the next opportunity: *Proudfoot* v. *Holden*, 1 Cham. R. 22; *Johnson* v. *Sparrow*, 1 U.C. Q.B. 396; *Chase et al* v. *Goble*, 3 M. & G. 635. But the omission to do so will not necessarily deprive him of the benefit of the rule: *Grantham* v. *Powell*, 1 Prac. R. 256; *Rabidon* v. *Harkin*, 2 Prac. R. 129; *VanEvery* v. *Drake*, 3 Prac. R. 84. Plaintiff cannot treat the omission of the defendant to take out and serve the rule in what they consider due time as an abandonment of it, so as to justify him in signing judgment: *Lyman et al* v. *Snarr*, *Ib.* 86. Where a plaintiff set aside a nonsuit on payment of costs, and proceeded to trial without paying the costs, and obtained a verdict, the verdict was set aside: *Nichols* v. *Bozon*, 13 East. 185. But where a new trial is granted to a defendant on payment of costs, if plaintiff proceed to a second trial without payment of the costs he cannot afterwards recover them: *Farrer* v. *DeFlinn*, 8 Jur. 779. There is nothing to prevent either party taking out the rule and having the costs taxed: *Lyman et al* v. *Snarr*, 3 Prac. R. 86. When a plaintiff obtains a new trial on payment of costs he is not bound to pay them before the then next assizes: *Stacey* v. *McIntyre*, 6 U. C. L. J. N.S. 127. Under special circumstances the rule, though become absolute, may be discharged, and further time given to defendant to pay costs: *Reeves* v. *Myers*, T. T. 4 & 5 Vic. *MS.* R. & H. Dig. "New Trial," ix. 6.

JUDGMENT. (*r*)

46. (*s*) No rule for judgment shall be necessary.

47. (*t*) All judgments, whether interlocutory (*u*) or final, (*v*) shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day, (*w*) but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc.* (*x*)

COSTS: SETTING OFF DAMAGES OR COSTS. (*y*)

(*r*) Judgments are either interlocutory or final. Interlocutory judgments are occasionally given upon some plea, proceeding or default occurring in the course of the action, and which does not terminate the suit. But the most common kind of interlocutory judgments are those which are given when the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: Smith's Action at Law, 10th ed., 179. As to final judgments, they put an end to the action altogether by declaring either that the plaintiff is or is not entitled to recover, and if entitled to recover, specifying what: *Ib.* 183. It may be mentioned that interlocutory judgments and judgments by default are sometimes spoken of as synonymous. Though often identical in effect, as where some ulterior step, such as assessing damages by a jury, referring bills, bonds, notes, &c. to the master is necessary before final judgment; still there is this distinction, a judgment by default or *nil dicit* is sometimes final, whereas an interlocutory judgment is always inchoate and imperfect, always requiring ulterior steps to be taken.

(*s*) Taken from Eng. R. G. No. 55 of H. T. 1853; but in this Province is in fact as old as rule 10 of T. T. 3 & 4 Wm. IV.: Cam. R. 10.

(*t*) Taken from Eng. R. G. No. 56 of H. T. 1853, the origin of which was Eng. R. G. No. 3 of H. T. 4 Wm. IV.: Jervis N. R. 116; with which our rule No. 22 of E. T. 5 Vic. corresponded: Cam. R. 28.

(*u*) See note *r* to R. G. pr. 46.

(*v*) Taxation of costs and entry of final judgment are contemporaneous acts, and judgment is not final until costs have been taxed, unless, it seems, the party entitled to them intends to waive them: *Peirce* v. *Derry*, 4 Q. B. 635.

(*w*) Judicial proceedings are considered as taking place at the earliest period of the day on which they are done. Therefore where judgment was signed at the opening of the office at its usual hour, 11 A.M. and the defendant died at half past nine A.M. on the same morning, the judgment was held regular: *Wright et al* v. *Mills*, 4 H. & N. 488; see also *Converse et al* v. *Michie*, 16 U. C. C. P. 167.

(*x*) This provision applies only to cases where the delay is the act of the court and not of the parties: *Lawrence* v. *Hodgson*, 1 Y. & J. 368; *Freeman* v. *Tranah*, 12 C. B. 406; *Miles* v. *Williams*, 9 Q. B. 47; *Heathcote* v. *Wynn*, 25 L. T. Rep. 247; *Denison* v. *Holiday*, 26 L. J. Ex. 227; *Bates q. t.* v. *Lockwood*, 1 T. R. 637; *Lanman* v. *Lord Audley*, 2 M. & W. 535; *Doe d. Trylor* v. *Crisp*, 7 Dowl. P. C. 584; *The Fishmongers' Co.* v. *Robertson et al*, 3 C. B. 970; *Blackburn* v. *Godrick*, 9 Dowl. P. C. 337; *Neil* v. *McMillan*, 27 U. C. Q. B. 257.

(*y*) Incident to the judgment are the costs which are awarded therein to the successful party. Costs are either interlocutory or final. Interlocutory costs are given upon matters arising in the course of the suit; they are generally awarded upon motion, and lie in the discretion of the court, which exercises its equitable jurisdiction either in granting or refusing them. Final costs are given by statute, and depend on the event of the action: Smith's Action at Law, 10th ed. 189.

48. (*z*) One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase, if any, shall be given by the attorney of the party, whose costs are to be taxed (*a*) to the other party or his attorney in all cases where a notice to tax is necessary. (*b*)

49. (*c*) One appointment only shall be deemed necessary for proceeding (*d*) in the taxation of costs or of an attorney's bill. (*e*)

50. (*f*) Notice of taxing costs shall not be necessary in any case (*g*) where the defendant has not appeared in person, or by his attorney or guardian.

51. (*h*) When issues in law or fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a

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(*z*) Taken from Eng. R. G. No. 59 of H. T. 1853, the origin of which was Eng. R. G. No. 10 of M. T. 1 Wm. IV.: Jervis N. R. 10.

(*a*) Where by the practice of the court costs need not be taxed, it is unnecessary to give one day's notice of taxation: *Griffiths* v. *Liversedge*, 2 Dowl. P.C. 143.

(*b*) It seems to have been at one time doubted whether non-compliance with a rule similar to this was a ground for setting aside a judgment: see *Perry* v. *Turner et al*, 2 C. & J. 89; *Routledge* v. *Giles*, *Ib.* 163. But it is now settled that it is merely a ground for reviewing the taxation: *Taylor* v. *Murray*, 3 M. & W. 141; *Wilkins* v. *Perkins*, 2 M. & W. 315; *Lloyd* v. *Kent*, 5 Dowl. P.C. 125; *Ilderton* v. *Sill*, 2 C. B. 249; *Field* v. *Partridge*, 7 Ex. 689; *Felton* v. *Conley*, 1 Prac. R. 319. The rule does not apply to judgment on demurrer: *Taylor* v. *Murray*, 3 M. & W. 141.

(*c*) Taken from Eng. R. G. No. 60 of H. T. 1853.

(*d*) One half hour's grace is always allowed by the practice of the courts for both parties to appear before proceeding to taxation: *Landon* v. *Stubbs*, 3 U. C. L. J. 70. This is the practice as much where an appointment is taken out as where a notice of taxation is given: *Ib.* When a party fails to attend the taxation pursuant to notice or appointment, he may perhaps be precluded from objecting to the amount of an item in the discretion of the master, but not from objecting *in toto* to items, upon the allowance of which the master has no discretion at all: *Conger* v. *McKechnie*, 1 Cham. R. 209.

(*e*) "In the taxation of costs *or* of an attorney's bill," &c. apparently intending costs as between party and party, and as between attorney and client.

(*f*) Taken from Eng. R. G. No. 61 of H. T. 1853, the origin of which was Eng. R. G. No. 17 of H. T. 4 Wm IV.: Jervis N. R. 110.

(*g*) *In any case*, &c. This rule is express, that no notice shall be necessary when no appearance is entered: *Bolton* v. *Manning*, 5 Dowl. P. C. 769; *Pope* v. *Mann*, 2 M. & W. 881. Notice, however, will be necessary when defendant has done that which is equivalent to appearing, as where he has assented to a judge's order for a stay of proceedings: *Lloyd* v. *Kent*, 5 Dowl. P. C. 125; *Perry* v. *Turner et al*, 2 C. & J. 89. But a mere summons for time to plead, though taken out by defendant, is not tantamount to appearing: *Welch* v. *Vickery*, 15 M. & W. 59.

(*h*) Taken from Eng. R. G. No. 62 of H. T. 1853, the origin of which was Eng. R. G. No. 7 of H. T. 4 Wm. IV.: Jervis N. R. 121; with which our Rule No. 26 of

verdict on any material issue, he will also be entitled to the general costs of the trial; (*i*) but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party. (*j*)

52. (*k*) No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; (*l*) provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted. (*m*)

53. (*n*) No privilege shall hereafter be allowed to any person to exempt him as plaintiff from the operation of any statute or rule of court which restrains costs on any causes of action of the proper competence of the county court. (*o*)

E. T. 5 Vic. corresponded: Cam. R. 29. The latter part of section 110, C. L. P. Act, which is to the effect that "the costs of any issue, either of fact or of law, shall follow the finding or judgment on such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues," is in substance the same as this rule. See the notes thereto.

(*i*) The rule does not apply to a case where the pleadings in one action against two or more defendants are at common law and each pleading separately, one defendant succeeds on his single plea, so as to prevent the plaintiff having judgment against his co-defendant or co-defendants who have failed on the issues on the other pleas: *Cazneau* v. *Morrice et al*, 25 L. J. Q. B. 126.

(*j*) For a review of the decided cases bearing upon the subject matter of this rule, see note *i* to section 110, C. L. P. Act,

(*k*) Taken from Eng. R. G. No. 63 of H. T. 1853, the origin of which was Eng. R. G. No. 93 of H. T. 2 Wm. IV.: Jervis N. R. 86. The history of the latter rule is explained by Jervis, C. J., in *Dunn* v. *West*, 1 L. M. & P. 615.

(*l*) This rule is inflexible, and applicable to all cases: *Humbleton* v. *Higginbotham*, Ex. H. T. *MS.* 1832. It cannot be affected by the private agreement of the parties to a reference: *Cowell* v. *Betteley*, 2 Dowl. P.C. 780. Where, however, an arbitrator awards a sum to be paid to A., in respect of matters in difference between him and B., and the costs of the action (a smaller sum) to be paid to B. at the same time and place, the court has not, it appears, jurisdiction to order B. to pay the whole sum awarded to A., to A.'s attorney on account of his lien for costs: *Dunn* v. *West*, 10 C. B. 420. The rule extends only to the costs of the particular cause to be taxed as between attorney and client: *Watson* v. *Maskell*, 1 Bing. N. C. 366. It applies to cases where there is a cross claim in separate actions: *George* v. *Elston et al*, *Ib.* 513; *Lees* v. *Riffitt et al*, 3 A. & E. 707; see also *Latham* v. *Hyde*, 1 C. & M. 128; *Scott* v. *DeRichebourg*, 11 C. B. 447; *Simpson et al* v. *Lamb*, 7 El. & B. 84; *Lloyd* v. *Manseil*, 22 L. J. Q. B. 110; *Brunsdon* v. *Allard*, 2 E. & E. 19; *Shaw* v. *Neale*, 20 Beav. 157; *Sympson* v. *Prothero*, 26 L. J. Ch. 671; *Verity* v. *Wild*, 28 L. J. Ch. 561; *In re Marsack and Webber*, 2 E. & E. 637; *Standeven et al* v. *Murgatroyd*, 27 L. J. Ex. 425.

(*m*) As to interlocutory costs, see note *y* to R. G. pr. 48.

(*n*) Taken from our R. G. pr. 43 of H. T. 13 Vic.

(*o*) See C. L. P. Act, section 328.

EXECUTION. (*p*)

54. (*q*) No writ of execution shall issue until the proceedings to the end of the judgment are duly entered on the roll; (*r*) nor shall any writ against lands issue until the judgment has been duly minuted and docketed. (*s*)

55. (*t*) A *præcipe* for every writ of execution shall be filed with the proper officer, (*u*) and the endorsement upon every such writ, for debt or damages, shall be to the effect, and as nearly as the circumstances will allow, in the form following: (*v*) "Levy (*or* take) the sum of £——, being the debt (*or* damages), and the sum of £——, being the costs taxed in this cause, with interest (*according to the circumstances*); also the sum of £—— for this writ (and former writs, *if any*, and Sheriff's fees thereon), together with your own fees, poundage and incidental expenses:" and shall also (*w*) be endorsed with the name and place of abode, or office of business, of the attorney actually suing

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(*p*) The judgment of the court is the sentence as between the parties to a cause. The next step is to put that sentence into operation, which is done by issuing execution.

(*q*) This rule is original, and lays down a practice at variance with that of England: see Eng. R. G. Nos. 70, 71 of H. T. 1853.

(*r*) No execution can issue until final judgment is entered: *Finch* v. *Brook*, 5 Dowl. P. C. 59; and when issued, must conform to the judgment roll: *King* v. *Birch*, 3 Q. B. 425; *Phillips* v. *Birch*, 2 Dowl. N. S. 97. Execution cannot issue pending an action on the judgment: *Burdus* v. *Satchwell*, Barnes, 208.

(*s*) See C. L. P. Act, section 243.

(*t*) The first part of this rule appears to be taken from our rule No. 44 of H. T. 13 Vic., and the last part from Eng. R. G. No. 73 of H. T. 1853.

(*u*) The *præcipe* may be in this form: Required a writ of, &c., directed to the sheriff of, &c., returnable immediately after the execution thereof, &c.

(*v*) If money have been paid on the judgment before the issue of execution, the levy should be restricted to the balance unpaid: *Plevin* v. *Henshall et al*, 10 Bing. 24; and though the action be on a bond conditioned for the payment of a sum of money in gross, and judgment be had for the penalty, the indorsement on the execution should not be for a sum greater than the principal or true debt, interest, nominal damages and costs: *Amery* v. *Smalridge*, 2 W. Bl. 760. When execution is fraudulently issued and indorsed for the whole sum named in a judgment when part has been already paid, the defendant's remedy (unless malice, &c., can be proved) is by motion to set aside the execution: *De Medina* v. *Grove et al*, 10 Q.B. 152. In the absence of fraud, &c., the court will only direct the levy to be reduced: *McCormack* v. *Melton*, 1 A. & E. 331; and when the sum indorsed, if too much, has been really levied, the court may direct the overplus to be refunded: *Barchead* v. *Hall*, 8 Dowl. P. C. 796, n. So if too little have been levied, the court may allow plaintiff to amend his indorsement: *Hunt* v. *Passmore*, 2 Dowl. P. C. 414; *Smith* v. *Dickinson*, 13 L. J. Q. B. 151.

(*w*) This part of the rule is taken from Eng. R. G. No. 73 of H. T. 1853.

out the same; (*x*) and when the attorney actually suing out the writ shall sue out the same, as agent for any attorney in the country, the name and place of abode of such attorney in the country shall also be endorsed upon the said writ; (*y*) and in case no attorney shall be employed to issue the writ, then it shall be endorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, (*z*) mentioning the city, town, ncorporated or other village, or township, within which such plaintiff or defendant resides. (*a*)

56. (*b*) Every writ of execution shall be tested in the name of the Chief Justice of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of the senior puisne judge of the said court. (*c*)

PROCEEDINGS AGAINST GARNISHEE. (*d*)

57. (*e*) All writs, rules, orders, or other proceedings against a Garnishee, shall be issued, taken, and had (*f*) in the Court in which the judgment was rendered in favour of the party applying to attach the debt due to his judgment debtor. (*g*)

58. (*h*) The entries of the proceedings against a Garnishee, in the debt attachment book, (*i*) shall be made according to the form hereafter given. (*j*)

(*x*) See note *s* to section 12, C. L. P. Act.

(*y*) See note *t* to section 12, C. L. P. Act.

(*z*) See note *u* to section 13, C. L. P. Act.

(*a*) See note *w* to section 13, C. L. P. Act.

(*b*) Taken from Eng. R. G. No. 72 of H. T. 1853, and corresponds with section 24 of C. L. P. Act, which relates to writs of mesne process.

(*c*) See note *l* to section 5 C. L. P. Act.

(*d*) It is in effect enacted in the C. L. P. Act, that it shall be lawful for a judgment creditor to make application to a judge, setting forth that a judgment has been recovered against a debtor, and is unsatisfied, and that any *other* person is indebted to the judgment debtor, whereupon the Judge may order the debt accruing from such third person to be attached, &c.: section 288. The "other person" of whom mention is made in this section is the person described in legal proceedings as the "garnishee."

(*e*) This rule is original.

(*f*) "Issued" refers to the act of the officer of the Court, "taken and had" to the act of the attorney.

(*g*) See notes to section 288, C. L. P. Act.

(*h*) This rule is original.

(*i*) See section 298, C. L. P. Act.

(*j*) See form No. 60, in Schedule to these rules

REVIVOR AND SCIRE FACIAS. (*k*)

59. (*l*) A plaintiff shall not be allowed a rule to quash his own writ *scire facias* or revivor, (*m*) after a defendant has appeared, except on payment of costs. (*n*)

60. (*o*) A *scire facias* upon a recognizance taken before a judge or a commissioner in the country (*p*) and recorded at Toronto, (*q*) shall be brought in the County of York only, and the form of the recognizance shall not express where it was taken. (*s*)

61. (*t*) No judgment shall be signed for non-appearance to a *scire facias*, without leave of the court or a judge, unless defendant has been summoned, but such judgment may be signed by leave after eight days from the return of one *scire facias*. (*u*)

62. (*v*) A notice in writing to the plaintiff, his attorney, or agent,

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(*k*) The writ of revivor is the old writ of *scire facias*, or more properly an improved form of *scire facias:* see notes to section 305, C. L. P. Act. Owing to the circumstance of the old *scire facias* in certain cases being retained, the *scire facias* and writ of revivor are practically distinct writs. Either proceeding is in the nature of an action, because the defendant can plead to the writ: 2 Wm. Saunders, 6 a.

(*l*) Taken from Eng. R. G. No. 78 of H. T. 1853, the origin of which was Eng. R. G. No. 78 of H. T. 2 Wm. IV.: Jervis N. R. 81.

(*m*) The Rule is *nisi* only: *Ade* v. *Stubbs*, 4 Dowl, P. C. 282; *Oliverson* v. *Latour*, 7 Dowl. P. C. 605.

(*n*) The application to quash is generally founded upon an error of the party issuing the writ. In such a case the opposite party is always put to some expense in consequence of the error. It is therefore only reasonable that he should be paid the costs incurred thereby: *Pickman* v. *Robson*, 1 B. & Al. 486; see note *l* to section 320, C. L. P. Act.

(*o*) Taken from our Rule No. 2 of H. T. 10 Vic.; 4 U. C. Q. B. 93.

(*p*) See note *p* to section 33 of C. L. P. Act.

(*q*) No bail piece is perfect as a recognizance till filled: *Gillespie et al* v. *Grant*, 3 U. C. Q. B. 400.

(*s*) As to proceedings by *scire facias* against bail, see Petersdorff, Bail, 371.

(*t*) Taken from our Rule No. 3 of H. T. 10 Vic.: 4 U. C. Q. B. 93; the origin of which was Eng. R. G. No. 81 of H. T. 2 Wm. IV.; Jervis N. R. 82.

(*u*) The object of this and the succeeding rule (62) being retained is not apparent; for it is provided by the C. L. P. Act, that "the writ of revivor shall be directed to the party called upon to show cause, &c.:" section 305; and that "all writs of *scire facias*, &c. (specifying all the forms of writ in general use), *shall be tested, directed, and proceeded upon in like manner as writs of revivor*:" section 311.

(*v*) Taken from our rule No. 4 of H. T. 10 Vic.: 4 U. C. Q. B. 93; the origin of which was Eng. R. G. No. 82 of H. T. 2 Wm. IV.: Jervis N. R. 83.

shall be sufficient appearance by the bail or defendant on a *scire facias*. (*w*)

63. (*a*) In all suits, actions, or proceedings, by *scire facias*, information or otherwise, by or at the suit of, or in the name of the Queen, or of the Attorney or Solicitor General for the time being, commenced or taken to enforce or protect any of the civil rights of the Crown, or concerning any matter or thing affecting such rights, or for any penalties or forfeitures under any Customs' Act, or other Act of Parliament in force in this Province—rules to appear, plead, rejoin, join in demurrer, &c., may be had and issued on filling a *præcipe* either term or vacation, (*b*) and all such rules, excepting rules to appear, (*c*) shall be eight day rules, (*d*) and the party or parties named in any such rules shall be bound to appear, plead, rejoin, join in demurrer, &c., within the time mentioned in such rules respectively, but the Court or a Judge may extend the time mentioned in any such rules in their or his discretion; (*e*) Provided that nothing in this rule shall affect or restrict any right, privilege, or prerogative now enjoyed or possessed by the Crown. (*f*)

ENTRY OF SATISFACTION ON ROLL. (*g*)

(*w*) See note *u* to preceding rule.

(*a*) Taken from our Rule No. 53 of H. T. 13 Vic.

(*b*) This rule must be read in connection with Con. Stat. U. C. cap. 21—that every commission, extent, writ or other process issued, &c. may be tested, made returnable and be returned on any day certain in term or vacation, to be named in such commission, extent, writ or other process: section 1; and that at the return of any such commission, extent, writ, or other process, the like rules may be given, and such other proceedings had, and such subsequent writs and process issued at any time in vacation, as may be given, had, or issued in term time: section 2. It is by the same Statute provided that it shall and may be lawful for the Judges of the Superior Courts of Common Law in Upper Canada, &c., to make all such general rules and orders for the regulation of the pleadings and practice on such informations, suits, and other proceedings, and may frame such writs and forms of proceedings as to them may seem expedient: section 8; in order that the procedure and practice in informations on suits and other proceedings instuted on behalf of the *Crown*, &c., should be *assimilated* as nearly as may be to the course of practice and procedure now in force in actions *between subject and subject*.

(*c*) Which are in general four day rules: Tidd Prac. 1141.

(*d*) All such, were formerly four day rules: West on Extents, 317.

(*e*) *Court or a Judge*—relative powers, see note *w* to section 48, C. L. P. Act.

(*f*) The Crown has various prerogatives in replying to its defendants traverse or plea: Chit. Prerog. 369.

(*g*) When plaintiff's judgment is satisfied in order that defendant may not be harassed a second time on the same account, it is necessary that satisfaction be

64. (*h*) In order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction piece in form as hereinafter mentioned, (*i*) and such satisfaction piece shall be signed by the party or parties acknowledging the same or their personal representatives, and their signatures shall be witnessed by some practising attorney, (*j*) expressly named by him or them, and attending at his or their request, (*k*) to inform him or them of the nature and effect of such satisfaction piece before the same is signed; (*l*) which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, (*m*) and state he is witness as such attorney (provided that a Judge at Chambers may make an order dispensing with such signature under special circumstances, if he think fit); (*n*) and in cases where the satisfaction piece is signed by the personal represen-

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entered on the judgment roll: see *Lambert Parnell*, 15 L. J. Q. B. 55; *Simpson* v. *Hanley et al*, 1 M. & S. 695; *Coombe* v. *Sansom*, 1 D. & R. 201; *Doe d. Draz* v. *Filliter*, 11 M. & W. 80; *Crafts* v. *Wilkinson*, 4 Q. B. 74; *Ward* v. *Broomhead et al*, 7 Ex. 726. An order to enter satisfaction will not be made though defendant swear that the judgment is satisfied if the plaintiff deny the fact, and it be not otherwise clear that the judgment is in truth satisfied: *Lewine et al* v. *Savage*, 3 U. C. L. J. 89.

(*h*) Taken from Eng. R. G. No. 80 of H. T. 1853, the origin of which was R. G. of E. T. 7 Vic.: 5 Q. B. 832. The object of the rule is to make it necessary for plaintiff himself to sign a satisfaction piece; but before doing so to see that he is well informed as to the effect thereof. Many of the requirements of the rule resemble those contained in Rule No. 26 as to cognovits and warrants of attorney, to which references are hereafter made.

(*i*) Where an Act of Parliament or rule of Court expressly provides that a thing is to be done in a given form, that form must be closely followed: see *Warren* v. *Love*, 7 Dowl. P. C. 602; *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.

(*j*) See note *i* to R. G. pr. 26.

(*k*) See note *j* to R. G. pr. 26.

(*l*) See note *k* to R. G. pr. 26.

(*m*) See notes *m*, *l*, and *n* to R. G. pr. 26.

(*n*) Before a judge will under any circumstances dispense with the signature of plaintiff, clear proof of satisfaction must be adduced. Where the plaintiff was abroad, an affidavit of the sheriff's officer that he had levied the amount was held insufficient unless accompanied with an affidavit of the plaintiff's attorney to the same effect: *De Bastos* v. *Willmott*, 1 Hodg. 15. So where plaintiff was dead, and no administration had been taken out, an affidavit of the defendant's attorney that the plaintiff had been paid in full was held of itself insufficient: *Speach* v. *Slade*, 8 Moore, 461. So where four out of five plaintiffs consented to satisfaction being entered, but the fifth was abroad and could not be found, the application failed, though the attorney of the fifth assented to satisfaction: *Davis et al* v. *Jones*, 5 Dowl. P. C. 503. In one case in Upper Canada where plaintiff was resident abroad, the Court relaxed the rule under consideration in favour of a satisfaction piece signed by his attorney: *Pawson et al* v. *Wightman*, 2 U. C.

tative of a party deceased, his representative character shall be proved by the production of the probate of the will, or of the letters of administration, to the officer in custody of the judgment roll. (*o*)

Form of Satisfaction Piece.

In the

day, the day of A.D. 18 : to wit:— Satisfaction is acknowledged between plaintiff, and defendant, in an action for £ and costs. And do hereby expressly nominate and appoint , attorney-at-law, to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of in the year of our Lord, 18 . Roll No.

Signed by the said in the presence of me of one of the attorneys of the Court of . And I hereby declare myself to be attorney for and on behalf of the said expressly named by and attending at request to inform of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by). And I also declare that I subscribe my name hereto as such attorney.	(*Signature*) the above named plaintiff. Date.

65. (*p*) Every satisfaction piece must be entered in the principal office of the proper court at Toronto, (*q*) and every deputy clerk

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L. J. 184. So where plaintiff being abroad, a letter of recent date fully authorising his attorney to settle the suit was produced: *Rudall* v. *Hurd et al*, 3 U. C. L. J. 14. So also where plaintiff was a resident of Lower Canada, and the amount of the judgment small: *The Bank of Montreal* v. *Cronk et al*, *Ib.* 32. So where the attorney produced an express authority from his client, the plaintiff, who resided in Lower Canada: *Darling* v. *Wright*, *Ib.* 50. If the satisfaction be executed in Lower Canada, and attested by a practising attorney of that section of the Province, the signature of such attorney should be verified by a certificate of one of the judges of Lower Canada, or by an affidavit made before a commissioner for taking affidavits appointed under Stat. 12 Vic. cap. 77: *Moss* v. *Dayly*, 3 U. C. L. J. 74, *per* McLean, J.

(*o*) It is not said that probate shall be filed with, but produced to the officer in custody of the judgment roll. The object of doing so is to prove the representative character of the person who assumes to sign as "the personal representative of a party deceased."

(*p*) This rule is original.

(*q*) *Proper court, i. e. the* court in which the suit has been instituted and proceedings had.

of the Crown shall transmit the judgment roll and papers belonging thereto for that purpose, upon the satisfaction piece being exhibited to him, (*r*) unless such roll shall have been previously transmitted under the direction of the Common Law Procedure Act, 1856, section fifteen. (*s*)

BAILABLE PROCEEDINGS AND BAIL. (*t*)

66. (*u*) Where the defendant is described in the writ of capias or affidavit to hold to bail by initials, or by wrong name, or without a Christian name, the defendant shall not for that cause be discharged out of custody, (*v*) or the bail bond be delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

67. (*w*) An action may be brought upon a bail bond by the Sheriff himself in either Court. (*x*)

(*r*) *Upon the satisfaction piece being exhibited to him*, &c., which it is presumed means, upon the satisfaction piece (regularly signed and attested) being exhibited, &c.

(*s*) See notes to sections 243, 245, C. L. P. Act.

(*t*) For a review of the practice as to bail in civil cases, see note *p* to section 33, C. L. P. Act.

(*u*) Taken from Eng. R. G. No. 82 of H. T. 1853, the origin of which was Eng. R. G. No. 32 of H. T. 2 Wm. IV.: Jervis N. R. 67.

(*v*) Before Eng. R. G. No. 32 of H. T. 2 Wm. IV., a defendant arrested, if summoned, might be discharged out of custody, and have the bail bond delivered up to be cancelled, on entering a common appearance. It was at first doubted whether the rule did not deprive the defendant of his remedy: *Callum* v. *Leeson*, 2 Dowl. P. C. 381; but it was afterwards settled that he might still do so, unless the plaintiff could show that he had used due diligence to ascertain the right name of the defendant: *Ladbrook* v. *Phillips*, 1 H. & W. 109; *Rosset* v. *Hartley*, 7 A. & E. 522, n. In determining whether or not a case falls within the rule, the court will have regard to various circumstances; and if it appear that the defendant countenanced the plaintiff in calling him by a wrong name, or was likely to abscond if inquiry were made of him personally, it will not interfere to the prejudice of plaintiff: see *Hicks* v. *Murreco*, 1 C. & M. 83; *Newton* v. *Maxwell*, 1 Dowl. P. C. 315; *Lyon* v. *Walls*, 2 M. & Scott. 393; *Lindsay* v. *Wells*, 3 Bing. N. C. 777; *Finch* v. *Cocken et al*, 2 C. M. & R. 196.

(*w*) Taken from Eng. R. G. No. 83 of H. T. 1853, the origin of which was Eng. R. G. No. 28 of H. T. 2 Wm. IV.: Jervis N. R. 66.

(*x*) Before the Eng. R. G. of Wm. IV., the sheriff could only bring an action in the Queen's Bench upon a bond taken upon process in that court: *Donatty* v. *Barclay*, 8 T. R. 152; but it was otherwise in the English Court of Common Pleas: *Newman et al* v. *Faucitt*, 1 H. Bl. 631; and Exchequer; *Yorke* v. *Ogden et al*, 8 Price, 174. The rule only enables the "sheriff himself" to bring the action in either court. His assignee, it would seem, must still, as formerly, bring the action in the court from which process issued upon which the bond was taken.

68. (*y*) In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. (*z*)

69. (*a*) Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more. (*b*)

70. (*c*) When bail to the Sheriff becomes bail to the action, the plaintiff may except to them though he has taken an assignment of the bail bond. (*d*)

71. (*e*) A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant. (*f*)

72. (*g*) No rule shall be drawn up for setting aside an attachment

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(*y*) Taken from Eng. R. G. No. 84 of H. T. 1853, the origin of which was Eng. R. G. No. 29 of H. T. 2 Wm. IV.: Jervis N. R. 66.

(*z*) In the English Court of Common Pleas, though it was at one time usual to sign judgment on staying proceedings in an action on a bail bond, when the bail consented that it should stand as a security, yet it was afterwards held that the bail in such a case were at liberty to plead to the action on the bail bond, and were consequently entitled to a demand of plea before judgment could be signed against them: see Tidd's Prac. 304, 305.

(*a*) Taken from Eng. R. G. No. 85 of H. T. 1853, the origin of which was Eng. R. G. No. 30 of H. T. 2 Wm. IV.: Jervis N. R. 66.

(*b*) Where several actions on a bail bond were brought and carried to verdict, the English Court of Exchequer held that it was too late to apply to stay the proceedings upon payment of the costs of one action only: *Johnson* v. *Macdonald*, 2 Dowl. P. C. 44.

(*c*) Taken from Eng. R. G. No. 86 of H. T. 1853, the origin of which was Eng. R. G. No. 15 of H. T. 2 Wm. IV: Jervis N. R. 62.

(*d*) Where bail below became bail above, no exception could be taken in the English Court of Queen's Bench after an assignment of the bail bond: *Fish* v. *Horner*, 7 Mod. 62. But in the Common Pleas the same bail might be excepted to after an assignment of the bail bond: *Claxton* v. *Hyde*, Barnes, 90. This rule follows the practice of the Common Pleas.

(*e*) Taken from Eng. R. G. No. 87 of H. T. 1853, the origin of which was Eng. R. G. No. 23 of H. T. 2 Wm. IV; Jervis N. R. 64.

(*f*) This has been the practice of the courts from an early period: *Whittle* v. *Oldaker et al*, 7 B. & C. 478; *Blackford* v. *Hawkins*, 1 Bing. 181. The object of the rule to bring in the body is for the purpose of compelling the sheriff to have the defendant in custody or to put in bail, so that the plaintiff can declare and proceed with the suit to judgment. But plaintiff may waive it if he pleases, and proceed with his suit if he can, without the defendant being in actual custody or putting in special bail: see *Dusolme* v. *Hamilton*, 15 U. C. Q. B. 183; s. c. *Ib.* 574; *Regina* v. *The Sheriff of Perth*, 2 Prac. R. 298.

(*g*) Taken from Eng. R. G. No. 88 of H. T. 1853, the origin of which was R. G. Q. B. of M. T. 59 Geo. III.

regularly obtained against a sheriff for not bringing in the body (*h*) or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, (*i*) or if made on the part of the sheriff, bail, or any officer of the sheriff, be grounded on an affidavit, showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant. (*k*)

73. (*l*) Whenever a plaintiff shall rule, the sheriff on a return of *cepi corpus* to bring in the body, (*m*) the defendant shall be at liberty to put in and perfect special bail at any time before the expiration of such rule. (*n*)

74. (*o*) In case a rule for returning a writ of *capias* shall expire in

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(*h*) Where the plaintiff at the instance of the sheriff's officer forbore for ten days to enforce an attachment, it was held that the sheriff was not discharged by such indulgence: *Pople et al* v. *Wyatt*, 15 East. 215.

(*i*) The application to stay proceedings cannot in general be made until bail is perfected: *Heath* v. *Gurley*, 4 Moore, 149. If the application be made at the instance of the bail the court will not impose terms on the defendant: *Gale et al* v. *Hayworth*, 6 Dowl. P. C. 323.

(*k*) The object of this rule is throughout to prevent collusion between the party applying and the original defendant. Plaintiff obtained an order to hold the defendant to bail in an action for seduction for £50. The defendant did not put in special bail and the sheriff was ruled to bring in the body and an attachment issued against him. The sheriff applied on affidavit to be relieved on payment of the £50 and costs, *held* that the application must fail because he had not negatived collusion between himself and the defendant: *Regina* v. *The Sheriff of Hastings*, 1 Cham. R. 230.

(*l*) Taken from Eng. R. G. No. 89 of H. T. 1853, the origin of the latter part of which was Eng. R. G. No. 23 of H. T. 2 Wm. IV: Jervis N. R. 64.

(*m*) This is a side bar rule: see R. G. pr. 102; and should be issued promptly: *Rex* v. *Sheriff of Middlesex*, 1 Dowl. P. C. 53. But cannot be issued before the day on which the writ is returned or before the time for putting in bail has expired: *Hutchins* v. *Hird*, 5 T. R. 49; *Potter* v. *Marsden*, 8 East. 525; *Pouchee* v. *Lieven*, 4 M. & S. 427. It cannot issue after judgment recovered against the sheriff for an escape: *Borwick* v. *Walton*, 2 B. & Al. 623; nor after discharge of the defendant by order of the plaintiff: *Ib.* The rule when issued must be served within a reasonable time: *Rex* v. *The Sheriff of Middlesex*, 1 Dowl. P. C. 53.

(*n*) The sheriff obeys the rule by merely showing that defendant is in his custody: *Macleed* v. *Marsden*, Barnes, 32; or that bail has been put in: *Rex* v. *Sheriff of Middlesex*, 8 T. R. 464.

(*o*) Taken from Eng. R. G. No. 90 of H. T. 1853, the origin of which was Eng. R. G. of H. T. 3 Wm. IV: Jervis N. R. 103.

vacation, and the sheriff or other officer (*p*) having the return of such writ shall return *cepi corpus* thereon, a rule may thereupon issue requiring the sheriff or other officer within the like number of days after the service of such rule, as by the practice of the Court is prescribed with respect to rules to bring in the body, issued in term, (*q*) to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action, and if the sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term, for disobedience of such rule, (*r*) whether bail shall or shall not have been put in and perfected in the meantime. (*s*)

75. (*t*) Notice of more bail than two shall be deemed irregular, unless by order of the Court or of a Judge. (*u*)

76. (*v*) The bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge. (*w*)

(*p*) "Or other officer," *i. e.* Coroner, &c.

(*q*) The courts ought as far as possible to assimilate the practice in vacation under this rule to that which prevailed in England before the passing of the rule of 1 M. T. 3 Wm. IV: *Rex* v. *Sheriff of Essex*, 1 M. & W. 721, *per* Alderson, B. In vacation, if the plaintiff mean to make the sheriff liable for intermediate damages in consequence of his default, he should give the sheriff notice to that effect, and then should receive such damages as may occur between the notice and the notice which the sheriff must give when the defect has been cured: *Ib.* The expense of the notice to the sheriff will be part of the costs of the attachment obtained against the sheriff during the next term: *Ib.*

(*s*) If bail be put in and perfected after the contempt and before the issuing of the attachment under the above rule, the court will set aside the attachment upon payment of costs: *Regina* v. *Sheriff of Middlesex*, 2 Dowl. P. C. 432.

(*t*) Taken from Eng. R. G. No. 91 of H. T. 1853, the origin of which was Eng. R. G. No. 18 of H. T. 2 Wm. IV: Jervis N. R. 63.

(*u*) Where the sum is large the judge will allow several to become bail in different sums amounting together to the required amount: *Anon.* 13 Price, 448; *Easter* v. *Edwards*, 1 Dowl. P. C. 39.

(*v*) Taken from Eng. R. G. No. 92 of H. T. 1853, the origin of which was Eng. R. G. No. 5 of T. T. 1 Wm. IV: Jervis N. R. 42.

(*w*) Bail cannot be changed without a sufficient reason, and then only upon payment of costs and putting plaintiff in the same situation as before: *Whitehead* v. *Minn*, 2 C. & J. 54; *Elliott* v. *Gutteridge*, 6 Dowl. P. C. 255. An expectation that a cause would be settled is not a sufficient reason for change of bail: *Orchard* v. *Glover*, 1 Dowl. P. C. 707. In *Stroud* v. *Kenny*, Taunton, J., decided that the English rule of Wm. IV. applied to bail for prisoners in custody and rejected bail who had been changed without leave: K.B. 17th April, 1832, *MS.*; Jervis N. R. 43; but in *Bird's* case, 2 Dowl. P. C. 583, Patteson, J. held that it did not. The rule applies to bail put in by the sheriff: *Rex* v. *Sheriff of Essex*, 2 Dowl. P. C. 782; as well as to that put in by a party: *Jones* v. *Vestris*, 3 Bing. N. C. 677. It has been held not to be necessary to give a four days' notice of added bail: *Perry's Bail*, 1 Dowl. P.C. 564; *Key* v. *Mackyntire*, 5 Dowl. P.C. 543

77. (*x*) No person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants, if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants. (*y*)

78. (*z*) No attorney shall take any recognizance of bail in a case in which he is employed as attorney or agent for either party. (*a*)

79. (*b*) If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, (*c*) or clerk to a practising attorney or sheriff's officer, bailiff, or person concerned in the execution of process, (*d*) the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in, in the meantime. (*e*)

80. (*f*) When bail which has been put in, in the country, (*g*) is to be justified in Court, (*h*) the bail piece, with the affidavit of the due

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But where the order to change the bail was not obtained until the day on which the bail were to justify, the court gave the plaintiff time to inquire into their sufficiency: *Perry's Bail*, 2 C. & J. 475. If the order be granted upon payment of costs, the costs must be paid before the bail justify: *Jourdain* v. *Gunn*, 2 Tyr. 491.

(*x*) Taken from Eng. R. G. No. 93 of H. T. 1853, the origin of which was Rule H. T. 37 Geo. III: 1 B. & P. 103.

(*y*) This has been for some time the well understood practice: *Greensill* v. *Hopley*, 1 B. & P. 103; *Anon.* 1 Dowl. P. C. 1; *Hunt* v. *Blaquiere*, 4 Bing. 588. It has however been held no objection to bail that they are indemnified by the sheriff's officer: *Chick's case*, M.T. 56 Geo. III. Nov. 17, 1815, 1 Chit. Rep 714 n.

(*z*) This rule appears to be original, though simply declaratory of a previously existing practice.

(*a*) An affidavit to hold to bail before action commenced may be sworn before plaintiff's attorney: *Brett* v. *Smith*, 1 Prac. R. 309

(*b*) Taken from Eng. R. G. No. 94 of H. T. 1853, the origin of which was Eng R. G. No. 13 of H. T. 2 Wm. IV: Jervis N. R. 62.

(*c*) An attorney who had not practised for six years was allowed to justify bail: *Anon.* E. T. May 16, 1815, 1 Chit. Rep. 714 n.

(*d*) It was a rule of all the English courts of common law that an attorney: 2 Doug. 466 n; or attorney's clerk: *Bologne* v. *Vautrin*, Cowp 828; *Laing* v. *Cundale*, 1 H. Bl. 76; *Cornish* v. *Ross*, 2 H. Bl. 349; whether articled or not: *Cakish* v. *Ross*, 1 Taunt. 164 n.; should not be bail to the action.

(*e*) A practising attorney or a clerk may be allowed to become bail to surrender a defendant: 1 Chit. R. 714, note *a*.

(*f*) Taken from our old Rule of T. T. 3 & 4 Wm. IV: Cam. R. 4.

(*g*) See note *q* to section 34 C. L. P. Act.

(*h*) See note *q* to section 34 C. L. P. Act.

taking thereof, and the affidavit of justification, (*i*) shall be transmitted by the deputy clerk of the Crown for the county in which they have been filed to the principal office in Toronto, to be filed and produced in court, upon the motion for allowance, on proper notice being given to such deputy clerk to transmit the same. (*j*)

81. (*k*) If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, (*l*) and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order. (*m*)

FORM OF AFFIDAVIT OF JUSTIFICATION OF BAIL. (*n*)

In the ———

Between A. B., *Plaintiff*, and C. D., *Defendant*.

B. B., one (*o*) of the bail for the above named defendant (*p*) maketh

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(*i*) As to which, see R. G. pr. 81.

(*j*) If bail be put in and justified before a commissioner, any justice of the court from which process issued, or of either of the superior courts sitting in chambers, upon receipt of the said bail piece or recognizance from such commissioner, may, if he shall think fit (after proof of due notice of justification or upon cause shown), order a rule to issue for the allowance of such bail: C.L.P. Act, s. 36.

(*k*) Taken from Eng. R. G. No. 98 of H. T. 1853, the origin of which was Eng. R. G. No. 3 of T. T. 1 Wm. IV: Jervis N. R. 40.

(*l*) This form must be strictly followed: *Miller's Bail*, 5 Dowl. P. C. 602; *Welter's Bail*, 6 Dowl. P. C. 312.

(*m*) The object of the affidavit being to enable plaintiff to satisfy himself as to the bail offered if the affidavit be vague, he may obtain further time to make inquiries: *Anon.*, 1 Dowl. P. C. 159. The court may allow an amendment: *Warren* v. *De Burgh*, 7 Dowl. P. C. 96; and though the bail may, if sufficient, justify: *De Bode's Bail*, 1 Dowl. P. C. 368; *Anon. Ib.* 126; *Popjoy's Bail*, 3 Dowl. P. C. 170; the defendant will not be allowed the costs of justification: *Heald's Bail*, 3 Dowl. P. C. 423; *Miller's Bail*, 5 Dowl. P. C. 602. The rule is, that if the notice of bail be accompanied by an affidavit *according to the form* thereto subjoined, the plaintiff, if the bail be allowed, shall pay the costs of justification: *Ib.* If the affidavit be not in that form—and the better way is not to deviate from it—the defendant cannot have the costs of justification, though his bail be sufficient: *Ib.*

(*n*) See note *l*, *supra*.

(*o*) Though the affidavit is in form several, the bail may justify by a joint affidavit: *Anon.* 1 Dowl. P. C. 115.

(*p*) By G. R. pr. 109, it is provided that "the *addition* and true place of abode of *every person* making an affidavit shall be inserted therein." Though the form of affidavit omits the addition of the deponents, it is only proper that it should be inserted: *Treasure's Bail*, 2 Dowl. P. C. 670; *Brown's Bail*, 5 Dowl. P. C. 220.

oath and saith, (*q*) that he is a housekeeper (*r*) (*or* freeholder, *as the case may be*), residing at (*give particular description of the place of residence,*) (*s*) that he is worth property to the amount of £—— (*double the amount sworn to*) over and above what will pay all his just debts, (*t*) (*if bail in any other action, add,* and every other sum for which he is now bail), that he is not bail for any (*u*) defendant, except in this action (*or if bail in any other action or actions, add,* except for C. D., at the suit of E. F., in the Court of ——, in the sum of £——, for G. H., at the suit of J. K., in the Court of ——, in the sum of £——, *specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail*). (*v*) Sworn, (*w*) (&c., as usual.) (*x*)

(*q*) This is not in accordance with R. G. pr. 112, which provides that "*every* affidavit sworn within this Province . . . *shall* be drawn up in the first person, and *shall* be divided into paragraphs, &c.;" but the object of that rule was to prevent prolixity in affidavits, when prepared by suitors or their attorneys. The judges having themselves the framing of this form, the objection against which the rule was directed cannot arise.

(*r*) *Housekeeper.* There appears to be some difference between "householder" and "housekeeper:" See *Anon.* 1 Dowl. P.C. 127; *Gablentz's Bail,* 1 H. & W. 111.

(*s*) Where the deponent described himself as a housekeeper but did not go on to say where he resided, the affidavit was held insufficient: *Heald's Bail,* 3 Dowl. P. C. 423; *Welsh* v. *Lywood,* 1 Bing. N. C. 258; *Wilson's Bail,* 2 Dowl. P. C. 431.

(*t*) As to what is a sufficient compliance with this part of the affidavit: see *Lanyon's Bail,* 3 Dowl. P. C. 85; *Hunt's Bail,* 4 Dowl. P. C. 272; *Stevens* v. *Miller,* 2 M. & W. 368; *Miller's Bail,* 5 Dowl. P. C. 602; *Edmunds* v. *Keats,* 6 Dowl. P. C. 359; and as to the effect of non-compliance: see *Hutchinson's Bail,* 1 Dowl. P. C. 571; *Simpson's Bail, Ib.* 605; *Rogers* v. *Jones, Ib.* 704; *Thompson's Bail,* 2 Dowl. P. C. 50; *Worlison's Bail, Ib.* 53; *Harrison's Bail, Ib.* 198; *Naylor's Bail,* 3 Dowl. P. C. 452; *Penson's Bail,* 4 Dowl. P. C. 627; *Carter's Bail,* 5 Dowl. P. C. 577; *Edmunds* v. *Keats,* 6 Dowl. P. C. 359; *Weller's Bail, Ib.* 312; see also R. G. pr. 84. It is not a sufficient ground to reject one of two bail as insufficient that one of his creditors agreed to compound for his debt for two shillings in the pound: *Daniell* v. *James,* 2 Prac. R. 195. The inquiry must be as to the sufficiency of property of and not as to the character of the proposed bail, whether brothel house keepers, &c.: see *Gouge's Bail,* 3 Dowl. 320; *Anon.* 1 Dowl. 160; *Hatfield's Bail,* 2 Chit. Rep. 98.

(*u*) In a case where the deponent stated that he was not bail for "any," omitting "defendant," the affidavit was still held sufficient: *Smith's Bail,* 1 Dowl. P. C. 514.

(*v*) The form of affidavit in the Eng. R. G. No. 98, here goes on to specify the property upon which the bail justify; thus, "that deponent's property to the amount of, &c. consists of," &c.: see *Anon.* 1 Dowl. P. C. 159; *Lanyon's Bail,* 3 Dowl. P. C. 85; *Cooper's Bail, Ib.* 692; *Pierpoint* v. *Brewer,* 3 D. & L. 487.

(*w*) The affidavit of justification cannot be sworn before defendant's attorney: *Koyle* v. *Wilcox,* 2 O.S. 113.

(*x*) In every affidavit made by two or more deponents, the names of the several persons making such affidavit must be written in the jurat: R. G. pr. 110.



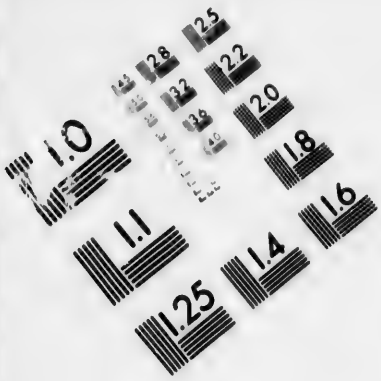
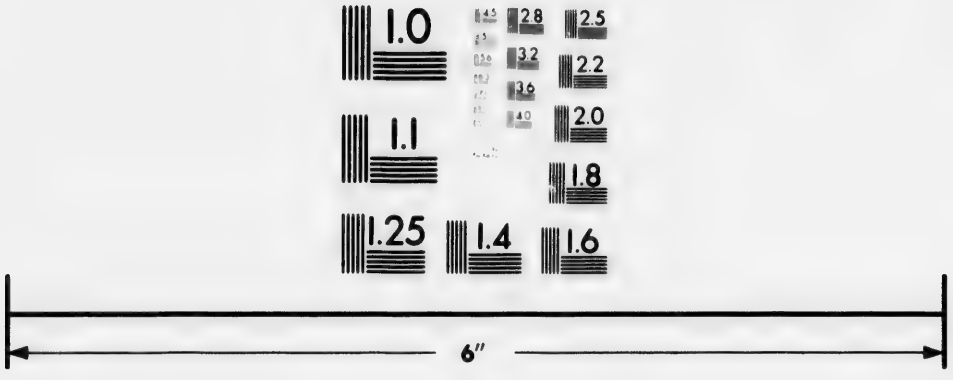
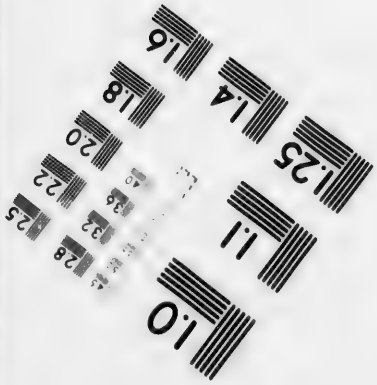
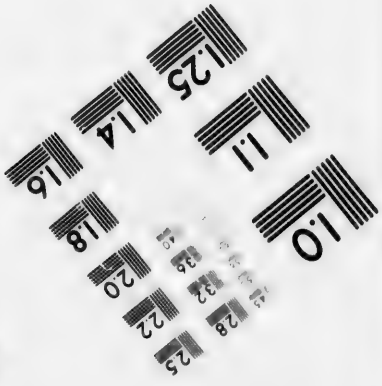




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82. (*y*) **If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made,** (*z*) **the recognizance of such bail may be taken out of court without other justification than such affidavit.** (*a*)

83. (*b*) **Where notice of bail shall not be accompanied by such affidavit,** (*c*) **the plaintiff may except thereto within twenty days next after the putting in of such bail,** (*d*) **and notice thereof** (*e*) **given in writing to the plaintiff or his attorney,** (*f*) **or where special bail is put in before any commissioner,** (*g*) **the plaintiff may except thereto within twenty days next after the bail piece is filed** (*h*) **in the proper**

(*y*) Taken from Eng. R. G. No. 99 of H. T. 1853, the origin of which was R. G. No. 4 of T. 1 Wm. IV: Jervis N. R. 42.

(*z*) Where bail to the sheriff became bail to the action, the plaintiff may except, though he has taken an assignment of the bail bond: R. G. pr. 70. If the plaintiff do not except to the bail in proper time he waives all objections to the regularity of the proceedings: *Bell* v. *Gate*, 1 Taunt. 162.

(*a*) This rule does not apply where the bail must have justified without exception had the rule not been made: *Webb's Bail*, 1 Dowl. P. C. 446; *Rex* v. *Wilson et al*, 3 Dowl. P. C. 255; *Rex* v. *The Sheriff of Middlesex*, 4 M. & W. 529. In the case of added bail no exception is necessary: *Gregory* v. *Gurdon*, Barnes, 74; nor where bail has been put in after the proper time: *Turner* v. *Cary*, 7 East. 607; *Nunn* v. *Rogers*, 2 Chit. Rep. 108.

(*b*) Taken from Eng. R. G. No. 100, the origin of which is R. B. R. of M. T. 3 Ann: 1 Salk. 98.

(*c*) *i.e.* Affidavit of justification: see R. G. pr. 81.

(*d*) When the last of the twenty days happens on a Sunday the exception may be regularly made on the following Monday: *Oldham et al* v. *Burrell*, 7 T. R. 26.

(*e*) *And* notice thereof, &c." Entering an exception without serving a corresponding notice is nugatory: *Satchwell* v. *Lawes*, Barnes, 88; *Goswell* v. *Hunt*, *Ib.* 101. The notice is usually served immediately after the entry of the exception: *Oldham et al* v. *Burrell*, 7 T. R. 26.

(*f*) The notice of exception must not only be in writing: *Cohn* v. *Davis*, 1 H. Bl. 80, but be correctly intitled both as to the Court and the name of the cause: *Anon.* 1 Chit. Rep. 374; see also *Harvey et al* v. *Morgan et al*, 2 Stark, 17. Where a notice of exception was entitled "in the Lord Mayor's Court" instead of "in the King's Bench," it was considered a nullity: *Anon.* 1 Chit. Rep. 374. So a notice of exception not intitled in any cause is a nullity: *Rex* v. *Sheriff of Middlesex*, *Ib.* 742. The circumstance of a notice not so intitled being delivered with the declaration will not aid the omission: *Ib.* And per Abbott, C. J., "The notice of exception must be a perfect instrument in itself, and the mere delivery of a notice not intituled in any cause with a declaration is not sufficient. We ought not to encourage a plaintiff under these circumstances, because the step he takes almost inevitably leads to some application to the Court."

(*g*) See note *q* to section 34 C. L. P. Act.

(*h*) See note *d*, *supra*.

office, (*i*) and notice thereof given as aforesaid; (*j*) and no exception to bail shall be admitted after the time hereinbefore limited. (*k*)

84. (*b*) Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts and over and above every other sum for which he is then bail, (*c*) except when the sum sworn to exceeds one thousand pounds, when it shall be sufficient for the bail to justify in one thousand pounds beyond the sum sworn to. (*d*)

85. (*e*) It shall be sufficient in all cases if notice of justification of bail be given two days before the time of justification. (*f*)

86. (*g*) In all cases, bail to the action shall be justified, when required, within four days after exception, before a Judge at Chambers, both in term and vacation. (*h*)

(*i*) *i.e.* Pursuant to R. G. pr. 80.

(*j*) See notes *e* and *f*, *ante*.

(*k*) See *Bologne* v. *Vautrin*, 2 Cowp. 828; *Huggins* v. *Bambridge*, Barnes, 81; *Fenton* v. *Ruggles*, 1 B. & P. 356; *Rex* v. *Sheriff of Surrey*, 2 East. 181; *Bell* v. *Gate*, 1 Taunt. 162; *Wallace* v. *Arrowsmith*, 2 B. & P. 49.

(*b*) Taken from Eng. R. G. No. 101 of H. T. 1853, the origin of which was Eng. R. G. No. 19 of H. T. 2 Wm. IV.: Jervis N. R. 63.

(*c*) See form to R. G. pr. 81.

(*d*) If the affidavit be insufficient the bail may justify in person: *Shave* v. *Spode*, 2 M. & W. 42; but in such a case the defendant will not be entitled to the costs of justification: *Stevens* v. *Miller*, *Ib.* 368. If the sum for which the bail is required be very large, the Judge has a discretion to admit more than two bail: R. G. pr. 75.

(*e*) Taken from Eng. R. G. No. 102 of H. T. 1853, the origin of which was Eng. R. G. No. 16 of H. T. 2 Wm. IV.: Jervis N. R. 63.

(*f*) The notice ought in strictness to be served personally upon plaintiff's attorney, or on some clerk or servant in his office: *Saunder's Bail*, 1 Chit. Rep. 77; *Fowler's Bail*, *Ib.* 78. Depositing it in a letter box is unavailable: *Ib.*; unless the receipt of it be at a subsequent period: *Saunder's Bail*, *Ib.* 77; *Jameson's Bail*, *Ib.* 100; *Jones' Bail*, *Ib.* 294; distinctly acknowledged by the attorney or some authorized clerk: *Ib.*; see also *Bailey* v. *Davy*, *Ib.* 77, n. *b*; *Arrowsmith* v. *Ingle*, 3 Taunt. 284. The notice is as between the parties a waiver of any irregularity in the notice of exception: *Cohn* v. *Davis*, 1 H. Bl. 80; though it would not be a waiver with respect to the sheriff to prevent him from objecting to the irregularity when ruled to bring in the body: *Rogers* v. *Mapleback*, *Ib.* 106.

(*g*) Taken from Eng. R.G. No. 103 of H.T. 1853, the origin of which was Eng. R. G. No. 17 of H. T. 2 Wm. IV.: Jervis N. R. 63; and Eng. R. G. 1 Vic.: *Ib.* 153.

(*h*) If one of the bail, from sudden illness or other unforeseen casualty, be unable to attend, it seems that the time may be extended: *Gillbank's Bail*, 9 D. & R. 6; *Gwillim* v. *Howes*, 2 Chit. Rep. 107. A summons for the purpose

87. (*i*) Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance. (*j*)

88. (*k*) When the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, (*l*) but not at any later period, (*m*) and upon notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only. (*n*)

89. (*o*) Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance. (*p*)

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may be obtained, and when obtained should contain a stay of proceedings: *Ib.* When an order is obtained it should be served with a new notice of justification: *Newton's Bail*, 4 Dowl. P. C. 270. It sometimes happens that extended time is granted at the time of justification, owing to defects in the affidavit or notice: *Drabble* v. *Denham*, 2 Chit. Rep. 92. If one judge in chambers grant an order, another will not interfere: *Tomlinson* v. *Harvey*, *Ib.* 83. When an order is issued the bail must justify, though no exception be entered by plaintiff: *Turner* v. *Cary*, 7 East. 607; *Nunn* v. *Rogers*, 2 Chit. Rep. 108; *Rex* v. *Wilson et al*, 3 Dowl. P. C. 255.

(*i*) Taken from Eng. R. G. No. 104 of H. T. 1853, the origin of which was Eng. R. G. No. 20 of H. T. 2 Wm. IV.: Jervis N. R. 63.

(*j*) This was always the practice in the English court of Queen's Bench: *Rex* v. *The Sheriff of Essex*, 5 T. R. 633; see also 1 Chit. Rep. 446, n. *a*; from which our practice was adopted. Bail may render without justifying: *Wiggins* v. *Stephens*, 5 East. 533; and if one of the bail only justify, the other may render: *Anon.* 1 P. & B. N. R. 138, n. Before render can be made special bail must be put in, either by the defendant, the sheriff, or the bail below: *Bercher* v. *Colson*, 2 Str. 876; *Taylor* v. *Evans*, 1 Bing. 367; *Hodgson et al* v. *Mee*, 3 A. & E. 765.

(*k*) Taken from Eng. R. G. No. 108 of H. T. 1853, the origin of which was Eng. R. G. No. 3 of T. T. 3 Wm. IV.: Jervis N. R. 104.

(*l*) Intervening Sundays are to be counted: *Creswell* v. *Green*, 14 East. 537.

(*m*) No render can be allowed at a subsequent period: *Bird* v. *Atkins et al*, 7 Dowl. P. C. 769; *McPherson et al* v. *Bail of Mosier*, 2 O. S. 491. As to the sufficiency of the render: see *Read et al* v. *Scovill et al*, 16 U. C. Q. B. 453; *Arnold* v. *Andrews*, 8 U. C. C.P. 467; *Scatcherd* v. *Andrews*, *Ib.* 473; *Blackman* v. *O'Gorman*, 5 U. C. L. J. 161; *Kennedy et al* v. *Brodie*, 4 U. C. Q. B. 189.

(*n*) The payment of costs is a condition upon which the proceedings are stayed: *Horn* v. *Whitcombe*, 5 Dowl. P. C. 328; and if not paid plaintiff may go on with his action: *Ib.* See further, *Wright et al* v. *Tucker*, 6 U. C. Q. B. 24.

(*o*) Taken from Eng. R. G. No. 109 of H. T. 1853, the origin of which was Eng. R. G. No. 21 of H. T. 2 Wm. IV: Jervis N. R. 64.

(*p*) The meaning of the rule is that at the utmost bail are only liable for the sum mentioned in each of their recognizances, although the sum recovered with costs of suit amounts to more: *Vanzandau et al* v. *Nash*, 2 Dowl. P. C. 767; *Jonas et al* v. *Tepper et al*, 1 E. & E. 327.

90. (*q*) To entitle bail to a stay of proceedings pending a writ of error or appeal, the application must be made before the time to surrender is out. (*r*)

91. (*s*) Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the parties intended to justify, or some of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected. (*t*)

EJECTMENT.

92. (*v*) No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act, 1856, (*w*) together with the writ or a copy

(*q*) Taken from Eng. R. G. No. 110 of H. T. 1853, the origin of which was Reg. R. G. No. 84 of H. T. 2 Wm. IV: Jervis N. R. 83.

(*r*) The English court of King's Bench used, without regard to the time when the application was made, to stay proceedings against bail where a writ of error was allowed, before the expiration of the time allowed to render, until the determination of the writ of error, the bail undertaking to pay the condemnation money or render the principal within four days after the determination of the writ of error. The Common Pleas would not grant time to render; but merely to pay the money if the application were made after the time for rendering had expired: Tidd. Prac. 265; *Bennett* v. *Forester*, 2 Price, 296; *Edwards* v. *Jameson*, Forrest, 25; *Rolfe et al* v. *Cheetham*, Wightwick, 79.

(*s*) Taken from Eng. R. G. No. 111 of H. T. 1853, the origin of which was R. G. B. H. T. 1822.

(*t*) Where several notices of justification are vexatiously given, the court may compel defendant to pay the costs occasioned by them, though the bail do not appear to justify: *Aldiss* v. *Burgess*, 3 B. & Al. 759. And in some cases it is the duty of the defendant's attorney to see that bail attend pursuant to notice, or else himself be subjected to the costs: *Ib.*; see also *Blundell* v. *Blundell*, 5 B. & Al. 533.

(*v*) Taken from Eng. R. G. No. 112 of H. T. 1853. The object of the rule is to supply an omission in the Ejectment Act, which contains no provision requiring an affidavit of service of the writ of ejectment to be filed before signing judgment for non-appearance: see section 15, Ejectment Act.

(*w*) C. L. P. Act 1856, sec. 231, is now sec. 15 of the Ejectment Act. In many respects the affidavit required must resemble the affidavit formerly required as to service of the declaration in ejectment, when ejectment was commenced by a declaration, and not by a writ, as at present. This being the case, reference is made to some of the cases decided under the old practice. The affidavit may be sworn before a judge or commissioner not being an attorney in the cause: *Doe d. Walker* v. *Roe*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. "Ejectment,"

thereof, (*x*) where there is a limited defence, (*y*) or where personal service has not been effected, (*z*) without first obtaining a Judge's order or a rule of Court authorizing the signing such judgment; (*a*) which said rule or order, or a duplicate thereof, shall be filed together with the writ. (*b*)

93. (*c*) Where a person not named in the writ in ejectment has ob-

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iii. 9; and should be made by the person who effected the service, although in some cases the courts have been satisfied with the affidavits of persons who saw the service: *Goodtitle d. Wanklen* v. *Badtitle*, 2 B. & P. 120. The time of service should be made to appear on the face of the affidavit: *Doe d. Sherwood* v. *Roe*, 5 U.C. Q.B. 319; and the party served must be positively sworn to be the person in possession: *Doe d. Dunn* v. *Roe*, E. T. 2 Vic. *MS.* R. & H. Dig. "Ejectment," iii. 7; *Doe d. Dolby* v. *Hitchcock*, 2 Dowl. N.S. 1; and where it was so sworn, the court refused to set aside the service upon affidavits alleging the service to have been on a stranger: *Doe d. Dunlop* v. *Roe*, Tay. Rep. 480, *sed qu.* Where the affidavit is as to service on a person in possession of part of the premises, judgment may be signed as to that part: *Doe d. Davidson* v. *Roe*, M. T. 1 Vic. *MS.* R. & H. Dig. "Ejectment," iii. 6. If the affidavit be as to the service of two persons, tenants of different parts of the premises, a service on each of the persons must be distinctly alleged: *Doe d. Cock* v. *Roe*, 6 M. & G. 273. If the service were on the wife of the person in possession, it must be stated that the service was on the premises or at the husband's house: *Doe d. Morland* v. *Bayliss*, 6 T. R. 765; or that the husband and wife were at the time of service living together: *Jenny d. Preston et al* v. *Cutts*, 1 B. & P. N. R. 308; and the deponent's belief that the person served is the wife of such person: *Doe d. Sanderson* v. *Roe*, T. T. 2 & 3 Vic. *MS.* R. & A. Dig. "Ejectment," iii. 8. If the service be on a child, servant or other employee, it must generally be made to appear that the person in possession has since service acknowledged the service: see section 6 Ejectment Act, and notes thereto. The affidavit need not state that the copy served was endorsed with the name and residence of the attorney, nor that an endorsement of service was made on the writ within three days after service: *Martin* v. *McCharles*, 25 U. C. Q. B. 279.

(*x*) "And a copy thereof," &c., in Eng. R. G. No. 112 of H. T. 1853.

(*y*) The rule appears to be divided into two branches, the first making provision for cases where the writ has been personally served, and there is no defence, in which cases judgment for non-appearance may be signed without leave; and the second, for cases in which there has not been personal service, or there is a limited defence, in which cases leave to sign judgment must be obtained.

(*z*) As to when personal service can be said to have been effected: see Ejectment Act, s. 6, and notes thereto.

(*a*) An application for a judge's order, &c., intends the exercise of a discretion by the judge to whom application is made. Such judge must be satisfied that the persons in possession have been notified, or facts must be adduced from which it is reasonable to infer the same.

(*b*) Where an order has been made ex parte without all the facts having been known or considered, it will be set aside: *VanNorman* v. *McLennan*, 2 U. C. L. J. N.S. 207.

(*c*) Taken from Eng. R. G. No. 113 of H. T. 1853.

tained leave of the Court or a Judge to appear and defend, (*d*) he shall enter an appearance according to the Common Law Procedure Act, 1856, entitled in the action against the party or parties named in the writ as defendant or defendants, (*e*) and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff, if he sues in person. (*f*)

94. (*g*) If the plaintiff in ejectment appears at the trial, and the defendant does not appear, (*h*) the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff without producing any evidence, (*i*) and the plaintiff shall have judgment for his costs of suit as in other cases. (*j*)

PENAL ACTIONS, COMPOUNDING OF. (*k*)

(*d*) *i. e.* Under section 9 of the Ejectment Act.

(*e*) As to what manner of persons though not named in the writ are entitled to apply for leave to amend: see note *o* to section 9 of the Ejectment Act.

(*f*) It is necessary in such cases not only to *enter* an appearance in the manner prescribed, but forthwith to *give notice* thereof. This is a convenient practice, where a stranger to the writ is admitted to defend. It is not declared, as in section 51 C. L. P. Act, that a defendant appearing after the time limited for appearance shall give notice of his appearance. The want of such a provision may in some cases lead to difficulty: see *Van Norman* v. *McLennan*, 2 U. C. L. J. N.S. 207.

(*g*) Taken from Eng. R. G. No. 114 of H. T. 1853.

(*h*) *i. e.* Any person who having lawfully appeared to the writ and made himself a defendant.

(*i*) This is in effect the same as judgment for not confessing lease, entry, and ouster, when ejectment was a fictitious form of action. The rule under consideration is substantially the same as section 24 of the Ejectment Act, which provides that "if claimant appear (*i. e.* at the trial) and the defendant does not appear, the claimant shall be entitled to recover without any proof of his title."

(*j*) On the other hand, if the defendant appear at the trial and the claimant do not, the claimant shall be nonsuited: section 24 of the Ejectment Act, and defendant be entitled to judgment for costs of suit: R. G. pl. 24.

(*k*) In ordinary actions, the parties thereto being the only persons directly interested, may compromise at such time and upon such terms as they see fit; but in penal actions the public, and the crown representing the public, being interested, no compromise can be made without the leave of the court: 18 Eliz. cap. 5, s. 3. The statute of Elizabeth is in force in this Province: *Bleeker* v. *Meyers*, 6 U. C. Q. B. 134. It extends to suits by common informers, but not to those by parties aggrieved: *Kirkham* v. *Wheeley*, 1 Salk. 30. Where it clearly appears on the face of the declaration that the consideration of the defendant's promise is the compromise, without the leave of the court, of a penal action brought by the plaintiff as a common informer against the defendants, the consideration will be held illegal, and the declaration bad; *Hart* v. *Meyers*, 7 U. C. Q. B. 416.

95. (*l*) Leave to compound a penal action (*m*) shall not be given in cases where part of the penalty goes to the Crown, (*n*) unless notice shall have been given to the proper officer, (*o*) but in other cases it may. (*p*)

96. (*q*) The rule for compounding any *qui tam* action (*r*) shall express therein that the defendant thereby undertakes to pay the sum for which the Court has given him leave to compound such action. (*s*)

97. (*t*) When leave is given to compound a penal action, the Queen's proportion of the composition shall be paid into the hands of the Clerk of the Crown of the Court granting such leave, for the use of Her Majesty. (*u*)

(*l*) Taken from Eng. R. G. No. 118 of H. T. 1853, the origin of which was Eng. R. G. No. 99 of H. T. 2 Wm. IV.: Jervis N. R. 88.

(*m*) The leave cannot be obtained until after plea pleaded: *Rex* v. *Collier*, 2 Dowl. P. C. 581; see also *Rex* v. *Crisp et al*, 1 B. & Al. 282. It is discretionary with the court to grant or refuse it: *Maughan q. t.* v. *Walker*, 5 T. R. 98; *Sheldon* v. *Mumford*, 5 Taunt. 268. Where the sum agreed to be paid is so small as to appear manifestly collusive, the court will refuse: *Wood q. t.* v. *Cassin*, 2 W. Bl. 1157. The motion may be made and leave granted after verdict: *Maughan q. t.* v. *Walker*, 5 T. R. 98; or when defendant is in execution: *Bradshaw* v. *Mottram*, 1 Str. 167; but in such cases the defendant must show circumstances that entitle him to the indulgence, or the court will refuse: *Crowder* v. *Wagstaff*, 1 B. & P. 18.

(*n*) Leave was given to compromise a penal action on the statute 32 Hen. VIII. cap. 3, for buying pretended titles, the crown's share being paid into court: *Gray q. t.* v. *Dettrick*, H. T. 6 Wm. IV. *MS.* R. & H. Dig. "Penal Action," 2. In a *qui tam* action to recover penalties under the English statute 6 Geo. IV. cap. 114, which gives the penalty one-third to the king, one-third to the lieutenant-governor, and one-third to the informer, the court refused to arrest judgment on the ground that the plaintiff claimed the penalty for himself and the king only: *Jones q. t.* v. *Chace*, Dra. Rep. 334.

(*o*) The "proper officer" is the attorney-general: *Howard q. t.* v. *Sowerby*, 1 Taunt. 103.

(*p*) It is provided that leave shall not be given *in cases where part of the penalty goes to the crown*, unless notice, &c. but *in other cases* it may. The meaning is, that in cases other than those specified the leave may be obtained without showing notice, &c.

(*q*) Taken from Eng. R. G. No. 119 of H. T. 1853, the origin of which was Eng. R. G. No. 2 of E. T. 33 Geo. III.

(*r*) *Qui tam action.* From the words in the old form, it is so called because a moiety of the penalty is generally forfeitable to the crown and the other is given to the informer, "QUI TAM *pro domino rege quam pro seipso sequitur.*"

(*s*) The payment may after such an undertaking be enforced by attachment: *Rex q. t.* v. *Clifton*, 5 T. R. 257.

(*t*) Taken from Eng. R. G. No. 120 of H. T. 1853, the origin of which was Eng. R. G. of M. T. 7 Geo. III.: *Brown q. t.* v. *Bailey*, 4 Burr. 1929.

(*u*) The Queen's Bench and Common Pleas have concurrent jurisdiction.

PRISONERS, AND PROCEEDINGS AGAINST THEM.

98. (*w*) Every rule or order of a Judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, (*x*) shall also direct a *supersedeas* to issue forthwith. (*y*)

99. (*z*) The plaintiff shall proceed to trial or final judgment (*a*) against a prisoner (*b*) in the term next after issue is joined, or at the sittings or assizes next after such term, (*c*) unless the Court or a Judge shall otherwise order, (*d*) and shall cause the defendant to be charged in execution within the term next after such trial or judgment. (*e*)

(*w*) Taken from Eng. R. G. No. 123 of H. T. 1853, the origin of which was Eng. R. C. P. H. T. 1 Vic.: 4 Bing. N. C. 366.

(*x*) "Put in" and "perfected." These words refer to separate and distinct steps, each of which is explained in note *q* to section 34 C. L. P. Act.

(*y*) Where a prisoner is supersedable, he should take advantage of it in due time. Though there is a rule that a prisoner once supersedable is always supersedable, it only holds good so long as the prisoner remains in custody under the same process: *London Assurance Co.* v. *Perkins*, 1 T. R. 591 n.

(*z*) Taken from Eng. R. G. No. 126 of H. T. 1853, the origin of which was Eng. R. G. No. 85 of H. T. 2 Wm. IV.; Jervis N. R. 84.

(*a*) "Trial or final judgment." The words "final judgment" as contradistinguished from the word "trial" mean a final after an interlocutory judgment: see *Heaton* v. *Whittaker*, 4 East. 349; *Foulkes* v. *Burgess*, 6 Dowl. P. C. 109; *Baxter* v. *Bailey*, 8 M. & W. 415. Where a defendant was arrested on a *capias* under the Eng. Stat. 1 & 2 Vic. cap. 110, and judgment was signed for want of a plea, such judgment was held to be final within the meaning of the English rule of William, though no costs were taxed: *Walter* v. *De Richemont*, 6 Q. B. 544.

(*b*) This rule does not apply to prisoners in criminal custody, nor to prisoners on bail: *Brash* v. *Latta*, 5 U. C. L. J. 226; *Curry* v. *Turner*, 9 U. C. L. J. 211.

(*c*) Where a cause though entered for trial within the time prescribed by the rule of Wm. IV. was not tried owing to the amount of business to be transacted at the Court, the delay being the delay of the Court, plaintiff was held sufficiently to have complied with the rule: *Myers* v. *Cooper*, 2 Dowl. P. C. 423.

(*d*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

(*e*) A plaintiff need not charge a defendant in execution until he has been in custody for the prescribe period at his suit: *Hall* v. *Wetherell*, 2 Scott, N. R. 196. The time is calculated from the signing of judgment: *Colbron* v. *Hall*, 5 Dowl. P. C. 534; and if judgment be signed in term or vacation, plaintiff must in either case charge defendant in execution in the following term: *Thorn* v. *Leslie*, 8 A. & E. 195; *Borer* v. *Baker*, 2 Dowl. P. C. 608; *Baxter* v. *Bailey*, 8 M. & W. 415. Upon an affidavit of defendant that he was sued as indorser of a promissory note, arrested and in close custody, that the cause was tried at, &c., on, &c., and that although more than a term had elapsed since said trial, plaintiff had not entered up judgment or charged defendant in execution, a summons for a *supersedeas* was made absolute, no cause to the contrary having been shown: *Wright et al* v. *Hull*, 3 U. C. L. J. 68, *per* Richards, J.; see further, C. L. P. Act, section 248 and notes thereto.

100. (*f*) In all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias*, or being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, (*g*) the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, (*h*) otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering a common appearance, (*i*) unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge. (*j*)

SHERIFFS, RULES TO RETURN WRITS, &c. (*k*)

101. (*l*) All rules upon sheriffs to return writs, or to bring in the

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(*f*) Taken from our Rule No. 3 of E. T. 5 Vic.: Cam. R. 18.

(*g*) The object of this rule is to hasten proceedings against prisoners in gaol: see *Glenn* v. *Box*, 3 U. C. Q. B. 182. Therefore if defendant be out on bail, plaintiff is not bound to declare against the defendant before the end of the term next after the arrest or detainer, &c.: *Ib.*

(*h*) "*Shall* declare, &c." Though section 32 C. L. P. Act reads "*may* before the end of the next term after the arrest, &c.," "may" should be construed "shall:" *Tyson* v. *McLean*, 1 Prac. R. 339. The declaration must be served as well as filed so as to "declare" within the meaning of the rule: *Ib.* The fact that defendant had during the term made application for his discharge from custody, which application was refused before the end of the term, is no excuse for not declaring during the term: *Glennie* v. *Ross*, 10 U. C. L. J. 105.

(*i*) Upon an affidavit of a defendant that he was in close custody on a writ of *capias* issued, &c., that although two terms had elapsed since said arrest, plaintiff had not declared, a summons for the prisoner's discharge, was made absolute upon entering a common appearance: *Bamberg* v. *Solomon*, 3 U C. L J. 69. If defendant be supersedable because plaintiff has not declared, subsequent offers of settlement cannot interfere with his discharge: see *Tyson* v. *McLean*, 1 Prac. R. 339.

(*j*) *Court or judge.* Relative powers: see note *w* to section 48 of C. L. P. Act.

(*k*) The sheriff as the chief ministerial officer of the courts has the execution of all writs of final process. The command in each writ is to execute the same, and at a fixed time or "immediately after the execution thereof" to make a return to the court. If the sheriff do not return the process within the time limited by the practice of the court plaintiff has a right to call upon him by rule to know why the return is not made as directed. The sheriff failing to show good cause brings himself into comtempt and is liable to attachment. And a sheriff may be called upon to return process not only at the instance of plaintiff but at the instance of defendant, if able to show special grounds for the same: *Williams* v. *Webb*, 2 Dowl. N.S. 904; *Daniels* v. *Gomperts*, 3 Q. B. 322.

(*l*) This rule appears to be original.

bodies of defendants, shall be six day rules, (*m*) and shall be issued from the same office whence the writ was sued out. (*n*)

102. (*o*) No Judge's order shall issue for the return of any writ or to bring in the body of the defendant, but a side bar rule shall issue for that purpose in vacation as in term, (*p*) which shall be of the same force and effect as side bar rules made for that purpose in term. (*q*)

103. (*r*) The sheriff shall file the writ in the office from which the rule to return the same was issued, (*s*) at the expiration of the rule, or as soon after as the office shall be open, (*t*) and the officer with whom it is filed shall endorse the day and hour when it was filed. (*u*)

104. (*v*) In case a rule to bring in the body of a defendant shall expire in vacation, having been duly served, (*w*) but not having

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(*m*) This has always been the practice in Upper Canada: see *Hilton et al* v. *Macdonell*, 1 Cham. R. 207. As to the computation of time: see *Regina* v. *Jarvis*, 3 U. C. Q. B. 125. The time may be enlarged beyond the six days: *Jones* v. *Robinson*, 2 Dowl N S. 1044; see further note *s* to section 276 of C. L. P. Act.

(*n*) Every deputy clerk of the crown and pleas may sign and issue rules on the sheriff or coroner to return writs and process issued out of the office of such deputy: C. L. P. Act, section 275. And it is the duty of each sheriff and coroner to return such writs to the office from which such rule issued: *Ib.*

(*o*) Taken from Eng. R. G. No. 132 of H. T. 1853, the origin of which was Eng. R. G. of H. T. 1 Vic.: Jervis, N. R. 153.

(*p*) Formerly in vacation a party might obtain a judge's order instead of the rule here mentioned.

(*q*) A sheriff cannot be ruled by the plaintiff to return a writ when it has been executed by a special bailiff duly appointed by such plaintiff or his agent: *Hamilton* v. *Dalziel*, 2 W. Bl. 952; *Pallister* v. *Pallister*, 1 Chit. R. 614 n.; or where there has been collusion between the sheriff's officer and plaintiff or his attorney: *Ruston* v. *Hatfield*, 3 B. & Al. 204; or where the action or return of the writ has been compromised: *Hedges* v. *Jordan*, 5 Dowl. P. C. 6; or where the writ is a nullity: *Brown* v. *McMillan*, 7 M. & W. 198; but not so however if only an irregularity: *Jones* v. *Williams et al*, 8 M. & W. 357.

(*r*) Taken from Eng. R. G. No. 131 of H. T. 1853, the origin of which was Eng. R. G. Nos. 11 and 12 of H. T. 2 Wm. IV: Jervis, N. R. 61, 62.

(*s*) See C. L. P. Act, section 280, and notes thereto.

(*t*) See R. G. pr. 101.

(*u*) Where the writ was enclosed to the clerk of the crown three or four days before the expiration of the rule, so that it was not on the files when the search was made, but was produced in open court by the clerk, an attachment was refused though asked for the purpose of making the sheriff pay the costs: *Andrews* v. *Robertson et al*, 3 O. S. 304.

(*v*) Taken from Eng. R. G. No. 133 of H. T. 1853, the origin of which was Eng. R. G. of H. T. 3 Wm. IV: Jervis, N. R. 103.

(*w*) *i. e.* Personally served.

been obeyed, (*x*) an attachment shall issue for disobedience of such rule, whether the rule shall or shall not have been obeyed in the meantime. (*y*)

105. (*z*) Where any sheriff, before his going out of office, shall arrest any defendant and take a bail bond and make return of *cepi corpus*, he shall and may, within the time allowed by law, (*a*) be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. (*b*)

IRREGULARITY. (*c*)

106. (*d*) No application to set aside process or proceedings, (*e*) for irregularity shall be allowed, unless made within a reasonable time, (*f*)

(*x*) The sheriff to obey the rule must within the time limited bring the defendant into court either by having him in legal custody or by causing him to put in and perfect special bail. It is not enough to render the defendant or put in and perfect special bail afterwards, though before motion for attachment: R. G. pr. 74.

(*y*) Before the passing of Provincial statute 7 Vic. cap. 33, it was held that a judge in chambers had no power to issue an attachment against a sheriff for disobedience of a rule or order for the return of a writ: *Rex* v. *The Sheriff of Niagara*, Dra. Rep. 343. Even since the statute, it has been doubted whether a single judge has power to pass judgment on a sheriff for contempt, when the object of the statute has been attained by the return of the process: *Regina* v. *Jarvis*, 6 U. C. Q. B. 558; see further C. L. P. Act, ss. 280, 281, and notes thereto, both of which sections are taken from sections 1 and 2 of the 7 Vic. cap. 33. As to the time to move for an attachment after a rule to bring in the body: see *Rex* v. *The Sheriff of Middlesex*, 8 T. R. 464; *Rex* v. *The Sheriff of Surrey*, 11 East. 591; *Rex* v. *The Sheriff of Middlesex*, 1 Dowl. P. C. 53.

(*z*) Taken from Eng. R. G. No. 134 of H. T. 1853.

(*a*) The rule cannot issue earlier than the day on which the writ is returnable, nor before the time for putting in bail has expired: *Pouchee* v. *Lieven*, 4 M. & S. 427; *Potter* v. *Marsden*, 3 East. 525; *Hutchins* v. *Hird*, 5 T. R. 479.

(*b*) The rule should be served within a reasonable time: *Davis* v. *Allen*, 1 Dowl. P. C. 53.

(*c*) An irregularity is defined as the want of adherence to some prescribed rule or mode of proceeding: see note *u* to section 48 of C. L. P. Act.

(*d*) Taken from R. G. No. 135 of H. T. 1853, the origin of which was Eng. R. G. No. 33 of H. T. 2 Wm. IV.: Jervis, N. R. 67; with which our rule No. 22 of H. T. 13 Vic. corresponded.

(*e*) This rule applies in the case of prisoners as well as in other cases: *Claridge* v. *Mackenzie*, 5 M. & G. 251. The first irregular proceeding must be attacked in the motion: *Cingmars et al* v. *The Equitable Fire Insurance Co.*, 2 Prac. R. 207.

(*f*) The time begins to run from the time when the party complaining had the means of knowledge, though in fact he did not know of the irregularity till afterwards: *Tarber* v. *French*, 5 N. & M. 658; *Brooks et al* v. *Hodgson*, 7 M. & G. 529; *Bate* v. *Lawrence*, *Ib.* 405; *Ramme* v. *Duncombe*, *Ib.* 425; *Lewis* v. *Davison*,

nor if the party applying has taken a fresh step after knowledge of the irregularity. (*g*)

107. (*h*) Where a summons is obtained to set aside proceedings for irregularity, (*i*) the several objections intended to be insisted on shall be stated therein. (*j*)

108. (*k*) In all cases where a rule is obtained to show cause why

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1 C. M. & R. 655; *Seymour* v. *Maddox*, 1 L. M. & P. 543; *Roberts et al* v. *Fox et al*, 1 Cham. R. 146. An irregularity in a writ of summons should be complained of before the time for entering an appearance has expired: *Chubb* v. *Nicholson*, 1 H. & W. 666; *Tyler* v. *Green*, 3 Dowl P. C. 439; *Hinton* v. *Stevens*, 4 Dowl. P. C 283; *Edwards* v. *Collins*, 5 Dowl. P. C. 227; *Child* v. *Marsh*, 3 M. & W. 433. So in an affidavit to hold to bail or capias, before the time for putting in bail has expired: *Tucker* v *Colegate*, 1 Dowl P. C. 574; *Firley* v. *Rallett*, 2 Dowl. P. C. 708, *Johnson* v. *Kennedy*, 4 Dowl. P C. 345; *Fowell et al* v. *Petre*, 5 Dowl P. C. 276; *Foote* v. *Dick*, 1 H & W. 207; in the declaration before the expiration of the time for pleading: *Hinton* v. *Stevens*, 4 Dowl. P. C. 283; *Golding* v. *Scarborough*, 2 H. & W. 94; *Ramme* v. *Duncombe*, 7 M. & G. 425; *Cooper* v *Watson*, 5 Prac. R. 30: in the plea on the ground of its not being issuable before obtaining time to reply: *Trott* v. *Smith*, 9 M & W. 765; in an issue book promptly: *McBean* v. *Duffy*, 4 Prac R 338: in an interlocutory judgment, within a reasonable time after defendant has notice of it; and *qu.* if not now within a reasonable time after its entry? see *Lewis* v. *Browne*, 3 Dowl. P. C 700; *Roberts* v. *Cuttill*, 4 Dowl P. C. 204; *Grant* v. *Flower*, 5 Dowl. P. C. 419; see also *Scott* v. *Cogger*, 3 Dowl. P. C. 212; *Hill* v. *Mills*, 2 Dowl. P. C. 696; *Bate* v. *Lawrence*, 7 M. & G. 405; *McKenzie et al* v. *McNaughton*, 3 Prac R 35; *Herr* v. *Douglass*, 4 Prac. R. 102. In an application to set aside a final judgment, signed on a writ not specially indorsed, or so indorsed improperly, on the ground that the judgment should have been interlocutory, plaintiff should produce the writ or copy shewing that it was not so indorsed, or that it was not a proper case for special endorsement: *Kerr et al* v. *Bowie*, 3 U. C. L. J. 150.

(*g*) The application must in all cases be made before the applicant takes a fresh step, even though that step be irregular: *Rutty* v. *Arbur*, 2 Dowl. P. C. 36; *Smith* v. *Clarke*, *Ib.* 218; *Flynn* v. *Kemp*, *Ib.* 620; *Doe d. McLean* v. *McDonald*, 3 U. C. Q. B. 126; *Proctor* v. *Young*, H. T. 4 Vic. *MS.* R. & H. Dig. "Irregularity," 15.

(*h*) Taken from Eng. R. G. No. 136 of H. T. 1853.

(*i*) It has been held not to be necessary in a rule *nisi* to set aside proceedings for irregularity to specify the grounds of irregularity on which the party relies: *Rennie* v. *Bruce*, 2 D. & L. 946.

(*j*) Irregularities in technical applications, where there are no merits, cannot in general be remedied: *Woolly* v. *Tweedle*, 3 U. C. L. J. 185. An enlargement of a summons for the purpose of remedying them will not in general be granted: *Ib.* Writ of summons in Common Pleas: *T. H B Purdy* v. *Rowlands*; declaration by mistake in the Queen's Bench: *J. T. H. Purdy* v. *Rowlands*; motion to set aside declaration for irregularity properly made on affidavits entitled in the latter court: *Purdy* v. *Rowlands*, 4 Prac. R. 308.

(*k*) Taken from Eng. R. G. No. 137 of H. T. 1853, the origin of which was R. K. B. 37 Geo. III.: 7 T. R. 82.

proceedings should not be set aside for irregularity with costs, (*l*) and such rule is afterwards discharged generally without any special direction upon the matter of costs, it is to be understood as discharged with costs. (*m*)

AFFIDAVITS.

109. (*o*) The addition and true place of abode of every person making an affidavit shall be inserted therein. (*p*)

(*l*) A judge in chambers has the same power to grant or refuse costs as the court: *Davy* v. *Brown*, 1 Scott, 384; *Doe d. Prescott* v. *Roe*, 1 Dowl. P. C. 274. If costs be asked and the rule be made absolute, it is usually made absolute with costs: *Tilley* v. *Henly*, 1 Chit. R. 136; *Edwards* v. *Danks*, 4 Dowl. P. C. 357. If not so asked, it is made absolute with or without costs, in the discretion of the court or judge, but generally without costs: *Duncombe* v. *Crisp*, 2 Dowl. P. C. 5; *Ex parte Morrison*, 8 Dowl. P. C. 94. If made absolute with costs they are payable alone to the person who obtains the rule, though one of several defendants: *Showler* v. *Stoakes et al*, 2 D. & L. 2.

(*m*) If a rule is discharged on a preliminary objection, such as an error in the intitutling of an affidavit or defect in the jurat, it is not usual to give costs: *Hughes* v. *Hamilton et al*, 2 U. C. Q. B. 172; *Duke of Brunswick* v. *Sloman et al*, 8 C. B. 617; but see *Blackwell* v. *Allen*, 7 M. & W. 146; *Frost* v. *Hayward*, 10 M. & W. 673; *Cobbett* v. *Oldfield*, 16 M. & W. 469; *In re Robertson et al*, 5 Prac R. 132 Where a rule or summons is moved with costs, when discharged it is usually discharged with costs: *Willis* v. *Ball*, 1 Dowl. N.S. 303; *Becket* v. *Durand*, 6 U. C. L. J. 15. If too much be asked for, the rule or summons may be made absolute as to part without costs: *Patterson and the Corporation of Grey*, 18 U. C. Q. B. 189. If the point be new, the application may be refused without costs: *Boulton* v. *Ruttan*, 7 U. C. L. J. 151. Where the party complaining of an irregularity himself committed the first error, no costs will be given: *Ross* v. *Fraser*, 6 U. C. L. J. 282. Costs not given unless asked for: *In re Marriott* v. *The London and South Western Railway Co.* 1 C. B. N.S. 499; and not allowed on an *ex parte* application: *Nokes* v. *Gibbon*, 3 Jur. N.S. 282; or where cause shown in the first instance: *Harvey* v. *Divers*, 16 C. B. 497. So if each party fail on a material part of the application: *Sullivan* v. *King*, 24 U. C. Q. B. 161. Where the court is equally divided, costs not allowed: *Archer* v. *James et al*, 2 B. & S. 61. A judge in chambers may himself fix the amount of costs: *Collins* v. *Aaron*, 6 Dowl. P. C. 423. There can be no appeal on the decision of a judge as to costs: *Forster* v. *Forster et al*, 8 L. T. N.S. 661.

(*o*) Taken from Eng. R. G. No. 138 of H. T. 1853, the origin of which was Eng. R. G. No. 5 of H. T. 2 Wm. IV. Jervis N. R. 58, with which our Rules of T. T. 3 & 4 Wm. IV. and E. T. 4 Wm. IV. Cam. R. 1, in part corresponded. "The new rule is precisely similar to the old one:" *In re Philp*, 21 L. T. Rep. 170, *per* Wightman, J. It was decided under the old rule that if deponent described himself as "defendant," he need not also give his addition and place of abode: *Poole* v. *Pembrey et ux.* 1 Dowl. P. C. 693; *Jackson* v. *Chard*, 2 Dowl. P. C. 469; *Sharpe* v. *Johnson*, 4 Dowl. P. C. 324; *Brooks* v. *Farlar*, 5 Dowl. P. C. 361: *Lyman* v. *Brethron*, 2 Cham. R. 108; and it would seem that a similar construction would apply where the affidavit is made by a person describing himself as "plaintiff in the cause:" *Ewing et al* v. *Lockhart*, 3 U. C. Q. B. 248.

(*p*) The requirements of the rule are of two kinds—*addition* and *place of abode*.

1. *Addition* — The following have been held sufficient in England: — "Merchant:" *Vaissier* v. *Alderson*, 3 M. & S. 165; "late clerk to, &c.:" *Simpson* v.

110. (*q*) In every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat. (*r*)

Drummond, 2 Dowl. P. C. 473; "managing clerk to, &c.:" *Graves* v. *Browning*, 6 A. & E. 806; "agent and collector to the plaintiff, an hotel keeper:" *Short* v. *Campbell*, 3 Dowl. P. C. 487; "agent of the above named plaintiff:" *Luxford* v. *Groombridge*, 2 Dowl. N. S. 332; *Matthewson* v. *Baistow*, 3 D. & L. 327; "process server:" *Phillips* v. *Basford*, 4 Jur. 52. The following have been held insufficient — "Assessor:" *Nathan* v. *Cohen*, 3 Dowl. P. C. 370; "acting as managing clerk, &c.," or "articled clerk, &c.," without saying to whom or in whose office: *Regina* v. *Reeve*, 4 Q. B. 211. It is doubtful whether a joint affidavit in which the additions and places of abode of some of the defendants are correctly stated and others not, can be used: *Rex* v. *The Justices of the County of Carnarvon*, 5 N. & M. 364; *Nathan* v. *Cohen*, 3 Dowl. P. C. 370; *Ex parte Edmonds*, 5 Dowl. P. C. 702.

2. *Place of abode* — The following have been held sufficient in England: — "City of London:" *Vassier* v. *Alderson*, 3 M. & S. 165; *Miller* v. *Miller*, 2 Scott, 118; "Bath, in the County of Somerset:" *Coppin et ux.* v. *Potter*, 2 Dowl. P. C. 785; "Kensington, in the County of Surrey:" *Wilton* v. *Chambers*, 1 H. & W. 116; "Ely, in the County of Cambridge:" *Hunt's Bail*, 4 Dowl. P. C. 272; "late of Tyrone, in the County of Tyrone, in Ireland, but now in Dublin Castle:" *Stuart* v. *Gaveran*, 1 H. & W. 699. So where a foreigner, who was temporarily in England described himself as of his residence abroad: *Bonhet* v. *Kittoe*, 3 East. 154. So when an articled clerk without stating his residence stated the place of business of his employer: *Alexander* v. *Milton*, 1 Dowl. P. C. 570; *Bottomley* v. *Belchamber*, 4 Dowl. P. C. 26; *Strike* v. *Blanchard*, 5 Dowl. P. C. 216; see also *Haslope* v. *Thorne*, 1 M. & S. 103; *Anon.* 2 Chit. R. 15. But a mere description of "a clerk to defendant's attorney," without stating residence or place of business of himself or master, is insufficient: *Daniels* v. *May*, 5 Dowl. P. C. 83; but see *Simpson* v. *Drummond*, 2 Dowl. P. C. 473. It should be observed that the "*true* place of abode" must be stated. Therefore a description as "*late* of, &c.," without showing actual residence at the time of making the affidavit, is insufficient: *Sedley* v. *White*, 11 East. 528. Where the defendant described himself as of "Dorset place, Clapham road, Middlesex," and his true place of abode was "Dorset place, Chapman Road, Surrey," the affidavit was held insufficient: *Collins* v. *Goodyer*, 2 B. & C. 563.

(*q*) Taken from Eng. R. G. No. 139 of H. T. 1853, the origin of which was Eng. R. K. B. No. 6 of M. T. 37 Geo. III.: 5 M. & G. 291, n. *b*. The rule must be strictly observed: *Lackington* v. *Atherton*, 6 Scott, N. R. 240. The practice in this Province was, before this rule, in effect the same as that prescribed in it: *Nicholson d. Spafford* v. *Rea*, 3 O. S. 84.

(*r*) The court has refused to allow an affidavit framed contrary to the old rule to be read: *Nicholson d Spafford* v. *Rea*, 3 O.S. 84. If inadvertently allowed to be read, any rule or affidavit obtained upon it may be discharged with costs: *Cobbett* v. *Oldfield*, 16 M. & W. 469. A jurat thus, "Sworn at C. the 23rd January, 1843, being read over to and fully understood by the said J. A. and A. M. A., before me, &c., a commissioner, &c.," is not a sufficient compliance with the rule: *Pardoe* v. *Terrett*, 2 Dowl. N.S. 903. The court has a discretion to amend affidavits defective in the jurat: see *Fisher* v. *Thayer*, 5 O S 513. So as to the place of swearing: *Cass* v. *Cass*, 1 D. & L. 698. So where the judge's clerk has inadvertently omitted the names of deponents: *Ex parte Smith*, 2 Dowl P C. 607; *Wilson* v. *Blakey*, 9 Dowl. P. C. 352. But in many cases the courts have refused to amend: *Goodricke* v. *Turley et al*, 4 Dowl P. C. 392;

111. (*s*) No affidavit shall be read or made use of in any matter depending in court, in the jurat of which there shall be any interlineation or erasure. (*t*)

112. (*t*) Every affidavit [sworn within this Province] (*u*) to be hereafter used in any cause or civil proceeding, (*v*) shall be written in a plain, legible hand, and shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially violating this rule; [nor shall any affidavit violating this rule be used on any motion to obtain or to show cause against a rule *nisi*, without the express permission of the court.] (*y*) This rule is not to be in force till Michaelmas term next. (*z*)

Anon. 2 Chit. R. 20; *Frost* v. *Hayward*, 2 Dowl. N.S. 566; *Holmes* v. *London and South Western Railway Co* 13 Q. B. 211; *Re Lloyd*, 15 Q. B. 682. A jurat stating that two deponents (naming them) were sworn, is a sufficient compliance with the rule: *Keefer* v. *Hawley*, 1 Prac. R. 1.

(*s*) Taken from Eng. R. G. No. 140 of H. T. 1853. the origin of which was Eng R. G. K. B. of M. T. 37 Geo. III : 7 T. R. 82. This rule applies to affidavits sworn abroad: *In re Paye*, 5 D. & L. 475; *In re Fagan*, 5 C. B. 436; *In re Tierney*, 15 C. B. 761.

(*t*) The rule does not apply where the jurat is altogether erased and a new one written: *Dawson* v. *Wills*, 10 M. & W. 663, *per* Lord Abinger, C. B. Where any word is struck out which in any degree alters the sense, the whole is bad: *Ib.* The rule does not apply where the words "before me" are erased, and "by the court" substituted: *Austin* v. *Grange*, 4 Dowl. P. C. 576; nor to an erasure *over* the jurat: *Atkinson* v. *Thomson*, 2 Chit. R. 19; nor to an interlineation in the affidavit itself, which need not in fact be noticed in the jurat: *Lister* v. *Boulton*, 5 U. C. Q. B. 632. But the rule does apply if a word in the jurat be *scored through*: *Williams* v. *Clough*, 1 A. & E. 376. Therefore a line drawn through words in the jurat, though leaving them perfectly legible, is an erasure: *Ib.* Part of the jurat was written on one side of the paper, and below it the words, "a commissioner for taking affidavits in this court," were erased, and the remainder of the jurat written on the other side of the paper, held that the affidavit was not vitiated: *Wills* v. *Dawson*, 2 Dowl. N.S. 465.

(*t*) Taken from Eng. R. G. No. 2 of M. T. 1854.

(*u*) It should be noted that this, unlike the preceding rule, does not extend to affidavits sworn abroad. The words in brackets constitute a restriction which is not to be found in the Eng. R. G. from which the rule under consideration is taken.

(*v*) The express restriction to "any cause or *civil* proceeding" is also deserving of note.

(*y*) There is no such provision as that here enclosed in brackets to be found in the Eng. R. G. The only penalty of contravening the English rule appears to be the loss of costs.

(*z*) M. T. 1856.

113. (*a*) When any affidavit is sworn before any Judge or any commissioner by a person who from his or her signature appears to be illiterate, (*b*) it shall be certified in the jurat that the affidavit was read in the presence of the party administering the same to the party making the same, (*c*) and that such last mentioned party seemed perfectly to understand the same, (*d*) and also wrote or made his or her signature or mark in the presence of the party administering the oath. (*e*)

114. (*f*) No affidavit shall be read or made use of for any purpose, if sworn before the attorney of the party in the cause on whose behalf such affidavit is made, or before the clerk or partner of such attorney; (*g*) but this rule shall not extend to affidavits to hold to bail. (*h*)

(*a*) Taken from Eng. R. G. No. 141 of H. T. 1853, the origin of which was Eng. R. K. B of 31 Geo III. 4 T. R. 284. The practice ordered by this rule has for a long time prevailed in this Province: *Moore* v. *James*, Dra. Rep 245.

(*b*) Where deponent makes his mark, it should appear from the jurat that the mark was made: *Wilson* v. *Blakey*, 9 Dowl. P. C. 352.

(*c*) The officer administering the affidavit ought himself to explain it: *Disney* v. *Anthony*, 4 Dowl. P. C. 765.

(*d*) This statement must be made in the jurat, whether or not the deponent be sworn in court: *Haynes* v. *Powell*, 3 Dowl. P. C. 599.

(*e*) The person who administers the affidavit must in all cases sign the jurat: *Bill* v *Bament*, 9 Dowl. P. C. 810. The signature of the commissioner without the addition "a commissioner, &c.," held insufficient: *Babcock* v. *The Municipal Council of Bedford*, &c, 8 U. C. C. P. 527; but the designation "a com'r, &c," is sufficient: *Pawson et al* v. *Hall et al*, 1 Prac. R. 294; *Brett* v. *Smith*, *Ib* 309. "Sworn before me at Belleville" (not saying in what district or county) sufficient: *Ridley* v. *Wilkins*, 1 Cham. R. 26. So "sworn before me at Toronto" (not saying whether in the city or township of that name): *Regina* v. *Brown*, E. T. 1870, C. P.

(*f*) Taken, with modifications, from Eng. R. G. Nos. 142, 143 of H. T. 1853, the origin of which was Eng. R. G. Nos. 3, 6 of H. T 2 Wm. IV.: Jervis N. R. 58, 59 The rule does not appear to apply to proceedings on the Crown side of the courts: *Regina* v. *Mizen*, 1 Dowl. N.S. 865; nor to revenue cases: *Ib.*

(*g*) The fact that the commissioner is the attorney or the clerk or partner of the attorney in the cause, may be shown by affidavit: *Hodgson* v. *Walker*, Wight. 62; or by the statement of the party himself: *Haddock* v. *Williams et al*, 7 Dowl. P.C 327 The person objected to must be the attorney *in the cause* or his partner or clerk: *Williams* v. *Hockin et al*, 8 Taunt. 435; *Doe d. Grant* v. *Roe*, 5 Dowl. P. C 409; *In re Gray*, 21 L. J. Q. B 380. It is no objection that he is the general law adviser: *Williams* v. *Hockin et al*, 4 Taunt. 435. It must appear that he was acting as attorney in the cause when taking the affidavit: *Kidd* v. *Davis*, 5 Dowl. P C. 568. An affidavit sworn before a clerk of the attorney of the landlord, on an application to set aside judgment against the casual ejector under the old ejectment practice, was held not to be within the rules: *Doe d. Grant* v *Roe*, 5 Dowl. P. C. 409; see also *Doe d. Cooper* v. *Roe*, 2 Y. & J. 284.

(*h*) Such also was the practice in this Province before this rule: *Brett* v. *Smith*, 1 Prac. R. 309.

115. (*i*) An affidavit sworn before a Judge of either of the Courts shall be received in the Court to which such Judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used. (*j*)

116. (*k*) Where a special time is limited for filing affidavits, no affidavit filed after that time shall be made use of in Court, or before the Master, unless by leave of the Court or a Judge. (*l*)

117. (*m*) No rule, which the Court has granted upon the foundation of any affidavit, shall be of any force unless such affidavit shall have been actually made before such rule was moved for and produced in Court (*n*) at the time of making the motion. (*o*)

118. (*p*) In all cases in which a defendant appears in person, (*q*)

(*i*) Taken from Eng. R. G. No. 144 of H. T. 1853, the origin of which was Eng. R. G. No. 4 of H. T. 2 Wm. IV.: Jervis N. R. 58.

(*j*) This is an exception to the general rule, that whenever there is a cause in court all affidavits made in that cause must be entitled in the court: see *Osborn* v. *Tatum*, 1 B. & P. 271; *Wigden* v. *Birt*, 1 Dowl N.S. 93; also *Rolfe* v. *Burke*, 4 Bing. 101; *Hands* v. *Clements*, 11 M. & W. 816; *Ex parte Randall*, 17 L. J. Q. B. 232.

(*k*) Taken from Eng. R. G. No. 145 of H. T. 1853, the origin of which was Eng. R. G. of M. T. 36 Geo. III.

(*l*) Affidavits when once filed by a party to a cause may be made use of by the opposite party, even though the party filing them decline to use them: *Price* v. *Hayman*, 7 Dowl. P. C. 47. An attorney who is bound but refuses on demand to file affidavits may be compelled to do so by the court: *Ex parte Dicas*, 2 Dowl. P. C. 92; *Pilmore* v. *Hood* 8 Dowl. P. C. 21. Where an exhibit is not filed by the one party to a suit, his opponent is entitled to a copy: *Tebbutt* v. *Ambler*, 7 Dowl. P. C. 674; see also *Davenport* v. *Jones*, 8 Dowl. P. C. 497. When once filed for a particular purpose, the court may refuse to allow it to be taken off the file to be used for any other purpose: *Price* v. *Seeley*, *Ib.* 653.

(*m*) Taken from Eng. R. G. No. 146 of H. T. 1853, the origin of which was Eng. R. G. of H. T 36 Geo. III.

(*n*) No affidavit made on a Sunday is of any force: *Doe d. Williamson et al* v. *Roe*, 3 D. & L. 328. Extracts from a letter contained in an affidavit cannot be read: *Vaughan* v. *Rose et al*, 8 U. C. Q. B. 506. Papers are sufficiently described as being annexed without further description: *McKay* v. *McDearmid*, 2 Cham. R. 1.

(*o*) Under special circumstances the court may allow the affidavit to be made afterwards: *Perring* v. *Kymer*, 4 N. & M. 477; *Davies* v. *Skerlock*, 7 Dowl P. C. 592; *Bury* v. *Clench*, 1 Dowl. N.S 848. If there be merits, the court may allow a rule to be drawn up on reading a supplementary affidavit: see *Ilderton* v. *Burt*, 6 C. B. 433.

(*p*) This rule is original and framed to meet the peculiar circumstances of this province, in which for some purposes judges of county courts have power to grant rules and orders in causes pending in the superior courts.

(*q*) Every appearance by a defendant in person must give an address, at

and an application is made to the Judge of the proper County Court for any summons under the authority of the Common Law Procedure Act, 1856, which ought to be served on the defendant, (*r*) the affidavit on which the plaintiff grounds his application shall, among other things, state that the defendant resides at some place within the jurisdiction of such County Court.

RULES, SUMMONSES, AND ORDERS.

119. (*u*) Every rule of Court shall be dated the day of the month and year on which the same is drawn up, and need not specify any other time or date.

120. (*w*) All rules which by the English practice may be had as a matter of course upon signature of counsel at side bar, or are given by the Master, Clerk of the Papers, or Clerk of the Rules in England, (*x*) are to be given by the Clerks of the Crown and Pleas, or their deputies, in the same manner, and the same may issue on any day in term or in vacation. (*z*)

121. (*a*) A rule may be enlarged if the Court think fit, without notice. (*b*)

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which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service: section 52 C. L. P. Act.

(*r*) The judge of the proper county court must be determined upon according to the circumstances. One test as regards this section is that he must be the judge of the county in which defendant resides.

(*u*) Taken from Eng. R. G. No. 149 of H. T. 1853.

(*w*) This rule is original.

(*x*) Side bar rules are those which are said in England to have been moved at the side bar in court, but they were afterwards obtained of the clerk of the rules upon precipe. The reference in this rule to rules which according to the English practice may be had as a matter of course upon signature of counsel at side bar is not strictly correct, as it does not appear there are any rules which issued on the signature of counsel at side bar. Side bar motions were made by the attorneys and not by counsel, nor upon the signature of counsel: *Adshead* v. *Upton et al*, 22 U. C. Q. B. 437, *per* Wilson, J.

(*z*) It is ordered in England that "side bar rules may be obtained on the last as well as other days of term:" R. G. No. 150 of H. T. 1853.

(*a*) Taken from Eng. R. G. No. 151 of H. T. 1853, the origin of which was Eng. R. G. No. 97 of H. T. 2 Wm. IV: Jervis N. R. 87.

(*b*) An enlargement may be asked either on the part of the party who is called upon to show cause, or of the party who obtained the rule. If the former, it will be sufficient for him to show that the rule was not served in sufficient time: *Anon.* 1 Smith, 199; *Regina* v. *Anderson*, 9 Dowl. P. C. 1041. If the latter, there must be some special ground. A rule cannot be enlarged after the day on

122. (*c*) All enlarged rules shall be drawn up for the first day in the ensuing term, unless otherwise ordered by the Court. (*d*)

123. (*e*) It shall not be necessary to issue more than one summons for attendance before a Judge upon the same matter, (*f*) and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary. (*g*)

124. (*h*) An attendance on a summons or on an appointment before a Master for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance. (*i*)

125. (*j*) All written consents upon which orders for signing judgment are obtained shall be filed and preserved by the clerk of the Judge's chambers. (*k*)

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which it is returnable upon the *ex parte* application of the person who obtained it: see *Abrahams* v. *Davison*, 6 C. B 622; *Price et al* v. *Thomas*, 11 C. B. 543. It is not the practice either of the Queen's Bench or Exchequer in England to serve an enlarged rule: *Anon.* 1 Smith, 199; though it is of the Common Pleas: *Batty* v. *Marriott*, 5 C. B. 420.

(*c*) Taken from Eng. R. G. No. 152 of H. T. 1853, the origin of which was Eng. R. G. of M. T. 4 Vic.: 12 A. & E. 586.

(*d*) Enlarged rules for a particular day come on for argument as if they had been originally drawn up for that day. When drawn up for the first day of the ensuing term they are generally disposed of within the first two days of that term: Pat. MacM. & M. Prac. 1096.

(*e*) Taken from Eng. R. G. No. 153 of H. T. 1853.

(*f*) Though in England before 1853 it was necessary so to do, it was never necessary in Upper Canada.

(*g*) To obtain such an order it is requisite that there should be either an admission or affidavit of service

(*h*) Taken from Eng. R. G. No. 154 of H. T. 1853, the origin of which was Eng. R G. of T T. 35 Geo. III: 6 T. R. 402.

(*i*) As to the effect of the party arriving a few moments after the expiration of the half hour: see *Moyse* v. *Dingle*, 23 L. J. Q. B. 305

(*j*) Taken from Eng. R. G. No. 155 of H. T. 1853, the origin of which was No. 1 of the "Orders of the Judges," dated 12th June, 1845 (14 M. & W. 335,) the history of which is given by Parke, B, in *Dixon* v. *Sleddon*, 15 M. & W. 430.

(*k*) This and the two following rules seem to have in view a practice which, though common in England, has never prevailed in this Province It is that which enables a defendant, after the commencement of an action, when having no defence, to assent to a judge's order that upon proceedings being stayed final judgment shall be signed if the debt and costs be not paid within a time specified The proceeding is one by consent, and gives jurisdiction to a judge in chambers only where both parties assent to the exercise of such jurisdiction: see *Kirby* v *Ellison*, 2 Dowl. P. C. 219; *Reynolds* v. *Sherwood*, 8 Dowl. P. C. 183; *Norton* v. *Fraser*, 2 M. & G. 916. This order does not operate as a stay

126. (*l*) In actions in which the defendant has appeared by attorney, no such order shall be made unless the consent of defendant be given by his attorney or agent. (*m*)

127. (*n*) Where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the Judge, and gives his consent in person, (*o*) or unless his written consent be attested by an attorney acting on his behalf, (*p*) unless the defendant is a barrister or attorney. (*q*)

128. (*r*) Where a Judge's order is made during vacation, it shall not be made a rule of Court before the next term, unless in any case otherwise provided for by Statute. (*s*)

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of proceedings unless so expressed: *Michael* v. *Myers*, 6 M. & G. 702; *Filmer* v. *Burnby*, 9 Dowl. P. C. 466; and is not a cognovit so as to require all the formalities necessary in the case of a cognovit: see *Baker* v. *Flower*, 8 M. & W. 670; *Bray* v. *Manson*, *Ib.* 668; *Thorne et al* v. *Neal*, 2 Q. B. 726. The order, if made, is not revoked by defendant, a *feme sole*, marrying: *Thorpe* v. *Argles*, 1 D. & L. 831. It may, however, be set aside in case of fraud: *Thorne* v. *et al Neal*, 2 Q. B. 726; or under other special circumstances: *Wade* v. *Simeon*, 2 D. & L. 658. If default be made, final judgment may be signed as agreed upon: see *Bell et al* v. *Bidgood*, 8 C. B. 763; *Andrews et al* v. *Digge*, 4 Ex. 827.

(*l*) Taken from Eng. R. G. No. 156 of H. T. 1853, the origin of which was No. 2 of the "orders of the judges," dated 12th June, 1845: 14 M. & W. 335.

(*m*) Where a judge's order for judgment had been obtained on a written consent, signed by a defendant and attested by an attorney acting also for the plaintiff, the court refused to set aside the order and judgment signed thereon: *Dixon* v. *Sleddon*, 15 M. & W. 427.

(*n*) Taken from Eng. R. G. No. 157 of H. T. 1853, the origin of which was No. 3 of the "orders of the judges," dated 12th June, 1845: 14 M. & W. 335.

(*o*) One partner has no implied authority to bind his co-partner by such a consent: *Hambidge* v. *De la Crouée et al*, 3 C. B. 742.

(*p*) The attestation had better be as nearly as possible the same as that required in the case of cognovits and warrants of attorney: see R. G. pr. 26 and notes thereto.

(*q*) Which is also the rule as to cognovits and warrants of attorney: see note *f* to R. G. pr. 26.

(*r*) Taken from Eng. R. G. No. 158 of H. T. 1853.

(*s*) No action lies for disobedience of a judge's order: *Dent* v. *Basham*, 9 Ex. 469; *Hookpayton* v. *Bussell*, 10 Ex. 24. The only mode of enforcing it is by making it a rule of court with a view to an attachment: *Swaine et al* v. *Stone*, 4 M. & Scott, 584; *Wilson* v. *Northop*, 2 C. M. & R. 326; *Black* v. *Lowe*, 4 D. & L. 285. The rule is absolute in the first instance: *Ib.* Where from the misconduct of an arbitrator the original order could not be obtained, a duplicate order was made a rule of court: *Thomas* v. *Philby*, 2 Dowl. P. C. 145. The order, if obtained by fraud, or in a case where there is no jurisdiction, appears to be *ipso facto* void: see *Woosnam* v. *Price*, 1 C. & M. 352; *Lander* v. *Gordon*, 7 M. & W. 218.

129. (*t*) When a Judge's order, or order of Nisi Prius, is made a rule of Court, it shall be a part of the rule that the costs of making the order a rule of Court shall be paid by the party against whom the order is made, (*u*) provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, (*v*) and disobeyed. (*w*)

130. (*x*) Rules to show cause shall be no stay of proceedings unless two days' notice of the motion shall have been served on the opposite party, (*y*) except in the cases of rules for new trials, or to enter verdict or non-suit, motion in arrest of judgment, or for judgment *non obstante veredicto*, or to set aside an award, or to enter a suggestion, (*z*) or by the special direction of the Court. (*a*)

NOTICES—SERVICE OF, AND OF RULES, PLEADINGS, &c. (*b*)

(*t*) Taken from Eng. R. G. No. 159 of H. T. 1853, the origin of which was Eng. R. G. of T. T. 3 Vic.: 12 A. & E. 1; 1 M. & G. 278; 6 M. & W. 602.

(*u*) Even though such party be an infant: *Beames* v. *Farley*, 5 C. B. 178.

(*v*) Service upon a Toronto agent is a sufficient service: *Thompson* v. *Billing*, 11 M. & W. 361; *Martin* v. *Stinson et al*, 7 U. C. L. J. 184; *In re Robertson et al*, 5 Prac. R. 132.

(*w*) The order would appear to be "disobeyed" if upon application to the Toronto agent, by virtue of the master's allocatur, he refuse to pay, upon the ground that he has received no instructions, though he promise to write and advise payment: *Thompson* v. *Billing*, 11 M. & W. 361. When the demand is on the town agents, and not on the principal, an interval of some days should be allowed to elapse after a demand for money, to amount to disobedience, so as to entitle a party to the costs of making the order a rule of court: *In re Robertson et al*, 5 Prac. R. 134, *per* Morrison, J. If the party have not disobeyed at the time the order is made a rule of court, so much of the rule as relates to costs may be rescinded: *In re Farrant and Goodrich*, 21 L. J. Q. B. 272. If, without a previous demand, the order be made a rule, the costs of the application will not be given: *Carter* v. *The Burial Board for the Township of Tong*, 5 H. & N. 523.

(*x*) Taken from Eng. R. G. No. 160.

(*y*) The notice may be in this form:—*Title of Court and Cause.* Take notice, that this Honorable Court will be moved on, &c., or as soon thereafter as counsel can be heard, for a rule to show cause, &c. Dated, &c.

(*z*) In each of which the inference is, that without a notice of motion the rule to show cause operates as a stay of proceedings, or rather will be granted with a stay of proceedings as part of the rule.

(*a*) When there is a stay of proceedings, no step can be taken by the opposite party until the rule is disposed of: *Wyatt* v. *Prebble*, 5 Dowl. P. C. 268; *Anderson* v. *Southern*, 9 Dowl. P. C. 994; *Murray* v. *Silver*, 3 D. & L. 26.

(*b*) When proceedings of any kind are taken by either party to a cause, which, if unopposed, would prejudice his opponent, it is generally necessary that the opponent should have notice of the same. The ordinary mode of notifying an opponent of a proceeding such as a writ, rule or pleading, is by serving him with a copy thereof. In England pleadings, though delivered, are not actually filed.

131. (*c*) All notices required by these rules or by the practice of the Court shall be in writing. (*d*)

132. (*e*) A copy of every declaration and subsequent pleading shall be served upon the opposite party, (*f*) whether the case be bailable or not bailable, (*g*) and whether the action be against any person having privilege or otherwise, and as well where the plaintiff has entered an appearance for the defendant, as where the defendant has appeared in person or by attorney. (*h*)

133. (*i*) Where the residence of a defendant is unknown, (*j*) pleadings, rules, notices, and other proceedings may be stuck up in the proper office, (*k*) but not without previous leave of the Court or of a Judge. (*l*)

134. (*m*) It shall not be necessary to the regular service of a rule

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At one time it was held in this Province to be unnecessary to serve pleas: *McKinnon* v. *Johnston*, 3 O. S. 298; *King* v. *Dunn*, *MS.* E. T. 2 Vic. R. & H. Dig "Practice, i. 8; but now service of pleadings is generally deemed essential to due filing, that is to say, a pleading to be duly filed must be both filed and served: *Tyson* v. *Maclean*, 1 Prac. R. 339; R. G. pr. 132.

(*c*) Taken from Eng. R. G. No. 161 of H. T. 1853.

(*d*) It is well to observe that "all notices required by these rules *or* the practice of the court," in other words, every notice made necessary during the progress of the cause, must be in writing. Where in England a writ issued for a sum under £20, the notice mentioned in the endorsement thereon, pursuant to Eng. R. G. E. T. 1853, of the defendant's intention to oppose the plaintiff's application for costs, was held to be a notice within the meaning of the English rule corresponding with the one here annotated: *Woodward* v. *North*, 5 H. & N. 790.

(*e*) This is a reprint of our old rule Q. B. No. 4 of E. T. 5 Vic.: Cam. R. 19.

(*f*) *Shall be served*, &c. From this it is seen that every pleading, to be available, must "be served upon the opposite party." Before 1842 the practice was otherwise: see note *b* to R. G. pr. No. 131.

(*g*) As to bailable proceedings: see section 34, C. L. P. Act, and notes thereto.

(*h*) Appearances by plaintiffs for defendants are, since the C. L. P. Act, rendered unnecessary if not abolished: section 54, C. L. P. Act.

(*i*) Taken from Eng. R. G. No. 162 of H. T. 1853.

(*j*) And he has not, it is presumed, appeared by attorney.

(*k*) See section 61, C. L. P. Act.

(*l*) This rule is in effect similar to rule Eng. R. G. No. 49, H. T. 2 Wm. IV. Jervis N. R. 72; and under it, as well as this rule, the previous leave of the court is necessary to make the service allowed a good service: *O'Neill et al* v. *Everett*, 3 Prac. R. 98.

(*m*) Taken from Eng. R. G. No. 163 of H. T. 1853, the origin of which was Eng. R. G. No. 51 of H. T. 2 Wm. IV.: Jervis N. R. 73.

or order that the original rule or order shall be shown, unless sight thereof be demanded, except in cases of attachment. (*o*)

135. (*p*) Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall, after the first day of Michaelmas Term next, (*q*) be made before seven o'clock, P.M., (*r*) except on Saturdays, when it shall be made before three o'clock, P.M. (*s*) If made after seven o'clock, P.M., on any day except Saturdays, the service shall be deemed as made on the following day; and if made after three o'clock, P.M., on Saturday, the service shall be deemed as made on the following Monday. (*t*)

(*o*) In order to bring a party into contempt for not obeying a subpœna, the original subpœna must be shown to the party at the time of service: *Pitcher* v. *King*, 14 L. J. Q. B. 99; *Wadsworth* v. *Marshall*, 1 C. & M. 87; even though the defendant be an attorney, and have previously evaded service of the writ: *Smith* v. *Truscott*, 6 M. & G. 267; but if there be no other remedy than by attachment and the court be satisfied that the party is avoiding service, such service may, it seems, be dispensed with: *In re Whalley*, 14 M. & W. 731. Service by placing the paper under the door of the attorney's office, without some evidence of its having come to hand, is not good service: *Burdett et al* v. *Lewis*, 7 C. B. N.S. 791. But where a defendant had left the country, and had not since been heard of, service at his last place of residence was allowed as good service: *Styrling* v. *Lloyd*, 9 L. T. N.S. 730. There may be a good service by post: *Smith* v. *Campbell et al*, 6 Dowl. P. C. 728. Where such a mode of service has been agreed upon, the time counts from the mailing of the notice, and not merely from the time of its receipt: *Robson* v. *Arbuthnot*, 10 U. C. L. J. 186 The paper mailed is entirely at the risk of the attorney to whom it is sent: *Ib.*

(*p*) Taken from Eng. R. G. No. 164 of H. T. 1853, for which was substituted Eng. R. G. 8th May, 1856.

(*q*) M. T. 1856.

(*r*) The hour hitherto was understood to be nine o'clock, P.M. though this was by no means uniform. The time varied in each of the English courts of Queen's Bench, Common Pleas and Chancery. It is now the same in all, viz. 7 P.M.

(*s*) This was a step towards the introduction into this Province of the Saturday half-holiday allowed in England. The last hour for service on Saturday in England is two, not three o'clock as in our rule. In England the long vacation extends from 10th August to 24th October, and it is ordered that no pleading shall be delivered between these dates. In a case where the last day for a pleading expired on a Saturday (9th August) a plea delivered after 2 o'clock of that day was held to be as if delivered on Monday (11th August) and therefore a nullity: *Sharp* v *Fox*, 28 L. T. Rep. 127. A plea delivered in England between 10th August and 24th October, is a nullity; *Mills* v. *Brown*, 9 Dowl. P. C. 151; where the time for pleading expired on 10th August, it was held that judgment for want of a plea signed on 11th August was too soon: *Morris* v. *Hancock*, 1 Dowl N.S. 320; *Severin* v. *Leicester*, 12 Q. B. 949; see further, *Wilson et al* v. *Bradslocke*, 2 Dowl. P. C. 416; where a month's time to plead had been given, and twenty-five days of it were unexpired on 10th August, it was held that defendant had twenty-five days after 24th October: *Trinder* v. *Smedley*, 3 Dowl. P. C. 87.

(*t*) Service of a summons in this Province on Saturday, after 3 o'clock, P.M., returnable on Monday following, is not good service, as being in effect service

136. (*u*) A book shall be kept by the clerk of the Crown of each of the Courts in Toronto, at his office, to be there inspected by any attorney or his clerk without fee or reward; (*v*) and every attorney practising in the said Courts and residing within the city of Toronto or the liberties thereof, or having an office and carrying on his business within the said city, (*w*) shall enter in such book (in alphabetical order) his name and place of business or some other proper place within the city, where he may be served with pleadings, notices, summonses, orders, rules and other proceedings; and as often as any such attorney shall change his place of business or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book; (*x*) and all pleadings, notices, summonses, orders, rules and other proceedings which do not require a personal service shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging to such place; (*z*) and if any such attorney shall neglect to make such entry, (*a*) the fixing up of any notice or of the copy of any

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of a summons on the day on which it is returnable, which is unreasonable: *Ball et al* v. *Cowdley*, 3 U. C. L. J. 131: see also *Connelly* v. *Bremner*, L R. 1 C. P. 557.

(*u*) Taken from Eng. R. G. No. 165 of H. T. 1853, the origin of which was Eng. R. G. No. 8 of M. T. 1 Wm. IV.: Jervis N. R. 9.

(*v*) The clerk of *each* of the Courts, *i. e.* Queen's Bench and Common Pleas, is required to keep a book, and in *each* of these books the necessary entries must be made.

(*w*) This is as regards this Province an entirely new provision. No former rule ever required more than the entry in a book to be kept for the purpose in Toronto, of the names of agents of attorneys "not resident in the Home District:" R. No. 2 of M. T. 4 Geo. IV. Cam. R. 1, which was afterwards extended to attorneys "residing in the Home District, and not having an office in the city of Toronto:" R. of H. T. 10 Vic. 4 U. C. Q.B. 92. Of these rules the rule here annotated which is made to apply to attorneys "residing within the city of Toronto, or the liberties thereof, or having an office or carrying on business within the said city," is an extension.

(*x*) In the old rule of Wm. IV. the word "pleadings" was omitted, but not withstanding the rule was understood to embrace pleadings and other proceedings in a suit: see *Blackburn* v. *Peat*, 2 Dowl. P. C. 293.

(*z*) "With any person resident at or belonging to such place, &c." It may be a question whether service on a menial servant or other person not engaged in the attorney's business would be sufficient.

(*a*) It is provided that every attorney practising, &c., shall enter in such book, &c., his name and place of business, &c., and as often as any attorney shall change his place of business, &c., he shall make the *like entry* thereof in the book, &c. It is conceived that the neglect of an attorney to make *either* of

pleadings, notice, summons, order, rule, or other proceedings for such attorney in the office aforesaid shall be deemed a sufficient service. (*b*)

137. (*c*) Every other attorney practising in the said Courts (*d*) shall enter in the said book (in like alphabetical order) his name and place of business, and also in an opposite column the name of some attorney having an office and carrying on business in the city of Toronto as his agent; (*f*) and all pleadings, notices, summonses, orders, rules and other proceedings which do not require a personal service shall be deemed sufficiently served on such first-mentioned attorney, if a copy thereof shall be served on his booked agent in manner mentioned in the next preceding rule. (*g*) And if any such attorney shall neglect to make the

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these entries would be a sufficient excuse for the opposite party to fix up a paper requiring service in the office of the proper court at Toronto.

(*b*) Whether necessary or not it would be well in this case to mark the papers on the outside as papers left for such attorney: see C. L. P. Act, section 61.

(*c*) This rule appears to be original.

(*d*) "Every *other* attorney, &c.," *i. e.* every attorney other than attorneys "residing within the city of Toronto or the liberties thereof, or having an office and carrying on business within the said city:" R. G. pr. 136.

(*f*) The agent at Toronto is a general agent upon whom papers may be served in any cause, no matter when, where, or how commenced: see *Parke* v. *Anderson*, 5 U. C. Q. B. 2; *Clemow* v. *Her Majesty's Ordnance*, *Ib.* 458; *Hamilton* v. *Brown et al*, 1 Cham. R. 257; *Houghton et al* v. *Hudson*, 1 Prac. R 160; *Smith* v. *Roe*, 1 U. C. L. J. N.S. 154. A defendant who had been sued in the county of Wentworth, but who lived in the county of York, employed an attorney in Toronto to defend him. This attorney instructed another attorney in Hamilton to enter an appearance. A declaration was then offered to the attorney in Hamilton, and declined on the ground that he had only been employed to enter an appearance. Interlocutory judgment was afterwards signed and damages assessed. An application to set aside the judgment failed on the ground of laches and other reasons: *Hamilton* v. *Brown et al*, 1 Cham. R. 257. Where defendant's attorney, living in St. Thomas, sent an appearance to attorneys in London whence the writ of summons issued, to enter there for him, which was done, and plaintiff afterwards (on 24th January) served the London attorney with a declaration and demand of plea, which did not reach the defendant's attorney till 25th January. *Held* that the time for pleading did not count till the 25th January: *Smith* v. *Roe*, 1 U. C. L. J. N.S. 154. Where an attorney residing and practising in the county where the action is brought appeared there for the defendant, formed a partnership with another attorney carrying on business there in their joint names, and then changed his actual residence to another county, leaving his name in the proper books in Toronto as still of the former county, and occasionally afterwards attended and did business in the former county, service of notice of trial on his partner there was held to be a good service, notwithstanding a private arrangement between the parties that the partner should only attend to new business: *Baby* v. *Langlois*, *Ib.* 209. Delivery of a rule nisi to the town agent of an attorney who had left the country, and leaving copies at his place of residence and office, were held sufficient on an application to discharge an articled clerk from his articles: *In re McGregor*, *Ib.* 13.

(*g*) R. G. pr. 136.

entry in this rule mentioned, the fixing up of any notice or of the copy of any pleading, notice, summons, order, rule or other proceeding for such attorney in the Crown office at Toronto, shall be deemed a sufficient service. (*h*) And as often as any such attorney shall change his place of business or his agent, he shall make an entry in the said books of such change, which last entry shall supersede all former ones. (*i*) Provided always, that in all cases service on the attorney at his office or usual place of business, in the manner mentioned in the next preceding rule, instead of on the booked agent, shall be deemed good service. (*j*)

138. (*k*) In all cases where a party sues or defends in person, (*l*) he shall, upon issuing any writ of summons or other proceeding, or entering an appearance, (*m*) leave a memorandum with the clerk or deputy clerk of the Crown, who shall file the same as a paper in the cause, stating an address or place in the county, within which the first process in the cause shall have been or shall be sued out, (*n*) at which all pleadings, notices, summonses, orders, rules, or other proceedings not requiring personal service may be left; such address or place to be not more than two miles from such office, and if such memorandum shall not be left, or if such address or place be more than two miles from the office aforesaid, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, and other proceedings, in such office. (*o*)

(*h*) See note *p* to C. L. P. Act, section 61.

(*i*) See R. G. pr. 186.

(*j*) If the attorney of either party do not reside, or have not a duly authorized agent residing in the county where the action has been commenced, service may be made upon the attorney wherever he resides, or upon his duly authorized agent in Toronto: C. L. P. Act, section 61.

(*k*) Taken from Eng. R. G. No. 166 of H. T. 1853.

(*l*) See notes to section 52, C. L. P. Act.

(*m*) As to appearance in person: see section 52, C. L. P. Act and notes thereto.

(*n*) With reference to an appearance, if it sufficiently show defendant's addition, an objection that the address does not appear on a separate memorandum will not be entertained: *Jones* v. *Grier*, 3 U. C. L. J. 91.

(*o*) In an action by an infant the writ was sued out in person, and one E. B. being appointed next friend, a copy of the order for that purpose was served on the defendant's attorney, endorsed "E. B. next friend, at S. N. C.'s, No. 8, Symond's Inn, Chancery Lane," and a declaration was afterwards delivered with a notice to plead similarly signed. The plaintiff having obtained a verdict, it was held that the above was a sufficient notice to the defendant that S. N. C. was authorized by the next friend to act as attorney: *Bryant* v. *Wilson*, 3 C. B. N.S. 722.

139. (*s*) In all cases where a plaintiff shall have sued out a writ in person or a defendant shall have appeared in person, and either party shall by an attorney of the Court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorised to act as attorney for the party on whose behalf such notice is given, (*t*) all pleadings, notices, summonses, orders, rules, and other proceedings, which, according to the practice of the Courts, are to be delivered to or served upon the party on whose behalf such notice is given, shall thereafter be delivered to or served upon such attorney. (*u*)

ATTACHMENT.

140. (*w*) Rules for attachment shall be absolute in the first instance in the two following cases only: 1st, for non-payment of costs on a Master's *allocatur*; (*y*) and 2nd, against a sheriff for not obeying a rule to return a writ or bring in the body. (*z*)

(*s*) Taken from Eng. R. G. No. 167 of H. T. 1853.

(*t*) Of course if either party sue or appear by attorney the rule here annotated will not apply. It has in view the appointment of an attorney after the suing out of process, or the appearance of a defendant in person respectively. A defendant may appear at any time before judgment: section 51 C. L. P. Act.

(*u*) "Shall *hereafter* be delivered," &c. It is not intended that a party availing himself of this rule shall by so doing gain any undue advantage over his opponent.

(*w*) Taken from Eng. R. G. No. 168 of H. T. 1853.

(*y*) It is no objection to the rule absolute that the party had only been served with the original rule and allocatur immediately before the application: *Steel* v. *Compton*, 9 Jur. 181. If that rule direct more than the payment of costs the the rule for an attachment can only be *nisi*: *Ex parte Townley*, 8 Dowl. P. C 39; *Hatfield* v. *Hatherfield*, 1 D. & L. 809; as where the costs are payable under an award: *Daniel et al* v. *Beadle et al*, 2 Scott, N. R. 155; but see *Daniels* v. *Wealds et al*, 9 Dowl. P. C. 44; *Thomson* v. *Billingsey*, 2 Chit. R. 57 n; or where the rule is a side bar rule by a clerk of assize: *Anon.* 3 Jur. 364; *Ashmore* v. *Rypley*, 2 Scott. N. R. 203. The rule may be made absolute in the first instance, though the party be a married woman: *Regina* v. *Johnson*, 5 Q. B. 335; or a *prochein amy*: *Newton* v. *London, Brighton and South Coast R. Co.*, 7 D. & L. 328: where a rule of court ordering payment of costs, was a rule making a Judge's order ordering a party to do an act a rule of court, and the applicant would not abandon the right to apply for an attachment on the other party for disobedience of the order, a rule absolute in the first instance was refused: *Crisp* v. *Groombridge*, 27 L. J. Q. B. 183. But process of contempt for non-payment of money or for non-payment of costs is now abolished: Con. Stat. U. C. cap. 24, s. 13. The remedy is a writ against goods: *Ib* s. 19; see *Clifton* v. *Durand*, 3 Prac. R. 60; *In re Thomas and Brooke*, *Ib.* 78; *Niagara & Detroit Rivers R. Co.* v. *Buckwell*, *Ib.* 82: *The Queen* v. *Simpson*, *Ib.* 339; *In re Judge of Elgin*, 8 U. C. L. J. 70; *Dickey et al* v. *Mulholland*, 2 Prac. R. 169.

(*z*) If a sheriff having returned *cepi corpus* go out of office, he may notwithstanding be ruled to bring in the body: see R. G. pr. 105.

AWARDS.

141. (*b*) Where a rule to show cause is obtained to set aside an award, (*c*) the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause. (*d*)

142. (*e*) Costs may be taxed on an award, although the time for moving to set aside the award has not elapsed. (*f*)

INSOLVENT DEBTORS.

143. The affidavit on which a debtor in close custody in execution shall apply under the Common Law Procedure Act, 1856, section 300, for his discharge from custody, shall not be sworn sooner than the day after that on which the notice of application shall expire, and shall in all cases state whether any interrogatories were served before the expiration of the fifteen days' notice, and if so, whether answers thereto upon oath have been duly made and filed, and when notice thereof was given.

(*b*) Taken from Eng. R. G. No. 169 of H. T. 1853, the origin of which was Eng. R. K. B. of T. T. 2 Geo. IV; 4 B & Al. 539, with which our R. Q. B. No. 3 of E. T. 6 Geo. IV.: Cam. R. 3, corresponded.

(*c*) The rule seems equally to apply to *certificates* of an arbitrator: *Carmichael* v. *Houchen*, 3 N. & M. 203; see also *Allenby* v. *Proudlock et al*, 4 Dowl. P. C. 54.

(*d*) No ground, though valid, can be relied on if not so stated: *Grenfell et al* v. *Edgcome et al*, 7 Q. B. 661. The objections must be specific: see *Boodle* v. *Davies*, 4 N. & M. 788; *Gray* v. *Leaf*, 8 Dowl. P. C. 654; *Staples* v *Hay*, 1 D. & L. 711; see further *Allenby* v. *Proudlock et al*, 4 Dowl. P. C. 54; *Dunn* v. *Warlters*, 9 M. & W. 293. How far rule defective as to the grounds is helped by affidavits: see *Rawsthorn* v. *Arnold*, 6 B. & C. 629; *Dunn* v. *Warlters*, 1 Dowl. N S. 626; *Staples* v. *Hay*, 1 D. & L. 711. The rule should be drawn up on reading the award itself or a copy of it: *Sherry* v. *Oke et al*, 3 Dowl P.C. 349; *Barton* v. *Ransom*, 5 Dowl. P. C. 597; *Carmichael* v. *Hunter*, 1 H & W. 120, n; *Davis* v. *Potter*, 21 L. J. Q. B. 134. It should also be drawn up on reading the rule making the submission a rule of court: *Browne* v. *Collyer*, 20 L. J. Q. B. 426; *Oswald* v. *Earl Grey*, 24 L. J. Q. B. 69; *Jacobs* v. *Ruttan*, 2 Cham. R. 138.

(*e*) Taken from Eng. R. G. No. 170 of H. T. 1853.

(*f*) If it be intended to sign judgment for the costs of the cause, they should in general be taxed separately from the costs of the reference: *Bignall* v. *Gale*, 4 Scott, N. R. 570. The costs up to the reference are costs in the cause: *Brown* v. *Nelson*, 13 M. & W. 397; including the costs of making the order a rule of court or any proceeding in the cause after the award: *Goodall* v *Ray*. 4 Dowl. P. C. 1; *Fryer* v. *Sturt*, 16 C. B. 218. Costs of reference may be taxed as costs in the cause when directed to abide the event of the action: *Deere* v *Kirkhouse*, 20 L. J. Q. B. 195. So if it be the duty of the arbitrator merely to certify: *Brown* v. *Nelson*, 13 M & W. 397; *Deere* v. *Kirkhouse*, 20 L. J. Q. B. 195. As to judgment if a verdict has been taken subject to a reference, the judgment

CLERKS AND DEPUTY CLERKS OF THE CROWN.

144. On every appointment made by the clerk or deputy clerks of the Crown, (*m*) the party on whom the same shall be served shall attend such appointment without waiting for a second, (*n*) or in default thereof, such clerk or deputy may proceed *ex parte* on the first appointment. (*o*)

145. (*p*) No business shall be transacted in any of the offices of the Court, (*q*) either in procuring or suing out process, or in re-entering judgments, or taking any proceeding whatever in a cause, unless upon the personal attendance of the party on whose behalf such business is required to be transacted, or of the counsel or attorney of such party, or the clerk or agent of the attorney, or the clerk of the agent. (*r*)

146. (*s*) The offices of the clerks of the Crown and Pleas shall be kept open as follows, that is to say: (*t*) during term from ten in the

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may be signed in the ordinary course; but if no verdict has been taken, the award may be enforced at any time after publication: *O'Toole et al* v. *Pott*, 7 El. & B. 102; 3 s. c. Jur. N.S. 261.

(*m*) Taken from Eng. R. G. No. 172 of H. T. 1853.

(*n*) It was never the practice in this Province to make it necessary for either party to wait for a second appointment.

(*o*) It is the usual practice for the master upon an appointment to allow one half hour's grace before proceeding with the taxation: *Landon* v. *Stubbs*, 3 U. C. L. J. 70.

(*p*) This rule is original.

(*q*) Before the C. L. P. Act, 1856, a writ of execution issued by an officer at his own house was decided not to be illegal: *Rolker et al* v. *Fuller*, 10 U. C. Q. B. 477. The practice of so doing was, however, censured: *Ib.* It has been held to be irregular for a deputy clerk of the crown to file papers at his own residence apart from his office and out of office hours: *Fralick* v. *Huffman*, 1 Cham. R. 80.

(*r*) The object of this rule is, it seems, to prevent unqualified persons transacting business "in the offices of the courts," by providing that it shall be done only upon "the personal attendance of the party on whose behalf such business is required to be transacted, or of the counsel or attorney of such party, or the clerk or agent of the attorney, or the clerk of the agent." The effect of the rule may be to prevent the clerk or deputy clerk of the crown from transacting business even on the written request (letter) of a solicitor. Both in town and country a personal attendance appears to be necessary. The court in one case granted an attachment against a deputy clerk of the crown for having issued process without authority: *Rex* v. *Fraser*, 3 O.S. 247 Afterwards he was dismissed from office and made to pay costs: *Ib.*

(*s*) The origin of this rule appears to be R. Q. B No. 18 of M. T. 13 Vic. It has been several times amended. It is published here as amended by R. G. of T. T. 24 Vic. 20 U. C. Q. B. 123.

(*t*) This rule seems to be restricted to "the offices of the clerks of the crown

morning to four in the afternoon, (*u*) and (except between the first day of July and the twenty-first day of August) (*v*) at other times from ten in the morning until three in the afternoon (*w*)—Sundays, Christmas-day, Good Friday, Easter Monday, New Year Day, (*x*) and the birth-day of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, excepted; (*y*) and between the first day of July and the twenty-first day of August, both days inclusive, the said offices shall be open from half-past nine in the forenoon until twelve o'clock noon.

147. (*z*) All rolls and records (*a*) shall be upon parchment or paper of such width and length as the clerks of the Crown shall prescribe by written notice, to be put up in some conspicuous place in their respective offices and in the offices of the several deputy clerks of the Crown, (*c*) and none of these officers shall be bound to receive any roll or record not made up in conformity to such notice, and such rolls

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and pleas." With reference to "the offices of *deputy* clerks of the crown and pleas" a similar provision exists: Con. Stat. U. C. cap. 10, s. 38.

(*u*) The offices of the deputies are not required to be kept open later than 3 o'clock during term more than at any other period of the year: Con. Stat. U. C. c 10, s 38. The reason apparently is that as the courts during term sit at Toronto, in the county of York, the business of the outer counties is not directly affected thereby.

(*v*) Special provision is hereafter made for the long vacation.

(*w*) Upon this point the Con. Stat. U. C. cap. 10, s. 38 and the rule here annotated, accord.

(*x*) New Year's day is made a holiday for deputy clerks of the Crown, Con. Stat. U. C. c. 10 s. 38.

(*y*) By the Interpretation Act, the word "holiday" includes Sundays, New Year's day, the Epiphany, the Annunciation, Good Friday, the Ascension, Corpus Christi, St. Peter's and St. Paul's days, All Saints' day, and Christmas day, and any day appointed by proclamation for a general Fast or Thanksgiving: Con. Stat. Can. cap. 5, s, 6, sub-s. 12. A judgment entered on Easter Monday was set aside with costs: *The Trust and Loan Co.* v. *Dickson*, 2 U. C. L. J. N.S. 166.

(*z*) The origin of this rule appears to be R. K. B. No. 3 of H. T. 1 Wm. IV.: Cam. R. 13.

(*a*) *All rolls and records, &c.* The ordinary roll is a judgment roll. About it there can be no doubt. There may also be a roll when a recognizance of bail is enrolled. This too is clearly within the meaning of the rule—if not as a "roll" certainly as a "record." Whatever is enrolled in a Court of Record may be said to be recorded, so that "roll" and "record" may be considered as convertible terms.

(*c*) *Qu.* Must the act of the clerks of the Crown be joint, or can either one without reference to the other prescribe, &c ?

and records shall not exceed, when folded, fourteen inches in length (*e*) and four in breadth, (*f*) written upon at least a sheet of paper, and folded accordingly.

148. (*h*) Whenever a deputy clerk of the Crown is required to transmit any roll, record, or paper in any cause (*i*) to the principal office in Toronto, he shall enclose and seal up the same in an envelope, and shall address such envelope to the Clerk of the Crown in the proper office, (*j*) and he may thereupon deliver such sealed envelope to the attorney who has required the transmission thereof, (taking a receipt from him), or may send the same by post, (*k*) and in no case shall any original papers be delivered out of the custody of the deputy clerk of the Crown, except for the purpose of being transmitted to Toronto, unless by order of the Court or a Judge. (*l*)

149. In counties where the petit jurors are paid by the county or united counties, the marshal or clerk of assize, or person discharging his duties, shall, previous to the entry of each record, be entitled to demand and receive from the party entering the same the sum of seven shillings and sixpence for each record marked "inferior jurisdiction," and the sum of fifteen shillings for every other record. (*o*)

CLERK OF THE PROCESS.

150. (*q*) The clerk of the process shall, on receiving a *præcipe* to be filed by him, issue any writ of summons required for the com-

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(*e*) "Thirteen inches" was the prescribed length under the old Rule No. 3 of H. T. 1 Wm. IV.: Cam. R. 13.

(*f*) This agrees with the old rule.

(*h*) This rule appears to be original.

(*i*) Each deputy clerk of the Crown is *ex officio* clerk of assize in his county: Con. Stat. U. C. cap. 11, s. 9; and it is his duty "within twenty-four hours after notice in writing delivered to him in his office for that purpose, and payment of the necessary postage, to enclose, seal up, and transmit by post to the proper principal office at Toronto, addressed to the clerk thereof any record of Nisi Prius in his custody mentioned in such notice, together with all exhibits filed at the trial:" C. L. P. Act, s. 228.

(*j*) This quite accords with C. L. P. Act, section 228.

(*k*) The party requiring any record, exhibit, or other paper, to be sent to the clerk of the judge's chambers, must, with the notice pay the postages incident to the transmission of the paper required by him: C. L. P. Act, section 228.

(*l*) A deputy clerk of the crown is forbidden to deliver to any party any exhibit filed without a judge's order to that effect: C. L. P. Act, section 229.

(*o*) Inferior jurisdiction of superior courts is now abolished.

(*q*) This rule is original.

mencement of an action; and on receiving a *præcipe* with the affidavit of debt required by law, or a *præcipe* and affidavit with a Judge's order for the arrest of a party, to be also filed by him, (*u*) shall issue any writ of *capias* for the commencement of an action; (*v*) and on receiving a *præcipe*, affidavit, and a Judge's order, to be also filed by him, shall issue any writ of attachment against an absconding debtor. (*w*)

151. (*x*) After issuing either of such writs for the commencement of an action in one of the Superior Courts, (*y*) he shall issue the next writ, whatever it may be, for the commencement of an action in the other of such Courts. (*z*)

152. (*a*) All other writs required by the Common Law Procedure Act, 1856, to be issued by the clerk of the process to the parties or their attorneys, shall be issued according to the established practice.

(*u*) The *præcipe* must not only be received before the issue of the writ, but be, it is presumed, filed in the proper office and during office hours: see *Fralick* v. *Huffman*, 1 Cham. R. 80.

(*v*) It is necessary that the clerk of the process, before issuing a writ, should inform himself that the party applying is entitled to receive it. Process for the commencement of an action is either bailable or non-bailable. If bailable, it may be asked either for a "debt certain" or for "a cause of action other than a debt certain." If for a debt certain there must be, first, a *præcipe*, and, secondly, an affidavit of debt. If for a cause of action other than a debt certain, there must be, first, a *præcipe*, secondly, an affidavit, and thirdly, a judge's order. When the writ asked for is non-bailable, it may be issued upon a *præcipe* only.

(*w*) The affidavit may be made by the plaintiff, his servant, or agent, and must be to the effect that the perso so departing is indebted to the plaintiff in a sum exceeding $100, and stating the cause of action, and that the deponent hath good reason to believe and doth verily believe that such person hath departed from this Province and hath gone to (stating some place to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he hath fled) with intent to defraud the plaintiff of his just dues, or to avoid being arrested, or served with process, &c.: Con. Stat. U. C. cap. 25, s. 2. This affidavit must be accompanied with corroboratory affidavits of two other credible witnesses: *Ib.*

(*x*) This rule is original.

(*y*) The writs must not be issued in blank: *Grimshawe* v. *White et al*, 3 Prac R. 320. The fact that the writ in some respects differs from the *præcipe* is no ground for setting the writ aside: *Cotton* v. *McCulley*, 7 U. C. L. J. 272; *Grimshawe* v. *White et al*, 3 Prac. R. 320.

(*z*) The clerk of the process receives all fees on writs issued by him, and they form part of the consolidated revenue fund of the Province: Con. Stat. U. C. cap. 10, ss. 40, 41.

(*a*) This rule is original.

153. (*d*) The clerk of the process shall attend in his office at all times when the clerks of the Crown and pleas are required to attend in their respective offices, (*e*) and shall permit all necessary searches respecting writs so issued by him, and the affidavits and papers whereon such writs are grounded, and shall grant office copies of all such affidavits and papers on payment of the usual fees. (*f*)

TAXATION OF COSTS AND DIRECTIONS TO TAXING OFFICERS.

154. The practice of the Courts as to costs and the services to be allowed for in all proceedings in the taxation of costs, (*h*) shall be governed, in all cases not otherwise provided for, by the established practice of the Court of Queen's Bench in England. (*i*)

155. (*j*) In any action of the proper competence of the County or Division Courts respectively, (*k*) in which final judgment shall have been obtained by a plaintiff without costs, or in which a plaintiff shall obtain execution on proceedings in the nature of a final judgment, (*l*) no more than County or Division Court costs, as the case may be, shall be taxed, without the special order of the Court or a Judge; but this rule shall not extend to costs on interlocutory proceedings.

(*d*) It has been held that a writ of *mandamus* may be sealed and signed by the clerk of the process: *Burdett* v. *Sawyer*, 2 Prac. R. 398.

(*e*) See R. G. pr. 146.

(*f*) The charge for an exemplification or office copy of proceedings is 6d. per folio. So for every search, if not more than two terms, 6d. If exceeding two and not more than four terms, 1s. If exceeding four terms or a general search, 2s. 6d : see Table of Costs.

(*h*) The origin of this rule appears to be our R. K. B. No. 1 of M. T. 4 Geo. IV.: Cam. R. 6.

(*i*) In cases not otherwise provided for by statute or rule of court, the allowance of costs to either party in suits and penal actions is regulated by the laws of England: section 313, C. L. P. Act.

(*j*) The origin of this rule appears to be our R. K. B. No. 9 of E. T. 11 Geo. IV.: Cam. R. 6. It is published here as amended by R. G. of T. T. 24 Vic. 20 U. C. Q. B. 123.

(*k*) Where the plaintiff's claim is within the jurisdiction of a county court, it is no ground for a certificate for full costs that the defendant's set-off cannot be tried in the county court: *Gooderham* v. *Chilver*, 5 O.S. 496.

(*l*) It is necessary in the case of a verdict by consent without taking of evidence or other hearing, where the amount is within the jurisdiction of an inferior court, to apply under this rule for an order for full costs: see note *j* to section 328, C. L. P. Act. The order may be made unless it appear that the cause is one which the plaintiff was bound to sue in the inferior court: *Geroux* v *Yager*, 8 U. C. L J. 19. The order should not be *ex parte*: *Ib.* The rule was extended to cases in which a "plaintiff obtained execution on proceedings in the nature of final judgment," in consequence of doubts which arose as to the construction

156. (*o*) In any action of the proper competence of the County Court, (*p*) in which the venue could not, according to the law and practice of the Superior Courts, be changed upon the usual affidavit only, (*q*) it shall not be a sufficient ground to certify at the trial thereof that it is a fit cause to have been withdrawn from the County Court, and commenced in either of the Superior Courts, or for either of those Courts, or for a Judge in Chambers, to order the allowance of any other than County Court costs, that the defendant or defendants, or any of them, had removed from the county in which the debt was contracted, or the cause of such suit or action accrued, into any other county or elsewhere out of such county, or that he or they resided or were served with process in any other place than within such county. (*u*)

157. (*v*) Fees shall in no case be taxed as between party and party to more than two counsel upon any trial or argument. (*w*)

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of the old rule: see *Cochrane* v. *Scott et al*, 3 Prac. R. 32; *Jones* v. *Reid*, 1 Prac. R. 247; *Morse* v. *Teetzel*, *Ib.* 375; *Watson* v. *Garrett et al*, 2 Prac. R. 70.

(*o*) The origin of this rule appears to be our R. Q. B. No. 42 of H. T. 13 Vic.

(*p*) See note *k* to preceding rule.

(*q*) See note *h* to section 89, C. L. P. Act.

(*u*) Unless otherwise provided by statute or rule of court, declarations and other pleadings and notices required to be served in any action, whether in the superior or county courts, may be served in any county: C. L. P. Act, section 84.

(*v*) The origin of this rule appears to be our R. K. B. 10 of E.T. 11 Geo. IV.: Cam. R. 6.

(*w*) It is to be observed that there is no power reserved to the court or a judge by rule or order in any case to allow fees to more than two counsel as between party and party. There is no such rule in England: *Morris* v. *Hunt*, 1 Chit. R. 544. If the master allow only one counsel in a case in which the court or a judge think two should be allowed, there may be a revision of taxation: *Grindall* v. *Godman*, 5 Dowl. P. C. 378; *Sharpe* v. *Ashby*, 12 M. & W. 732. The fees of a second counsel may in many cases be allowed if it were proper that he should be employed for the purpose of taking notes: Dax Prac. 297; Marshall on Costs, 2nd ed. 291. It is not usual to allow more than one counsel on a reference: *Hawkins* v. *Rigby et al*, 8 C. B. N.S. 271. But the rule is not an inflexible one: *Ib.*; and where the court thought more than one counsel should have been allowed, a revision of taxation was directed: *Sinclair* v. *The Great Eastern Railway Co.* L. R. 5 C. P. 135. The master's direction is subject to the control of the court where a proper case is shown for its interference: *In re Tillett and Stracey*, *Ib.* 185 Where on the taxation of costs in an action on a policy of insurance, where the questions involved were of an extremely complicated and important character, the master having duly considered all the circumstances, allowed the expenses of sending a barrister as commissioner to

158. (*x*) No counsel fee shall be taxed on any rule which may be obtained without filing a motion paper in court in term. (*y*)

159. (*z*) At the foot of, or accompanying every bill of costs, [when the action is special and the disbursements are large, and the fees paid to counsel exceed those which the taxing officer is permitted to tax,] (*a*) there shall be an affidavit of the attorney in the cause or the agent or clerk having had the management thereof, that the disbursements charged in such bill are correct and were actually paid, and that the several sums charged for mileage were actually paid (naming the party to whom payment was made), that the sum of £—— with brief at trial or argument, or as the case may have been, was paid to Mr. —, and that the pleadings were special and were revised by Mr. —. (*c*)

160. (*d*) In all cases an affidavit of payment of mileage, and to whom paid, is required. (*e*)

161. (*f*) When judgment is signed on a cognovit, (*g*) or on a Judge's order authorising the plaintiff to sign judgment, (*h*) no declaration to ground judgment shall be necessary or allowed on the taxation of costs. (*i*)

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examine witnesses in the Canaries, and the court refused to interfere with his discretion: *Yglesias et al* v. *The Royal Exchange Assurance Corporation*, *Ib.* 141. Counsel fees should in general be exclusively as for fee with brief at the trial: *Doe d. Boulton* v. *Switzer*, 1 Cham R. 83. The fee may, however, be taxed, even though counsel did not attend the trial: *Henderson* v. *Comer*, 3 U. C. L. J. 29. Counsel cannot tax a counsel fee in his own case against his opponent, but this rule does not extend to his partner: *Ib.* It is now held that no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies: *Ham et ux.* v. *Lasher*, 24 U. C. Q. B. 357.

(*x*) The origin of this rule appears to be our R. K. B. of E. T. 11 Geo. IV.: Cam. R. 7.

(*y*) See note *x* to R. G. pr. 120.

(*z*) The origin of this rule appears to be our R. K. B. No. 13 of E. T. 11 Geo. IV.: Cam R. 7.

(*a*) The old rule was unrestricted in its application. The words above placed in brackets show the cases to which the rule here annotated is restricted. The master is in general the judge within certain limits of the amount to be allowed counsel: *Fuzakerley* v. *Rogerson*, 1 L. M. & P. 747; *Cheshire* v. *Mumford*, 2 C. L. R. 746; *Knight et al* v. *The Gravesend Railway Co.* 27 L. J. Ex. 8.

(*d*) This rule appears to be original.

(*e*) See C. L. P. Act, section 315.

(*f*) This rule appears to be original.

(*g*) See R. G. pr. 26 *et seq.*

(*h*) See note *k* to R. G. pr. 125.

(*i*) Nor is a writ of summons necessary to ground a judgment on a cognovit: see note *b* to section 236, C. L. P. Act.

162. (*j*) The costs of attendance by counsel before a Judge in Chambers shall in no case be allowed as between party and party unless the Judge shall certify for such allowance. (*k*)

163. (*l*) Any number of names may be included in one *Subpœna*, and no more than one shall be allowed on taxation of costs, unless a sufficient reason be established to the satisfaction of the taxing officer for the issuing more than one. (*m*)

164. (*n*) The same fees shall be taxed and allowed to coroners for services rendered by them in the execution and return in process in civil suits as would be allowed to a sheriff for the same services, and when, according to the nature of the process and the service rendered thereon, the sheriff, if he had discharged the same duty, would have been entitled to poundage, the same poundage shall be allowed to coroners, and each coroner shall be allowed one shilling for every juror necessarily summoned, and whose name is returned to the clerk of assize, (*p*) in lieu of any other fee for summoning jurors.

165. (*r*) All affidavits of increase must be made by the attorney in the cause or some clerk having the management thereof, or by the client. (*s*) They must set forth the sums paid to counsel, naming

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(*j*) This rule appears to be original.

(*k*) The practice before this rule was to allow the item if, in the opinion of the master, counsel were necessary, and it were shown that counsel did really attend. It is difficult to understand on what sound principle the rule has been changed. It is not pleasant for counsel to apply to a judge for an order for a counsel fee. It is not proper that a judge should be troubled with such an application. The discretion should be with the master.

(*l*) The origin of this rule appears to be R. No. 8 of E. T. 11 Geo. IV.: Cam. R. 14.

(*m*) The second part of this rule grows out of the first part. If any number of names may be included in one *subpœna* ordinarily, one subpœna only in a cause may suffice, and if more than one be issued the *onus* is upon the party who issued it to show a reason for so doing to the satisfaction of the taxing officer.

(*n*) This rule appears to be original.

(*p*) On an execution against the person, lands or goods of any debtor, the sheriff may levy the poundage fees and the expenses of the execution over and above the amount recovered by the judgment, &c.: C. L. P. Act, section 270.

(*r*) This rule appears to be original.

(*s*) The master is empowered to tax costs on view of the proceedings: but if there be any expense incurred which cannot in that manner be ascertained, such as fees paid to counsel, witnesses, &c. there must be an affidavit of the extra costs, therefore termed an affidavit of increase. Where the affidavit is in support of the claim of a party entitled to the costs of particular issues, the affidavit

them, and for what service, (*t*) the names of witnesses, their places of abode, the places at which they were subpœnaed, and the distance which each such witness was necessarily obliged to travel, in order to attend the trial, that every such witness was necessary and material for the client in the cause, that they did attend, and that they did not attend as witnesses in any other cause, (*or otherwise, as the case may be*). (*u*) The number of days which each witness was necessarily absent from home in order to attend such trial must also be accurately stated. (*v*) If an attorney attends as a witness, it must be stated whether or not he attended at the place of trial as attorney or witness in any other cause, and whether or not he had any other business

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ought to state that the witnesses were called exclusively in support of the issues upon which he succeeded: *Pilgrim* v. *The Southampton and Dorchester Railway Co.* 8 C. B. 25. The payment should be money, and must be made at the time the affidavit is sworn: *Freeman* v. *Rosher*, 6 D. & L. 517; *Doe d. Mence et al* v. *Hadley*, 17 Q. B. 571; *Pembrey* v. *Jones*, 11 Jur. 589; *Trent* v. *Harrison*, 2 D. & L. 941.

(*t*) Fees should in no case as between party and party be taxed to more than two counsel upon any trial or argument: R. G. pr. 157.

(*u*) It is not usual to allow the costs of witnesses not in attendance: *Fryer* v. *Sturt*, 24 L. J. C. P. 154. But where a witness is in attendance and not called because, by reason of something that took place at the trial it was unnecessary to call him, his expenses may be allowed: *Miller* v. *Thomson*, 4 M. & G. 260; *Adamson* v. *Noel*, 2 Chit. R. 200; *Empson* v. *Fairfax et al*, 8 A. & E. 269; *Bagnall* v. *Underwood*, 11 Price, 510; *Allport* v. *Baldwin*, 2 Dowl. P. C. 599. The expenses may be allowed where material evidence is given, although the witness was not subpœnaed: *Stenhouse* v. *Barnes*, Cas. Prac. C. B. 98; and though called by the other side when subpœnaed: *Crompton* v. *Hutton*, 3 Taunt. 230; *Benson* v. *Schneider*, 7 Taunt. 337. A party giving evidence on his own behalf may be paid as a witness: *Howes* v. *Barber*, 21 L. J. Q. B. 254; *Flower* v. *Gardner*, 3 C. B. N.S. 185; *Clothier* v. *Gann*, 13 C. B. 220. So the costs of the partner of the plaintiff's attorney or of his town agent, when material: *Butler* v. *Hobson*, 5 Bing. N. C. 128; *Chapman* v. *Rodway*, 27 L. J. Ex. 7. The evidence of a witness refused by the judge cannot be allowed: *Galloway et al* v. *Keyworth et al*, 15 C. B. 228; but see *Rushworth* v. *Wilson*, 1 B. & C. 267.

(*v*) The witness is entitled to a reasonable sum for going to, remaining at and returning from the place of trial: *Dixon* v. *Lee*, 1 C. M. & R. 645; *Bettley* v. *McLeod*, 5 Dowl. P. C. 481; *Martin* v. *Andrews*, 7 El. & B. 1. Allowance when subpœnaed by both parties: see *Allen* v. *Foxall*, 1 C. & K. 315; *Bettley* v. *McLeod*, 5 Dowl. P. C. 481. The travelling expenses are to be allowed according to the sums reasonably and actually paid: *Hunter* v. *Liddell*, 16 Q. B. 402; *Radcliffe* v. *Hall*, 3 Dowl. P. C. 802. So subsistence money is that which is reasonably and actually paid: *Thomas* v. *Saunders et al*, 3 N. & M. 572; *Platt* v. *Greene*, 2 Dowl. P. C. 216. A witness who does not arrive until half-past ten of the evening of the day on which the cause is tried cannot be allowed his expenses: *Fryer* v. *Sturt*, 16 C. B. 218. Where a cause is over at three o'clock the witnesses may reasonably be allowed the following day to return home, though living only fifty miles off, and accessible by railway trains on the same evening: *Ib.* The contingent losses which witnesses may have suffered by

there. (*w*) The day on which the trial occurred should be stated. (*x*) If maps or plans were used at the trial, the necessity for them must be shown in the affidavit, or no allowance will be made for them; the sum paid for them must also be set forth, and that they were prepared or procured with a view to the trial of the cause. The taxing officer is authorised in such case to make a reasonable allowance for maps and plans. (*y*)

MISCELLANEOUS.

166. (*z*) In all cases (*a*) in which any particular number of days, not expressed to be clear days, (*b*) is prescribed by the rules of practice of the Courts, (*c*) the same shall be reckoned inclusively of the first and last day, (*d*) unless the last day shall happen to fall on any

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obeying the subpœna cannot be allowed: *Thellusson* v. *Staples*, 2 Doug. 438; *Moor* v. *Adam*, 5 M. & S. 156; *Willis* v. *Peckham*, 1 B. & B. 515; *Lopes* v. *De Tastet*, 3 B. & B. 292; *Collins* v. *Godefroy*, 1 B. & Ad. 950; *Trent* v. *Harrison*, 14 L. J. Q. B. 210.

(*w*) See note *u* on preceding page.

(*x*) As to allowance for attendance of witnesses before the day appointed for the opening of the court: see *Braun* v. *Mollett*, 16 C. B. 514; *Cosgrave* v. *Evans*, 2 Dowl. P. C. 448.

(*y*) Surveys and experiments made by scientific persons in order to qualify themselves to give evidence are not in general taxable as between party and party: Har. Man. Costs, 50; but plans, models, &c. useful to aid the court and jury in coming to a right conclusion, are not looked upon in the same light: *Pilgrim* v. *The Southampton and Dorchester Railway Co.* 8 C. B. 25.

(*z*) Taken from Eng. R. G. No. 174 of H. T. 1853, the origin of which was Eng. R. G. No. 8 of H. T. 2 Wm. IV.: Jervis N. R. 93.

(*a*) This rule seems to apply to pleas in abatement: see *Ryland* v. *Wormald*, 2 M. & W. 393.

(*b*) When expressed to be *clear* days, both the first and last days are excluded: see *Liffin* v. *Pitcher*, 1 Dowl. N.S. 767; *Regina* v. *The Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster*, 9 Dowl. P. C. 527; *Young* v. *Higgon*, 6 M. & W. 49; *Chambers* v. *Smith*, 12 M. & W. 2; *Blunt* v. *Haslop*, 9 Dowl. P.C. 982.

(*c*) Eng. R. G. reads "is prescribed by the rules *or* practice of the courts," &c. The difference in language deserves attention. These rules were made with a view to the interpretation of the practice of the courts, and not to the interpretation of the language of the C. L. P. Act: *Rowberry* v. *Morgan*, 9 Ex. 736, *per* Parke, B.; *Phillips* v. *Merritt*, 2 Prac. R. 233; *Cameron* v. *Cameron*, *Ib.* 259. The C. L. P. Act has its own interpretation clause, which is, however, quite in accordance with the rule here annotated: C. L. P. Act, section 342.

(*d*) This mode of computation differs from that prescribed by the English rule No. 174, which prescribes that the first day shall be exclusive and the last inclusive: see *Weeks* v. *Wray*, L. R. 3 Q. B. 212; see also *Young* v. *Higgon*, 6 M. & W. 49; *Gibson et al* v. *Muskett*, 3 Scott. N. R. 429. Three days' notice, first and last inclusive, is really only one day. Two days' notice, first and last inclusive, is not one day's notice. But where the meaning of the statute is plain, however

day on which the Crown offices are not required to be open, (*e*) in which case the time shall be reckoned exclusively of the last day. (*f*)

167. (*g*) Whenever the word folio is used in any rule or order, it shall be deemed to mean one hundred words. (*h*)

168. (*i*) In all cases unprovided for by statute or rule of Court, the practice as it existed in these Courts before the passing of the Common Law Procedure Act, 1856, shall be followed. (*j*)

FORMS OF PROCEEDINGS.

169. (*l*) The forms of proceedings contained in the schedule annexed, marked A, may be used in the cases to which they are appli-

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unreasonable it may be, effect must be given to it. Monday for Monday is eight days' notice of trial under the C. L. P. Act, as interpreted by section 342 of the act: *Morell* v. *Wilmott*, 20 U. C. C. P. 378.

(*e*) See R. G. pr. 146, and notes thereto.

(*f*) There are cases which show that where a party who has a certain number of days to do an act, by the practice of the court, and the last day for so doing falls on a holiday, that such day is not to be excluded from the computation unless the offices be closed on that day, in which case the day is to be excluded: see *Baddeley* v. *Adams*, 5 T. R. 170; *Wilkinson* v. *Britton*, 8 Dowl. P. C. 825; *Mesure* v. *Britten*, 2 H. Bl. 616; *Wheeler* v. *Green*, 7 Dowl. P. C. 194; *Lewis* v. *Calor*, 1 F. & F. 306; *Hughes et al* v. *Griffiths*, 13 C. B. N.S. 324; *Mumford* v. *Hitchcocks*, 14 C. B. N.S. 365; *Morris* v. *Barrett*, 7 C. B N.S. 139; *Regina* v. *The Justices of Middlesex*, 7 Jur. 396; *Rowberry* v. *Morgan*, 9 Ex. 730; *Connelly* v. *Bremner*, L. R. 1 C. P. 557; *Mayer* v. *Harding*, L. R. 2 Q. B. 410. But there are cases quite inconsistent with this position: see *Evans* v. *Jones*, 2 B. & S. 45; *Flower* v. *Bright*, 2 Johns. & H. 590; *Peacock* v. *The Queen*, 4 C. B N.S. 264; *Woodhouse* v. *Woods et al*, 29 L. J. M. C. 149; *Pennell* v. *The Uxbridge Churchwardens*, 31 L. J. M. C. 92; *Moore* v. *The Grand Trunk Railway Co.* 2 Prac. R. 227; *Cameron* v. *Cameron*, *Ib.* 259. The rule here annotated so far as time under the rule is concerned, has removed all doubt by declaring that if the last day "shall happen to fall on any day on which the crown offices are not required to be open, the time *shall* be reckoned exclusively of the last day."

(*g*) This rule appears to be original.

(*h*) In England, for many purposes, a folio means seventy-five words.

(*i*) This rule appears to be original.

(*j*) This is a very important rule. So far as it operates at all, it qualifies the rule which orders that "all existing rules of practice in either of the said courts in regard to civil actions, save and except as regards any step or proceeding taken before these rules come into force, shall be, from and after the first day of Trinity term, 1856, annulled:" R. G. pr. 1. The object of the present rule is to render the practice of the Queen's Bench in England still applicable to this Province in cases otherwise unprovided for. When the English courts differ as to the practice, it is proper to follow the practice of the Queen's Bench in preference to that of the other courts: see *Gill* v. *Hodgson*, 1 Prac. R. 381.

(*l*) Taken from the rule which follows Eng. R. G. No. 176 of H. T. 1853, but which itself bears no distinct number.

cable, with such alterations as the nature of the action, the description of the Court, the character of the parties, or the circumstances of the case may render necessary; (*m*) but any variance therefrom, not being in matter of substance, shall not affect their regularity. (*n*)

170. (*o*) From and after the last day of this term, (*p*) the tables of costs in civil actions in the Courts of Queen's Bench and Common Pleas shall be rescinded, (*q*) and the costs set down in the schedule annexed, marked B, shall be those allowed in taxation.

(*m*) In cases to which the forms do not apply, other forms may be framed by analogy: see *Smith* v. *Wedderburne*, 4 D. & L. 296.

(*n*) This would seem to order that no variance, "not being in matter of substance," shall be a ground for setting aside the particular proceeding for irregularity.

(*o*) This rule is original.

(*p*) Trinity term, 1856.

(*q*) This seems to apply to rules E. T. 11 Geo. IV. and T.T. 7 Wm. IV. as to costs allowed to attorneys and counsel. Rules T. T. 7 Wm. IV. and 37 H. T. 13 Vic as to costs in chambers and to the clerk in chambers. Rule M.T. 3 Vic. as to fees to the clerks of the crown and pleas. Rule H. T. 10 Vic. as to costs to sheriffs. Rules T. T. 5 Wm. IV. and H. T. 12 Vic. as to fees to coroners. Rule E T. 2 Geo. IV. as to fees to criers. Rule T. T. 5 Wm. IV. as to fees to witnesses—for all of which provision is made by the schedule B, to which reference is made.

REGULÆ GENERALES AS TO PLEADING,

MADE BY THE JUDGES IN PURSUANCE OF

THE COMMON LAW PROCEDURE ACT, 1856. (*s*)

TRINITY TERM, 20 VIC.

Whereas, under the authority of the Statute of Upper Canada, 7 Wm. IV. chap. 3, the Judges of the Court of Queen's Bench in Upper Canada made certain rules, orders, and regulations as to the mode of pleading and other matters, which, by a statute passed in the sixth year of Her Majesty's reign, chaptered 19, were confirmed. (*t*)

And whereas it is provided by the Common Law Procedure Act, 1856, (*u*) among other things, that it shall be lawful for the Judges of the Superior Courts of Common Law in Upper Canada, or any four or more of them, of whom the Chief Justices shall be two, by any rule or order to be from time to time by them made in term or vacation, at any time within five years after the Common Law Procedure Act, 1856, shall come into force, to make such further alterations in the time and mode of pleading, and of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and in the time and manner of objecting to errors in pleadings and other proceedings; and in the mode of verifying pleas and obtaining final judgment with-

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(*s*) The powers conferred upon "the judges of the superior courts of common law, or any four of them, of whom the chief justices shall be two," by the C. L. P. Act, 1856, were to frame rules of practice *and* pleading: section 313. See ss. 333, 334, of the present C. L. P. Act. The foregoing rules, numbering 170, are those which relate to practice. The following, numbering 23, are those which relate to pleading. The rules as to pleading are, like the rules as to practice, for the most part taken from the English *Regulæ Generales* of Hilary and Trinity Term, 1853.

(*t*) The rules to which reference is here made are those of Easter Term, 1842, framed by the judges under and pursuant to Statute 7 Wm. IV. cap. 3, s 1. To make them of binding effect the statute contained a provision that they should be laid before the legislature "if they (the legislature) shall be then sitting, immediately upon the making of the same, or if the legislature be not then sitting, then within five days after the next meeting thereof." The legislature were not sitting when the rules were made; and when the legislature did sit the rules were not laid before them within five days. To confirm the rules, notwithstanding this objection, the Statute 6 Vic. cap. 19, was passed.

(*u*) Section 313: now C. L. P. Act, ss. 333, 334.

out trial in certain cases, as to them may seem expedient, anything in the said Act to the contrary notwithstanding; and that all such rules, orders, or regulations, shall be laid before both Houses of the Parliament of this Province, if Parliament be then sitting, immediately upon making the same; or if Parliament be not sitting, then within twenty days after the next meeting thereof; and that no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule, order, or regulation, so made shall, from and after such time as aforesaid, be binding and obligatory on the said courts and on all courts of error and appeal in this Province into which the judgment of the said court, or either of them shall be removed, and be of like force and effect as if the provision contained therein had been expressly enacted by the Parliament of this Province: (*c*) Provided that the Governor of this Province by proclamation, or either House of Parliament by any resolution at any time, within three months next after such rules, orders, or regulations shall have been laid before Parliament, may suspend the whole or any part of such rules, orders, or regulations.

And whereas it is expedient, for the effectual execution of the said Common Law Procedure Act, 1856, that the said rules, orders, and regulations respectively made in pursuance of the said Act of the Parliament of Upper Canada should be repealed, and that other rules, orders, and regulations should be framed in lieu thereof. (*e*)

It is therefore Ordered, that from and after the first day of Easter term next inclusive, (*f*) unless Parliament shall in the meantime otherwise enact, the said rules, orders, and regulations, made in pursuance of the said Act of Upper Canada, shall be and the same are hereby repealed; (*g*) excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters

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(*c*) The English general rules of H. T 1853, were not laid before Parliament, as was the case with those of T. T. 1853, which were promulgated under section 223 of the C. L. P. Act. The latter rules, therefore, have the force and effect of an act of parliament: *per* Willes, in argument of *Rowberry* v. *Morgan*, 9 Ex. 731.

(*e*) The Statute of Wm. IV. only authorised the judges to make alterations in "the mode of pleading, &c.:" 7 Wm. IV. cap. 3, s. 1; but the C. L. P. Act, 1856, authorised alterations in "the time *and* mode of pleading, &c.:" section 313, now C. L. P. Act, section 334.

(*f*) E. T. 1857.

(*g*) Parliament did not "otherwise enact," so that the rules of E. T. 1842, are repealed, and those here annotated substituted.

to which they relate, had or taken previous to the said first day of Easter term next, (*h*) and the following rules, orders, and regulations shall be in force, that is to say:

1. (*j*) Except as hereinafter provided, several counts on the same cause of action, (*k*) shall not be allowed, (*l*) and any count or counts

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(*h*) E. T. 1857.

(*j*) Taken from Eng. R. G. pl. No. 1 of T. T. 1853, the origin of which was Eng. R. G. No. 5 of H. T. 4 Wm. IV.: Jervis N. R. 116; with which our old R. Q. B. No. 32 of E. T. 5 Vic. Cam. R. 38 in part corresponded.

(*k*) Several counts, though in certain cases allowable, when "on the same cause of action shall not be allowed." It is not a correct test to ascertain that nothing can be recovered under one set of counts which cannot be recovered under another: see *Gilbert* v. *Hales*, 2 D. & L. 227; *Bulmer* v. *Bousfield*, 9 Q. B. 986; nor can particulars of demand be taken into consideration as affording any test: see *Cahoon* v. *Burford*, 13 M. & W. 136; *Gilbert* v. *Hales*, 2 D. & L. 227; *Williams et al* v. *Vines et al*, 6 Q. B. 355; *Bulmer* v. *Bousfield*, 9 Q. B. 986. The true criterion would appear to be this: Are the counts different on the face of them? Can it be said by looking at them, that the same evidence will apply indifferently to either count? *Gilbert* v. *Hales*, 2 D. & L. 227; *Ramsden* v. *Gray et al*, 7 C. B. 961. It may, however, be shown by affidavit or otherwise that the counts, though apparently for the same cause of action, are not so in fact: *Dewar et al* v. *Swabey et al*, 1 G. & D. 397. Two counts upon the same agreement, framed for the purpose of removing the difficulty as to its legal effect, not allowed: *Smith* v. *Thompson*, 5 C. B. 486. So two counts upon the same contract, one count alleging the defendant to be jointly liable with another, and a second count charging him alone; not allowed: *Cholmondeley* v. *Payne et al*, 4 Scott, 418. Two counts, the one charging defendant as principal and the other as agent; not allowed: *Roy* v. *Bristow*, 5 Dowl. P. C. 452. Different modes of stating the consideration for the same promise or grant, not allowed: *Jenkins* v. *Treloar*, 4 Dowl. P. C. 690. Separate counts on express and implied contracts allowed only if they differ one from another: *Steill* v. *Sturry*, 3 Dowl. P. C. 133; *Jenkins* v. *Treloar*, 4 Dowl. P. C. 690; *Currie* v. *Almond*, 5 Bing. N. C. 224; *Temperley* v. *Brown*, 1 Dowl. N S. 310; *Arden* v. *Pullen*, *Ib.* 612; *Thornton* v. *Whitehead*, 4 Dowl. P. C. 747; *Vaughan* v. *Glenn et al*, 8 Dowl. P. C. 396; *Hoare* v. *Lee*, 5 D. & L. 765; *Grissell* v. *James*, 4 C. B. 768; *Ramsaen* v. *Gray et al*, 7 C. B. 961. Where there are different contracts, though in respect of one and the same transaction, a count allowed upon each: *James* v. *Bourne et al*, 4 Bing. N. C. 420; *Williams et al* v. *Vines*, 1 D. & L. 710. So the plaintiff may declare upon a bill of exchange and also on the original consideration for the bill: Pat. MacN. & M. Prac. 141. Counts in detinue and trover for the same cause of action not allowed: *Mockford* v. *Taylor*, 19 C. B. N.S. 209. Where a contract had been altered a count was allowed on the original contract and another on the contract as altered: *Hemming* v. *Trenery et al*, 9 A. & E. 926; *Hernod* v. *Wilkin et al*, 11 Q. B. 1. So several counts allowed on bills of exchange, stating the liability in different forms: *Gilbert* v. *Hales*, 2 D. & L. 227. So a count for a breach of warranty on the sale of a horse, and a count for the price, as money had and received: *Cahoon* v. *Burford*, 2 D. & L. 234. So a common count and a special count for work done: *Bulmer* v. *Bousfield*, 9 Q. B. 686. So a special count and a common count for money paid: *Simpson* v. *Rand*, 1 Ex. 688. So a count for double rent and a count for use and occupation: *Thornton* v. *Whitehead*, 4 Dowl. P. C. 747; *Lawrence* v. *Stephens*, 3 Dowl. P. C. 777. So a count in detinue for a note with a count for the amount of it: *Kirkpatrick* v.

used in violation of this rule (*m*) may, on the application of the party (*n*) objecting, within a reasonable time, or before an order made for time to plead, (*o*) be struck out or amended by the Court or a Judge (*p*) on such terms as to costs or otherwise as such Court or Judge may think fit. (*q*)

The Bank of England, 8 Dowl. P. C. 881; *Gilbert* v. *Hales*, 2 D. & L. 227. Different statements of the contract of a carrier allowed on different counts: *James et al* v. *Bourne et al*, 6 Dowl. P. C. 603. So different statements on different counts in regard to the defendant's duty as to a vessel hired to him by the plaintiff: *Bleaden* v. *Rupallo*, 9 Dowl. P. C. 857. Trover for a boiler, with a special count allowed: *Weeton et al* v. *Woodcock et al*, 7 Dowl. P. C. 384.

(*l*) "Shall not be allowed" *(in taxation of costs)*. The words in italics were in our old rule Q. B. No. 32 of E. T. 5 Vic.: Cam. R. 38; the consequence of which was that the only penalty for using several counts in violation of the rule was the loss of costs: *Johnson* v. *Hunter*, 1 U. C. Q. B. 280. These words having been omitted from the rule here annotated, the penalty is now in this Province the same as in England, viz. the counts improperly pleaded may be struck out.

(*m*) It is not usual for the court to construe these rules very strictly. Counts in the same cause of action are allowed whenever necessary for determining the real question in controversy between the parties on the merits: see *Cahoon* v. *Burford*, 13 M. & W. 136; *Gilbert* v. *Hales*, 2 D. & L. 227; *Dewar et al* v. *Swabey et al*, 11 A. & E. 913; *Chapman* v. *King et al*, 16 L. J. Ex. 15; see R. G. pl. 2. There is still the penalty as to costs: see R. G. pl 3.

(*n*) The application should in the first instance be made to a judge in chambers, and the order if obtained be drawn up on reading the declaration and affidavits filed: *Roy* v. *Bristow*, 5 Dowl. P. C. 452; *Daniels* v. *Lewis*, 1 Dowl. N.S. 844; *The South Eastern Railway Co.* v. *Sprott*, 8 Dowl. P. C. 493; *The South Eastern Railway Co.* v. *Barnes*, 4 Jur. 1185. From the decision of the judge in chambers an appeal may be made to the court in term: *Jenkins* v. *Treloar*, 4 Dowl. P. C. 690; *Johnstone* v. *Knowles*, 1 Dowl. N.S. 30; *Grissell et al* v. *James*, 4 C. B. 768; *Slack* v. *Clifton*, 8 Q. B. 524; *Chapman* v. *King et al*, 16 L. J. Ex. 15. When an order has been made the application should be to rescind it: *The South Eastern Railway Co.* v. *Sprot*, 8 Dowl. P. C. 493. Although no application be made to strike out counts pleaded in violation of this rule, plaintiff may ultimately have to pay the costs incident to such counts: R. G. pl. 3. Generally if there be several counts on the same cause of action, plaintiff will be entitled to a verdict on one count only: *Ward* v. *Bell*, 1 C. & M. 848; *Holford* v. *Dunnett*, 7 M. & W. 348; *Deere* v. *Ivey*, 4 Q. B. 379.

(*o*) The application should as a general rule be made before plea pleaded: see *Wilkins* v. *Perry*, Temp. Hardw. 129.

(*p*) The application should, when possible, be made in the first instance to a judge: *Ward* v. *Graystock*, 4 Dowl. P. C. 717; see also *Morse* v. *Apperley*, 6 M. & W. 145. The party dissatisfied with the order may appeal to the court: *Dewar et al* v. *Swabey et al*, 11 A. & E. 917; *Griffith* v. *Selby*, 9 Ex. 393. So where the judge refuses to make an order striking out a count application may be made to the court: *Grissell et al* v. *James*, 4 C. B. 768; but see *Slack* v. *Clifton*, 8 Q. B. 524.

(*q*) *Court or Judge.* Relative powers: see note *w* to section 48, C. L. P. Act.

2. (*r*) Several pleas, replications or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, (*s*) shall not be allowed, (*t*) provided that on application to the Court or a Judge (*u*) to strike out any count, (*v*) or on an objection taken before the Judge (*w*) on a summons to plead several matters to the allowance of several pleas, replications or subsequent pleadings, avowries or cognizances, on the ground of such counts or other pleadings being in violation of this rule, (*x*) the Court or Judge (*y*) may allow such counts on the same cause of action, or such pleas, replications or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence as may appear to such Court or Judge to be proper for determining the real question in controversy between the parties, on its merits, (*z*) subject to such terms as to costs and otherwise as the Court or a Judge may think fit. (*a*)

3. (*b*) When no such rule or order has been made as to costs (*c*) by the Court or Judge, and on the trial there is more than one count, (*d*)

(*r*) Taken from Eng. R. G. pl. No. 2 of H. T. 1853, the origin of which was Eng. R. G. Nos. 5 and 6 of H. T. 4 Wm. IV.: Jervis N. R. 116, 120; with the former of which our old R. Q. B. No. 33 of E. T. 5 Vic.: Cam. R. 40; in part corresponded.

(*s*) See note *s* to section 110, C. L. P. Act.

(*t*) It has been held that a special replication may be allowed together with a general traverse of the plea, though it do not raise a distinct defence, where the special replication enables the parties to raise by demurrer the substantial question to be decided in the cause: *Williams* v. *The African Steam Navigation Co.* 1 H. & N. 19.

(*u*) *Court or a judge:* see note *w* to section 48, C. L. P. Act.

(*v*) Under the preceding rule.

(*w*) *The judge:* see note *s* to section 110 C. L. P. Act.

(*x*) A pleading may also be struck out when calculated to embarrass, &c.: see section 119, C. L. P. Act.

(*y*) See note *w* to section 48, C. L. P. Act.

(*z*) See note *m* on preceding page.

(*a*) When a rule is made absolute to strike out or amend a pleading as framed to prejudice the fair trial of the action, the party obtaining it gets costs as costs in the cause: *Barnes* v. *Hayward*, 1 H. & N. 242. If when cause is shown the rule be varied, the party does not get costs unless the rule expressly give them to him: *Ib.*

(*b*) Taken from Eng. R. G. pl. No. 3 of H. T. 1853, the origin of which was Eng. R. G. No. 7 of H. T. 4 Wm. IV.: Jervis N. R. 121.

(*c*) *i. e.* Under the preceding rule.

(*d*) The general issue, if pleaded to several counts, raises a distinct issue on each count: *Cox* v. *Thomason*, 1 Dowl. P. C. 572; *Knight* v. *Brown*, *Ib.* 730.

plea, replication or subsequent pleading, avowry or cognizance on the record, (*e*) founded on the same cause of action or ground of answer or defence, (*f*) and the Judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, (*g*) the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea or other pleading, in respect of which he has failed to establish a distinct cause of action, or distinct ground of answer or defence, (*h*) including the costs of the evidence, as well as those of the pleading. (*i*)

4. (*j*) The name of the county shall in all cases be stated in the

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So if there be several closes mentioned by abuttals in one count in trespass, the allegation is divisible, and the defendant is entitled to costs as to those closes, of the breaking of which he is not guilty: *Phythian* v. *White et al*, 1 M. & W. 216. So if there be one count for a libel with several inuendoes, the defendant will be entitled to the costs incurred by disproving the inuendoes negatived by the jury, though the plaintiff succeed upon some: *Prudhomme* v. *Fraser*, 2 A. & E. 645.

(*e*) The costs of several pleas were, before the English rule of Wm. IV. regulated by the Statute 4 Anne, cap. 16: *Cartwright* v. *Cook*, 1 Dowl P. C. 529; *Vallance* v. *Evans*, 1 C. & M. 856; *Hart* v. *Cutbush*, 2 Dowl. P. C. 456; *Bird* v *Higginson*, 5 A. & E. 83: *Spencer* v. *Hamerton*, 4 A. & E. 413; *Middleton* v. *Mucklow*, 10 Bing. 401. That rule was held to apply to actions commenced before it came into operation: *Allenby* v. *Proudlock et al*, 4 A. & E. 326. And it was also held to apply when the cause was referred to an arbitrator who was to certify: *Woof* v. *Hooper*, 4 Bing. N. C. 449. It is further provided that "the costs of any issue either of fact or of law shall follow the finding or judgment on such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues:" see section 110 C. L. P. Act. A perusal of the notes to that section will throw additional light upon the meaning of the rule now under consideration.

(*f*) See note *e* to section 110 C. L. P. Act.

(*g*) A party pleading in violation of this rule is only deprived of costs, and that only when the judge certifies. A party pleading in violation of New Rules 1 or 12 is subject to have his pleadings struck out or amended upon an interlocutory application. But under the Statute of Anne, taken in connection with section 110 of C. L. P. Act, the costs upon an issue follow the finding upon that issue, whatever be the result of the other issue or issues, and this without the judge's certificate.

(*h*) The rule is inconvenient in this respect that each party has a right to the opinion of the jury on each issue, though upon one or more of the issues the result of the cause may be certain: *Rex* v. *Johnson*, 5 A. & E. 488; but see *Duckworth* v. *Harrison*, 4 M. & W. 432.

(*i*) In allowing the costs of witnesses the clerk exercises a discretion whether the witnesses were called solely to prove that issue upon which the party succeeded: *Eades* v. *Everatt et al*, 3 Dowl. P. C. 687; *Crowther* v. *Elwell*, 4 M. & W. 71.

(*j*) Taken from Eng. R. G. pl. No. 4 of T. T. 1853, the origin of which was Eng. R. G. No. 8 of T. T. 4 Wm. IV. Jervis N. R. 122, with which our old Rule Q. B. No. 31 of E. T. 5 Vic. Cam. R. 36 corresponded.

margin of a declaration, and shall be taken to be the venue intended by the plaintiff, (*k*) and no venue shall be stated in the body of the declaration, or in any subsequent pleading; (*l*) Provided that in cases in which local description is now required, such local description shall be given. (*m*)

5. (*n*) In all actions by and against the assignee of an insolvent debtor, (*o*) or against executors or administrators, or persons authorised by Act of Parliament to sue and be sued as nominal parties, (*p*) the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially denied. (*q*)

6. (*r*) In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, (*s*) or a plea traversing the contract

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(*k*) The meaning of this rule is that the county named in the margin shall be the place where the plaintiff intends to allege that the matters of fact took place. If it is immaterial to prove that those facts took place in the place named as the venue, they need not be proved, but if material they must be proved: *Boydell et al* v. *Harkness*, 4 D. & L. 181, *per* Maule, J. As to the mode of stating the venue in the margin of a declaration: see *Atkinson* v. *Hornby*, 2 C. & K. 335; *Thompson* v. *Hornby*, 9 Q. B. 978. It has been held that if no venue be stated when necessary, the declaration is subject to demurrer: *Remington* v. *Tayler*, 1 Lutw. 235.

(*l*) See *Richardson* v. *Locklin*, 6 B. & S. 777.

(*m*) See note *n* to section 7 C. L. P. Act.

(*n*) Taken from Eng. R. G. pl. No. 5 of T. T. 1853, the origin of which was Eng. R. G. No. 21 of H. T. 4 Wm. IV.: Jervis N. R. 125.

(*o*) In trespass for taking goods the defendants in England justified as assignees of a bankrupt; the plaintiff replied that the goods belonged to him: the court held that the defendants were not required by this replication to prove the bankruptcy and their appointment: *Jones* v. *Brown et al*, 1 Bing. N. C. 484; see also *Hernamann* v. *Barber*, 2 C. L. Rep. 825.

(*p*) An executor or administrator may be called upon to give security for costs like any other plaintiff: *Chamberlain* v. *Chamberlain*, 1 Dowl. P. C. 366.

(*q*) To understand fully the effect of this rule, it is necessary to remember that a party to a suit by taking issue on one or more traversable allegations in a pleading, in effect admits all others not traversed. Thus if in a declaration or other pleading either party be alleged to be an executor, administrator, or other person suing in a representative capacity, and that allegation be not traversed, it is for the purpose of the suit admitted: see *Jones* v. *Brown et al*, 1 Bing. N. C. 484.

(*r*) Taken from Eng. R. G. pl. No. 6 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 1 of H. T. 4 Wm. IV. Jervis N. R. 126, with which our old Rule Q. B. pl. No. 1 of E. T. 1 Vic. Cam. R. 52 corresponded.

(*s*) The plea of *non assumpsit* denies the *express* contract or the *facts* from which an express contract is *implied*. Defendant may under the general issue

or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the contract, promise or agreement may be implied by law.

Exempli gratiâ: — In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having

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show that the contract was made not with the plaintiff but with another: *Sutherland* v. *Pratt et al*, 11 M. & W. 296; a misjoinder of plaintiffs: *Chanter* v. *Leese et al*, 4 M. & W. 295; or defendants: *Cooper* v. *Whitehouse et al*, 6 C. & P. 545; *Jackson* v. *Nunn et al*, 4 Q. B. 209; though not the *non*joinder of a defendant: *Rice* v. *Shute et al*, 5 Burr. 2611; *Cocks et al* v. *Brewer et ux.* 11 M. & W. 51. So he may show that the agreement was not as alleged: *De Pinna* v. *Polhill*, 8 C. & P. 78; *Bennion* v. *Davison et al*, 3 M. & W. 179; *Brind* v. *Dale*, 2 M. & W. 775; *Sharland* v. *Leifchild*, 4 C. B. 529; *Williams et al* v. *Vines et al*, 6 Q. B. 355; *Mounsey et al* v. *Perrott*, 2 Ex. 522; or that the consideration was different from that alleged: *Raikes et al* v. *Todd*, 1 P. & D. 138; *Lyall et al* v. *Higgins*, 4 Q. B. 528; *Beech* v. *White*, 12 A. & E. 670; *Sutherland* v. *Pratt et al*, 11 M. & W. 296; *Weedon* v. *Woodbridge*, 13 Q. B. 462; but an after stipulation by which the parties agreed to vary the agreement, must be specially pleaded: *Heath et al* v. *Durant*, 12 M. & W. 438. So defendant may show under this plea that contract was under seal: *Weston* v. *Foster*, 2 Bing. N. C. 693; see further *Edwards* v. *Bates et al*, 7 M. & G. 590. But a defence of merger must be specially pleaded: *Filmer* v. *Burnby*, 2 M. & G. 529; or that the agreement, though signed, was not to take effect till the happening of something which has not happened: *Pym* v. *Campbell et al*, 6 El. & B. 370; *The Liverpool Borough Bank* v. *Eccles et al*, 4 H. & N. 139; *Furness* v. *Meek*, 27 L. J. Ex. 34; *Boyd* v. *Hind*, 1 H. & N. 938. So defendant may show that the plaintiff, an attorney, agreed to do the work for costs out of pocket: *Jones* v. *Nanney*, 1 M. & W. 333; or that goods were sold subject to an express condition not complied with: *Gardner* v. *Alexander*, 3 Dowl. P. C. 146; *Brind* v. *Dale*, 2 M. & W. 775; *Hannuic* v. *Goldner*, 11 M. & W. 849; see also *Sieveking et al* v. *Dutton*, 3 C. B. 331; or that a machine sold was to be paid for only if it worked well: *Grounsell* v. *Lamb*, 1 M. & W. 352; or that the goods delivered were not such as were ordered: *Cousins* v. *Paddon*, 2 C. M. & R. 547; or that the work was to be paid for only if it were successful: *Hayselden* v. *Staff*, 5 A. & E. 153; or that the contract declared on is in any respect different from that which in truth existed between the parties: *Morgan et al* v. *Pebrer*, 3 Bing. N. C. 457; *Mounsey et al* v. *Perrott*, 2 Ex. 522; or any other qualification or condition which defeats the contract as sued upon: *Brind* v. *Dale*, 2 M. & W. 775; *Nash* v. *Breeze*, 11 M. & W. 352; *Sharland* v. *Leifchild*, 4 C. B. 529; *Heath et al* v. *Durant*, 12 M. & W. 438; *Smith* v. *Dixon*, 7 A. & E. 1; *Whittaker et al* v. *Mason*, 2 Bing. N. C. 359; *Metzner* v. *Bolton*, 9 Ex. 518; *Kemble* v. *Mills*, 1 M. & G. 757; *Weedon* v. *Woodbridge*, 13 Q. B. 462; *Wallis* v. *Littell*, 11 C. B. N.S. 369; *Yates* v. *Nash*, 8 C. B. N.S. 581; or that there was no sufficient memorandum in writing to satisfy the Statute of Frauds: *Buttemere* v. *Hayes*, 5 M. & W. 456; *Leaf et al* v. *Tuton*, 10 M. & W. 393; *Reade* v. *Lamb*, 6 Ex. 130; see also *Johnson et al* v. *Dodgson*, 2 M. & W. 653; *Elliott* v. *Thomas et al*, 3 M. & W. 170; *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Fricker* v. *Thomlinson*, 1 M. & G. 772; or Lord Tenterden's Act: *Turnley* v. *Macgregor*, 6 M. & G. 46.

It has been holden that a partnership may be given in evidence under the general issue: *Worrall* v. *Grayson*, 1 M. & W. 166; *Payne* v. *Hales*, 5 M. & W. 598; or the fact that defendants were only competent to make the promise under seal: *Frend* v. *Dennett*, 4 C. B. N.S. 576.

been (*u*) given, but not of the breach; (*v*) and in an action on a policy of insurance, of the subscription of the alleged policy by the defendant, but not of the interest, to the commencement of the risk, of the loss, or of the alleged compliance with warranties. (*w*)

In actions against carriers and others bailees, for not delivering or not keeping goods safe, or not returning them on request, (*x*) and in

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(*u*) The words "upon the alleged consideration" used in the old rules are here omitted. The object of the omission is not manifest. A distinction has hitherto been drawn as to the effect of *non assumpsit* upon the proof of a consideration executed and one executory. In all cases it is necessary to prove the consideration as stated: *Wallis et al* v. *Broadbent et al*, 2 H. & W. 40. Where it is executed, the promise results from the performance and the plea of *non assumpsit* clearly puts in issue all the circumstances necessary to raise that promise, but only those material for that purpose: *Wright* v. *Newton*, 3 Scott, 595; *Bennion* v. *Davison et al*, 3 M. & W. 179. Where the consideration is executory, however, the point is not so clear, though the principle is when considered quite as intelligible: Jervis N.R. 127 n. An executory consideration imports that something is *to be* done by the plaintiff. If the defendant admit, that, relying upon that which was *to be* done by the plaintiff he made the promise and did not fulfil it, merely because the plaintiff did not or could not keep his part of the engagement, he in fact admits his own promise, and also the consideration which induced him to make it, or in other words confesses and should avoid it by pleading specially the ground of defence. The general issue merely denies that the promise was made for the consideration stated: *Ib.* For instance, where the declaration stated that the plaintiff was the composer of an opera and had a right to sell it as such, and that in consideration of the premises, and that the plaintiff would sell it to the defendant, he promised, &c., it was held that under the plea of *non assumpsit* the defendant could not dispute that the plaintiff was the author of and had a right to sell, and did in fact sell the music to the defendant: *DePinna* v. *Polhill*, 8 C. & P. 78. So where the declaration stated that P. had agreed to grant a lease to the plaintiff, that the plaintiff had agreed to grant it to S. upon the payment of a sum of money, that S. had sold his interest to the defendant, that S. had not paid the plaintiff, and that in consideration of the plaintiff granting lease to the defendant, the defendant promised, &c. It was held that the defendant could not under the general issue show that the plaintiff was bound to grant the lease to the defendant without payment of the money: *Passenger* v. *Brooks*, 1 Scott, 560; see also *Gibson* v. *Harris*, 8 C. & P. 378.

(*v*) The contract only and not the breach is traversed by the general issue: *Smith* v. *Parsons*, 8 C. & P. 199; *Warre et al* v. *Calvert*, 7 A. & E. 143; *King et al* v. *Walker*, 2 H. & C. 384; s. c. in Error, 3 H. & C. 209; see also *Smart* v. *Hyde*, 8 M. & W. 723.

(*w*) *Non assumpsit* puts in issue not merely the subscription to the policy containing the particular terms alleged, but to a policy *caused to be made by the plaintiff*, and containing those terms: *Sutherland* v. *Pratt et al*, 11 M. & W. 314, *per* Parke, B.

(*x*) In an action of *assumpsit* brought to recover the value of goods delivered to defendant as a common carrier to be taken care of and safely carried by him for the plaintiff, but which were lost through negligence, a plea that when the defendant received the goods an express condition and agreement was made between him and plaintiff, that the plaintiff should accompany the cart and

actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. (*y*)

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B (32) of the Common Law Procedure Act, 1856, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible; (*z*) and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises, (*a*) *exempli gratiâ*, in actions for goods bargained and sold, (*b*) or sold and delivered, (*c*) the plea will operate as a denial

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watch and protect the goods from being lost or stolen, but that he neglected and refused so to do, by reason whereof and not by reason of any negligence of the defendant the goods were lost. Held bad as amounting to the general issue: *Brind* v. *Dale*, 2 M. & W. 775.

(*y*) See *Benett* v. *The Peninsular and Oriental Steamboat Co.* 6 D. & L. 387.

(*z*) In all actions upon bills and notes, the plea of "non assumpsit" is inadmissible: R. G. pl. 7.

(*a*) It seems that the plea of "never indebted" to an action by a landlord against a tenant for not giving him notice that he had been served with a declaration in ejectment, is a material issue: *Lount* v. *Smith*, 5 U. C. Q. B. 302. Never indebted has been held a sufficient plea to an action for calls by a company incorporated by an act of a colonial legislature: *The Welland Railway Co.* v. *Blake*, 6 H. & N. 410.

(*b*) Where goods are sold on condition that if they are not paid for at a specified time, the owner may re-sell them and that the vendee shall be answerable for any loss on such re-sale, such sale is conditional and not absolute: *Lamond et al* v. *Davall*, 9 Q. B. 1030. Therefore if the vendee do not pay at the time and the vendor re-sell, he cannot maintain *assumpsit* for goods bargained and sold, or sold and delivered: *Ib.* It has been held that the defence might be raised under *non assumpsit*: *Ib.* But now that *nunquam indebitatus* is expressly made applicable to counts for goods bargained and sold, &c. (C. L. P. Act, Sch. B. No. 32), and being such, it is ordered by the rule under consideration that "non assumpsit" shall be inadmissible, the proper plea would appear to be "*nunquam indebitatus*:" *Ib.* Where the sale was on credit defendant under never indebted may show that the credit has not expired: *Broomfield* v. *Smith*, 1 M. & W. 542; or where delivered under a contract of barter: *Harrison* v. *Luke*, 14 M. & W. 139; *Sheriff* v. *McCoy*, 27 U. C. Q. B. 597; or where to be paid for out of a particular fund only: *Garey* v. *Pyke*, 10 A. & E. 512; or that the goods were sold with a warranty and did not agree with it and were of no value more than the money paid: *Dicken* v. *Neale*, 1 M. & W. 556; or that the goods were worthless: *Cousins* v. *Paddon*, 2 C. M. & R. 547; *Dawson* v. *Collis et al*, 10 C. B. 523.

(*c*) In an action for goods sold and delivered where there has been a sale, in point of fact the defendant cannot under the general issue show that the plaintiff had no title to the goods at the time of sale: *Walker* v. *Mellor*, 11 Q. B. 478; nor can he under such an issue insist that the contract of sale was illegal and void: *Fenwick* v. *Laycock*, 1 Q. B. 414.

of the bargain and sale, or sale and delivery in point of fact; (*d*) in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. (*e*)

(*d*) Where goods are sold for ready money and payment is made accordingly, no debt arises, and such payment is therefore provable under the general issue: *Bussey* v. *Barnett*, 1 Dowl. N. S. 646; *Dicken* v. *Neale*, 1 M. & W. 556; *Wood et ux.* v. *Beltcher*, 4 W. R. 566; but see *Littlechild* v. *Banks*, 7 Q. B. 739; *Timmins et ux.* v. *Gibbins*, 18 Q.B. 722. So where a transfer by deed is the consideration and the deed itself acknowledges the payment of the consideration money: *Baker* v. *Heard*, 5 Ex. 959. So where there was an antecedent debt which was accepted as payment: *Smith* v. *Winter*, 12 C. B. 487; *Littlechild* v. *Banks*, 7 Q. B. 739. *Quære*, if a co-operative association only authorized to buy for cash can avoid payment under the general issue when sued for goods sold: see *Fitzgerald et al* v. *The London Co-operative Association* (*Limited*), 27 U. C. Q. B. 605. Defendant may under this plea show that he was a partner with plaintiff: *Payne* v. *Hales*, 5 M. & W. 598; *Brown* v. *Tapscott*, 6 M. & W. 119; *Worrall* v. *Grayson*, 1 M. & W. 166.

(*e*) In an action for *money had and received*, defendant may under never indebted show that the money never was received or held by him to the use of the plaintiff: *Mileham* v. *Eicke*, 3 M. & W. 407; *Owen* v. *Challis*, 6 C. B. 115; *Coupland* v. *Challis*, 2 Ex. 682; or may show either that he received no money: *Simms* v. *Denison*, 28 U. C. Q. B. 323; or that the defendant has a lien upon the money received: *Williams et al* v. *Vines et al*, 6 Q. B. 335; *Brownrigg et al* v. *Rae*, 5 Ex. 489.

In an action for *money paid*, defendant may show under never indebted either that no money was paid or that the payment of it did not in law raise a request: *Power et al* v. *Butcher*, 10 B. & C. 329; *Stokes et al* v. *Lewis et al*, 1 T. R. 20; *Exall* v. *Partridge et al*, 8 T. R. 308; or that it was not to be repaid till a future time: *Maude* v. *Meesham*, 6 Dowl. P. C. 570; or paid in respect of transactions, which gives the plaintiff no right to sue for it in a court of law: *Morgan et al* v. *Pebrer*, 3 Bing. N.C. 457; *Worrall* v. *Grayson*, 1 M. & W. 166; *Brown* v. *Tapscott*, 6 M. & W. 119.

In an action for *money lent*, defendant may show under never indebted either that no money was lent, or if lent, that the loan was secured by deed: *Mathew* v. *Blackmore*, 1 H. & N. 762; *Browne* v. *Price*, 4 C. B. N.S. 598; *contra* where the deed contains no covenant to pay: *Yates* v. *Aston*, 4 Q. B. 182.

In an action for *work done*, defendant may show under never indebted either that no work was done or was done so unskilfully as to be valueless: *Hill* v. *Allen*, 2 M. & W. 283; *Hayselden* v. *Staff*, 5 A. & E. 153; *Bracey* v. *Carter*, 12 A. & E. 373; *Symes* v. *Nipper*, *Ib.* 377 n; *Long* v. *Orsi et al*, 18 C. B. 610; *Lewis* v. *Samuel*, 8 Q. B. 685; *Cox* v. *Leech*, 1 C. B. N.S. 617; that it was done under an agreement that there should be no pay for it: *Jones* v. *Nanney*, 1 M. & W. 333; *Jones* v. *Reade*, 5 Dowl. P. C. 216; that it was to be paid for otherwise than in money: *Collingbourne* v. *Mantell*, 5 M. & W. 289; *Bracegirdle* v. *Hicks*, 9 Ex. 361; that it was only to be paid on certain conditions with which the plaintiff has not complied: *Morgan* v. *Birnie*, 9 Bing. 672; *Milner* v. *Field*, 5 Ex. 829; *Grafton et al* v. *The Eastern Counties Railway Co.* 8 Ex. 699; *Batterbury* v. *Vyse*, 2 H. & C. 42; *Russell* v. *Viscount Sa da Bandeira*, 13 C. B. N.S. 149; or that defendant himself did a portion of the work: *Turner* v. *Diaper*, 2 M. & G. 241; *Newton et al* v. *Forster*, 12 M. & W. 772.

7. (*f*) In all actions upon bills of exchange and promissory notes, the pleas of *non assumpsit* and "never indebted" shall be inadmissible. (*g*) In such actions, therefore, a plea in denial must traverse some matter of fact, *exempli gratiâ* — the drawing or making, or indorsing or accepting, or presenting, or notice of dishonour of the bill or note. (*h*)

In an action on an *account stated*, defendant may show under never indebted that there was no account stated—that the statement was not correct: *Thomas* v. *Hawkes et al*, 8 M. & W. 140; *Duits* v. *Lloyd et al*, 12 Q. B. 531; that it was stated in respect of a debt for which defendant was in no way liable: *Wells* v. *Girling*, 8 Taunt. 737; *Pierce* v. *Evans*, 2 C. M. & R. 294; or for debt for which there was no consideration: *Clarke et ux.* v. *Webb et al*, 1 C. M. & R. 29; *French* v. *French*, 2 M. & G. 644; or that the consideration had failed: *Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C. B. 616.

(*f*) Taken from Eng. R. G. pl. No. 7 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 1 of H. T. 4 Wm. IV. Jervis N. R. 128, with which our Rule Q. B. pl. No. 1 of E. T. 5 Vic. Cam. R. 54, corresponded.

(*g*) This rule does not apply where the bill or note is but the inducement to the promise; as where upon a note given to a testator in his lifetime the promise is laid to the executor after his decease: *Timmis et al* v. *Platt*, 2 M. & W. 720; see also *Donaldson* v. *Thompson*, 6 M. & W. 316; *Rolleston* v. *Dixon*, 14 L. J. Ex. 304. Nor does it apply if the instrument be not in fact a bill or note, though the words "note of hand" be used in the body of it: *Worley* v. *Harrison et al*, 3 A. & E. 669. On the other hand, though the declaration profess to proceed on some other ground, if the cause of action be in fact a bill or note, the rule will apply, and the pleadings should be framed accordingly: *Hay et al* v. *Fisher*, 2 M. & W. 722. If the defendant plead the general issue to an action on a bill or note, the plaintiff may sign judgment: *Kelly* v. *Villebois*, 3 Jur. 1172; *Sewell* v. *Dale*, 8 Dowl. P. C. 309; *Harvey* v. *Hamilton*, 4 Ex. 43; but if he do not, and the cause go to trial, it may be tried: *Hay et al* v. *Fisher*, 2 M. & W. 722; and defendant may avail himself of any defence applicable to the extended issue: *Finleyson* v. *Mackenzie*, 3 Bing. N. C. 824; but see *Neale* v. *Proctor*, 2 C. & K. 456. Where in *assumpsit* on a bill of exchange against the acceptor the defendant pleaded *non assumpsit*, the plaintiff was held entitled to a verdict without calling any witnesses: *Ib.* Where to an action on a bill of exchange, together with the money accounts, the defendant pleads *non assumpsit* to the whole declaration, the plaintiff may sign judgment as to the count on the bill and enter a *nolle prosequi* as to the other counts: *Fraser* v. *Newton*, 8 Dowl. P. C. 773; *Eddison* v. *Pigram*, 16 M. & W. 137. Where the first count of a declaration was on a bill of exchange, and the second on an account stated, and two pleas were pleaded, and there had been judgment on demurrer for the plaintiff on the plea to the count on the bill and issue joined on the other, which was not a plea of payment: *Held* that upon a *venire tam ad triandum quam ad inquirendum et unica taxatio* it was not necessary to produce the bill: *Lane* v. *Mullins*, 1 Dowl. N.S. 562. This rule does not prohibit the plea of the general issue to a count on a bill where the plea is given by statute: *Weeks* v. *Argent*, 16 M. & W 817. Where the legal effect of the instrument is disputed it may be convenient to set it out *verbatim* in the plea, leaving the plaintiff to demurrer: see *Yates* v. *Nash*, 8 C. B. N.S. 581.

(*h*) The effect of the rule is to compel the defendant to traverse or admit each material allegation from which his liability arises: *Sibley* v. *Fisher*, 7 A. & E. 444. In an action by an indorsee against an indorser of a bill, the defendant cannot

8. (*i*) **In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law,** (*j*) **on the ground of fraud or otherwise, shall be specially pleaded,** ***exempli gratiâ,*****—infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law,** (*n*) **drawing, indorsing, accepting bills, &c., or notes, by way of accommo-**

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deny the making because the indorsement admits it: *Allen* v. *Walker*, 2 M. & W. 317. So the acceptor of a bill payable to the order of the drawer cannot deny the authority of the drawer to draw or indorse such bill: *Halifax et al* v. *Lyle*, 3 Ex. 446; see also *Phillips et al* v. *im Thurn*, L. R. 1 C. P. 463. But if the defendant charged as maker deny it, he may succeed if he show that he was indorser only: *Gwinnell* v. *Herbert*, 5 A. & E. 436. A plea denying the indorsement puts in issue not only the fact of the signature but also a delivery with intent to transfer: *Marston* v. *Allen*, 1 Dowl. N. S. 442; see also *Bell* v. *Lord Ingestre*, 12 Q. B. 317; *Harrop* v. *Fisher*, 10 C. B. N. S. 196. And as to the effect of a plea denying plaintiff to be the holder: see *Kemp* v. *Watt*, 15 M. & W. 672. Any plea which compels the plaintiff to produce the bill or note will enable the defendant to take advantage of any defect apparent on the face of the instrument: *Cock* v. *Coxwell*, 2 C. M. & R. 291; *Calvert* v. *Baker*, 4 M. & W. 417; *Dawson* v. *Macdonald*, 2 M. & W. 26; *McDowall* v. *Lyster*, *Ib.* 52; *Jeffs* v. *Creech*, 5 Dowl. P. C. 293; *Field et al* v. *Woods*, 7 A. & E. 114; but see *Bowes* v. *Bradley*, 1 D. & L. 380. Except want of stamps, which in this court must be specially pleaded: *Baxter* v. *Baynes*, 15 U. C. C. P. 237; see also *Stephens* v. *Berry*, *Ib.* 548; *Henderson* v. *Gesner et al*, 25 U. C. Q. B. 184; *Ritchie* v. *Proud*, 16 U. C. C. P. 426; *Lowe* v. *Hall*, 20 U. C. C. P. 244.

(*i*) Taken from Eng. R. G. pl. No. 8 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 1 of H. T. 4 Wm. IV. Jerv. N. R. 129, with which our old Rule Q. B. pl. No. 1 of E. T. 5 Vic. Cam. R. 55 corresponded.

(*j*) The meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, as usury, fraud, &c., and not to exempt the plaintiff from proving anything which he would formerly have been required to prove: *Buttemere* v. *Hayes*, 5 M. & W. 456.

(*n*) Illegality must be specially pleaded: *Potts* v. *Sparrow*, 1 Bing. N. C. 594; *Martin* v. *Smith*, 4 Bing. N. C. 436; though it appear from the plaintiff's own case: *Fenwick* v. *Laycock*, 1 Q. B. 414; *Daintree* v. *Hutchinson*, 10 M. & W. 85; *Bennett* v. *Bull*, 1 Ex. 593; *Allport* v. *Nutt*, 1 C. B. 974; for instance, that the attorney was guilty of maintenance in the suits in respect of which he sues: *Potts* v. *Sparrow*, 1 Bing. N. C. 594; in an action for demurrage that the plaintiff defrauded the customs: *Alcock et al* v. *Taylor*, 6 N. & M. 296; in an action for money had and received that it was the produce of an illegal wager; *Martin* v. *Smith*, 4 Bing. N. C. 446. The particular facts must be stated from which the illegality arises: *Ransford* v. *Copeland*, 6 A. & E. 482; *Grizewood* v. *Blane*, 11 C. B. 538. But where the facts sufficiently appear in the pleadings of the adversary, the objection may be raised by demurrer: *Fevaz* v. *Nicholls*, 2 C. B. 501. So partial failure of consideration must be pleaded: *Head* v. *Baldrey*, 6 A. & E. 459. If a simple contract debt be merged in a specialty subsequently given it must be specially pleaded: *Weston* v. *Foster*, 2 Bing. N. C. 693. So if a subsequent account be stated upon which the defendant relies: *Fidgett* v. *Penny*, 1 C. M. & R. 108.

dation, (*o*) set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

9. (*q*) In actions on policies of insurance the interest of the assured

(*o*) If the defence be that the bill or note was drawn, endorsed or accepted by way of accommodation, or that it was obtained by fraud or under any circumstances which disentitle the plaintiff to sue upon it, this defence must be specially pleaded. The plea of want of consideration must be proved by the defendant: *Lacey* v. *Forrester*, 2 C. M. & R. 59; *Noel* v. *Boyd*, 4 Dowl. P. C. 415; unless indeed the plaintiff state the consideration in his replication in answer to the plea and make it part of the issue: *Low* v. *Burrows*, 2 A. & E. 483. This plea in form must show the real grounds of defence, and state the circumstances under which the bill or note was given, for it is not sufficient to state generally that the defendant received no consideration for the bill or note: *Stoughton* v. *Earl of Kilmorey*, 2 C. M. & R. 72; *Graham* v. *Pitman*, 3 A. & E. 521; *Trinder* v. *Smedley*, *Ib.* 522; *Low* v. *Chifney*, 1 Bing. N. C. 267; *French* v. *Archer*, 3 Dowl. P. C 130; *Reynolds* v. *Ivemey*, *Ib.* 453; *Kearns* v. *Durell*, 6 C. B. 596. If, however, the plaintiff take issue on a plea that "there was not consideration for the bill," the defendant will be at liberty to give in evidence all matters of defence to which such plea is applicable: *Easton* v. *Pratchett*, 1 C. M. & R. 798; *Mills* v. *Oddy*, 2 C. M. & R. 103. So it is not sufficient to cast a suspicion on the plaintiff's title—the circumstances which constitute the defence must be specially pleaded: *Stein* v. *Yglesias et al*, 1 C. M. & R. 565; *Bramah et al* v. *Roberts et al*, 1 Bing. N.C. 469. If the plea alleges the circumstances under which the bill was given, and conclude that there was no consideration, a traverse of the first averment will be sufficient: *Atkinson et al* v. *Davies*, 11 M. & W. 236. It is a general rule that a defendant cannot, in defence to an action on a bill or note, set up a contract different from that which the bill or note imports: *Besant* v. *Cross*, 10 C. B. 895. He may, however, impeach the consideration or set up a collateral agreement furnishing an answer to the demand for payment: *Foster* v. *Jolly*, 1 C. M. & R. 703. For instance, he may show that the bill, &c. was to be renewed: *Thompson* v. *Chubley*, 1 M. & W. 212; either generally or upon a condition broken: *Byas* v. *Wylie*, 1 C. M. & R.686. It was at one time sufficient to cast a suspicion upon a bill in order to require the plaintiff to prove consideration. The rule is now different. The *onus* lies on the defendant to prove want or illegality of consideration, and in each case to trace the vice of the bill to the plaintiff, although in one case: *Mills* v. *Barber*, 1 M. & W. 425; it was doubted whether this was necessary where the bill had been obtained by fraud: *Percival et al* v. *Frampton*, 2 C. M. & R. 180; *Lewis* v. *Parker*, 6 N. & M. 294; *Whitaker* v. *Edmunds*, 1 A. & E. 638; *Edmunds* v. *Groves*, 2 M. & W. 642; see also *Smith* v. *Martin*, 9 M. & W. 304; *Bingham* v. *Stanley*, 2 Q. B. 117. Where the defendant pleads illegality or fraud of the original party to the bill: *Masters* v. *Ibberson*, 8 C. B. 100; and that the plaintiff took the bill without value: *Brown* v. *Philpott*. 2 Moo. & R. 285; on proof of the illegality or fraud, the *onus* is thrown upon the plaintiff. Upon the trial of such an issue it is not the duty of the judge to determine as a preliminary fact whether fraud is sufficiently proved to cast on the plaintiff the *onus* of proving consideration, but only whether there is evidence of fraud for the jury. And it is correct for him to direct them that if they think the fraud proved in the absence of proof by the plaintiff of consideration, the defendant is entitled to a verdict: *Bailey* v. *Bidwell*, 13 M. & W. 73; *Harvey* v. *Towers*, 6 Ex. 656. Payment or tender by the acceptor after the bill becomes due is no answer to the action: *Poole* v. *Tumbridge*, 2 M. & W. 223; *Chapman et ux.* v. *Vandevelde*, 1 H. & W. 385.

(*q*) Taken from Eng. R. G. pl. No. 9 of T. T. 1853, the origin of which was

may be averred thus: "that A. B. C. and D. (or some or one of them) were or was interested," &c. (*r*) And it may also be averred "that the insurance was made for the use and benefit and on the account of the persons so interested."

10. (*s*) In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; (*t*) and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. (*u*)

11. (*v*) The plea of *nil debet* shall not be allowed in any action. (*w*)

Eng. R. G. pl. No. 1 of H. T. 4 Wm. IV. Jervis N. R. 130, with which our old Rule Q. B. pl. No. 1 of E. T. 5 Vic. Cam. R. 55 corresponded.

(*r*) In a declaration on a policy of insurance it is necessary truly to describe the interest on which the policy is effected: *Cohen* v. *Hannam*, 5 Taunt. 101. If, therefore, A. and B. *jointly* interested, effect an insurance, and there be two counts, one averring interest in A. and the other in B. plaintiffs cannot recover on either count: *Ib.* An averment that A. and B. and certain other persons trading under the firm of A. B. & Co. were interested in the property, is sufficient, on a motion in arrest of judgment: *Wright et al* v. *Welbie*, 1 Chit. Rep. 49.

(*s*) Taken from Eng. R. G. pl. No. 10, of T. T. 1853, the origin of which was Eng. R. G. pl. No. 2 of H. T. 4 Wm. IV. Jervis N. R. 130, with which our old Rule Q. B. pl. No. 2 of E. T. 5 Vic. Cam. R. 55 corresponded.

(*t*) Defendant may show under this plea that he delivered the deed as an escrow: *Millership* v. *Brookes*, 5 H. & N. 797. So defendants, a corporation, may show that the deed is not binding on them: *Hill* v. *The Manchester and Salford Water Works Co.* 5 B. & Ad. 866; see further *Chambers* v. *Manchester and Milford Railway Co.* 5 B. & S. 588; *Royal British Bank* v. *Turquand*, 6 El. & B. 327. Besides, even if binding on defendant, a variance between the deed executed and the deed declared upon may be taken advantage of under this plea: *Trott* v. *Smith*, 12 M. & W. 688; and defendant may dispute the legal effect of the deed: *Ib.*; *North et al* v. *Wakefield*, 13 Q. B. 536: *Smith* v. *Scott*, 6 C. B. N.S. 771.

(*u*) If the defence be matter which renders the deed void or voidable, such as infancy, duress, alteration or fraud, there must be a special plea: *Whelpdale's Case*, 5 Coke, 119 a. But wherever the contract is declared on in its altered form the defence may be raised under the general issue: *Waugh et ux.* v. *Bussell*, 5 Taunt. 707; *Hemming* v. *Trenery et al*, 9 A. & E. 926; *Davidson* v. *Cooper et al*, 11 M. & W. 778; s. c. 13 M. & W. 343; *Heath et al* v. *Durant*, 12 M. & W. 438; *Mason* v. *Bradley*, 11 M. & W. 590.

(*v*) Taken from Eng. R. G. pl. No. 11 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 2 of H. T. 4 Wm. IV. Jervis N. R. 130, with which our old Rule Q. B. pl. No. 2 of E. T. 5 Vic. Cam. R. 56 corresponded.

(*w*) It was at one time doubted whether the rule of Wm. IV. (with which the rule here annotated corresponds) in terms applied to actions of debt on penal statutes: *Faulkner* v. *Chevell*, 5 A. & E. 213. It was, however, afterwards decided that it did not, and that *nil debet* is still a good plea in such actions: *Earl Spencer* v. *Swannell*, 3 M. & W. 154; *Jones* v. *Williams*, 4 M. & W. 375; see

12. (*x*) All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts. (*y*)

13. (*z*) In all cases in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. (*a*) But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum or sums,

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also *Williams* v. *Bryant*, 5 M. & W. 447. If *nil debet* be pleaded to a declaration containing a count on an account stated, it is bad for the whole declaration, although to the other counts it is a good plea by statute: *Calvert* v. *Moggs*, 10 A. & E. 632.

(*x*) Taken from Eng. R. G. pl. No. 12 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 2 of H. T. 4 Wm. IV. Jervis N. R. 130, with which our old Rule Q. B. pl. No. 2 of E. T. 5 Vic. Cam. R. 57 corresponded.

(*y*) See R. G. pl. 6.

(*z*) Taken from Eng. R. G. pl. No. 13 of H. T. 1853, the origin of which was Eng. R. G. pl. of T. T. 1 Vic. as extended to set-off, Jervis N. R. 156, with which our old Rule Q. B. pl. No. 15 of E. T. 5 Vic. Cam. R. 23 corresponded. With respect to the extension to cases of set-off, see *Shirley* v. *Jacobs*, 2 Bing. N. C. 88; *Ernest* v. *Brown*, 3 Bing. N. C. 674; *Kenyon* v. *Wakes*, 2 M. & W. 764; *Nicholl* v. *Williams*, *Ib.* 758; *Coates et al* v. *Stevens*, 2 C. M. & R. 118; *Booth* v. *Howard*, 5 Dowl. P. C. 438; *Eastwick* v. *Harman*, 6 M. & W. 13; *Rowland* v. *Blaksley et al*, 1 Q. B. 403.

(*a*) A plaintiff is not bound to give the defendant a statement of the items of payment admitted: *Myatt* v. *Green*, 13 M. & W. 377; see also *Townson* v. *Jackson*, *Ib.* 374; *Lamb et al* v. *Micklethwait*, 1 Q. B. 400; *Nosotti* v. *Page*, 20 L. J. C. P. 81. When the payments are admitted in the particulars, the effect of the rule is to put the admission on the same footing as if there had been a plea of payment, and no evidence of it except the admission in the particulars: *Goatley* v. *Herring*, 12 L. J. C. P. 32, *per* Maule, J.; *Russell et al* v. *Bell et al*, 10 M. & W. 340; *Turner* v. *Collins*, 2 L. M. & P. 99. Where the plaintiff in his particulars of demand admits a payment generally, as "Cr. by bills," &c., this is to be taken as a payment admitted to have been made to the plaintiff *by the defendant*: *Smethurst* v. *Taylor et al*, 12 M. & W. 545. But that admission may be explained by showing on what account such payments were made: *Mercy* v. *Galot*, 3 Ex. 851. Where the plaintiff gave credit for a bill and then debited it as dishonored, it was held that these statements must be taken together and that there was no admission of payment: *Green* v. *Smithies*, 1 Q. B. 796. It has been held by Pollock, C. B., that if a plaintiff in his particulars of demand delivered in a cause do not give credit for any sum paid, but in it refer to "full particulars" already delivered, and those full particulars do give credit for a sum paid by defendant, this would not dispense with the necessity of the defendant's pleading such payment: *Hart* v. *Middleton*, 2 C. & K. 9; see also *Bosley* v. *Moore*, 8 Dowl. P. C. 375.

or to cases of set-off where the plaintiff does not state the particulars of such set-off. (*b*)

14. (*c*) Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. (*d*)

15. (*e*) In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, (*f*) and no other defence than such denial shall be admissible under that plea. (*g*)

16. (*h*) In actions for *torts*, the plea of "not guilty" (*i*) shall

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(*b*) Where a party demands a balance without stating how it arises, if the defendant plead payment, the plaintiff may show that in his balance credit has already been given for the sum pleaded: see *Lamb* v. *Micklethwaite*, 9 Dowl. P. C. 531; *Townson* v. *Jackson*, 2 D. & L. 369; *Morris* v. *Jones*, 1 Q. B. 397.

(*c*) Taken from Eng. R. G. pl. No. 14 of T. T. 1853, the origin of which was the latter part of Eng. R. G. pl. of T. T. 1 Vic. Jervis N. R. 157, with which the latter part of our old Rule Q. B. pl. No. 15 of E. T. 5 Vic. Cam. R. 24 corresponded.

(*d*) Payment cannot be given in evidence even for the purpose of showing that the jury ought not to give damages in respect of interest: *Adams* v. *Palk*, 3 Q. B. 2; see also *Lane* v. *Mullins*, 2 Q. B. 254. When pleaded generally to an *indebitatus* count it means payment to any amount which the plaintiff can prove: *Freeman* v. *Crafts*, 4 M. & W. 4; *Alston et al* v. *Mills*, 9 A. & E. 248; *James* v. *Lingham et al*, 5 Bing. N. C. 553; *Moses* v. *Levy*, 4 Q. B. 213.

(*e*) Taken from Eng. R. G. pl. No. 15, T. T. 1853, the origin of which was Eng. R. G. pl. No. 3 of H. T. 4 Wm. IV. Jervis N. R. 131, with which our old Rule Q. B. pl. No. 3 of E. T. 5 Vic. Cam. R. 57 corresponded.

(*f*) The word "detention" in this rule or "detained" in a plea, means an adverse detention: *Clements* v. *Flight*, 16 M. & W. 42; *Mason* v. *Farnell*, 12 M. & W. 674; *Whitehead* v. *Harrison*, 6 Q. B. 423, 429. Defendant may show under the general issue delivery to a third person with the plaintiff's consent: *Anderson* v. *Smith*, 29 L. J. Ex. 460; or that the goods were legally sold: *Morgan et al* v. *Marquis et al*, 9 Ex. 145.

(*g*) If the defence be that plaintiff is not possessed of the goods, or that defendant is justified in detaining them, such a defence should be specially pleaded: *Richards* v. *Frankum*, 6 M. & W. 420. The defendant cannot either under a plea of *non detinet* or of not possessed, set up a tenancy in common with the plaintiff: *Mason* v. *Farnell*, 12 M. & W. 674; nor upon a plea denying property in plaintiff, can defendant as a defence set up that there are other persons cotenants with the plaintiff who are not joined in the action: *Broadbent* v. *Ledward*, 11 A. & E. 209; but under a plea that the goods are not the goods of the plaintiff defendant may set up a lien: *Lane* v. *Tewson*, 12 A. & E. 116 n. Formerly the defendant could not traverse the bailment: *Walker* v. *Jones*, 2 C. & M. 672; *Clements* v. *Flight*, 16 M. & W. 42; *Whitehead* v. *Harrison*, 6 Q. B. 423.

(*h*) Taken from Eng. R. G. pl. No. 16 T. T. 1853, the origin of which was Eng. R. G. pl. No. 4 of H. T. 4 Wm. IV. Jervis N. R. 131, with which our old Rule Q. B. pl. No. 4 of E. T. 5 Vic. Cam. R. 57, corresponded.

(*i*) The plea of "not guilty" which operates as a denial of the breach of duty

operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated

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or wrongful act and admits the inducement, does not admit circumstances irrelevantly stated, nor preclude the defendant from disputing under that plea the character of the act upon which frequently the action is founded. Thus in an action for malicious arrest, "not guilty" denies the malice and want of probable cause, though it admits the arrest: *Cotton* v. *Browne*, 3 A. & E. 312; *Drummond* v. *Figou*, 2 Bing. N. C. 114; *Watkins* v. *Lee*, 5 M. & W. 270; *Hounsfield* v. *Drury et al*, 11 A. & E. 98; *Coles et al* v. *The Governor and Company of the Bank of England*, 10 A. & E. 437. So in an action for keeping mischievous animals, it denies the *scienter*: *Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 D. & L. 509. So in an action for a deceitful representation, it puts in issue both the representation and the deceit: *Mummery* v. *Paul*, 14 L. J. C. P. 9. So in an action for erecting a cesspool near a well and thereby contaminating the water of the well, not guilty puts in issue both the fact of the erection of the well and the averment that the water was thereby contaminated: *Norton* v. *Scholefield*, 9 M. & W. 665. So in an action for running down the plaintiff's carriage, it may under not guilty be proved to have resulted from accident or from the plaintiff's negligence: see *Gough* v. *Bryan*, 2 M. & W. 770; *Dodd* v. *Holme*, 1 A. & E. 493; *Dawson* v. *Moore*, 7 C. & P. 25; *Whalley* v. *Pepper*. *Ib.* 506; *Bridge* v. *The Grand Junction Railway Co.* 3 M. & W. 244; *Dakin* v. *Brown et al*, 7 D. & L. 151; *The South Shields Waterworks Co.* v. *Cookson*, 15 L. J. Ex. 315; *Holden* v. *The Liverpool New Gas and Coke Co.* 3 C. B. 1.

It is, however, to be observed as an established rule of pleading not affected by the New Rules, that matters of inducement not material to the action cannot be traversed, and therefore are not admitted by the plea of not guilty: see *Mummery* v. *Paul*, 1 C. B. 316; *Mitchell et ux.* v. *Crassweller et al*, 22 L. J. C. P. 100. But it must not be supposed that not guilty admits only so much of the inducement as is necessary to found the action if the wrongful act be done. Additional duties may be created by subsequent and additional facts, and if such subsequent statement raise an additional duty, it is admitted by not guilty, even though without it an action might be maintained. Thus in an action against a sheriff for breach of duty in executing process upon the delivery of the writ against goods, he is bound to look out for the goods, if he find them he is bound to levy, if he levy he is bound to pay over the money; for the breach of each of these duties an action would lie, but if all are stated all the duties but not the breaches thereof, are admitted by the general issue: see *Wright* v. *Lainson et al*, 6 Dowl. P. C. 146; *Lewis* v. *Alcock*, *Ib.* 389; *Rowe et al* v. *Ames*, 6 M. & W. 747; *Needham* v. *Fraser*, 1 C. B. 815; *Atkinson* v. *Raleigh et al*, 3 Q. B. 79. It has been decided in an action for running down the plaintiff's chaise that if the declaration allege that the defendant by his servant was possessed of a horse, &c., such possession is admitted by not guilty: see *Wheatley* v. *Patrick*, 2 M. & W. 650; *Hart* v. *Crowley*, 12 A. & E. 378; *Taverner* v. *Little*, 7 Scott, 796; *Dunford et al* v. *Trattles*, 12 M. & W. 529. So to a declaration that the defendant was employed by commissioners of sewers to make a sewer in a public highway, that he kept and continued in the highway two iron gratings lying thereon in the custody and care of the defendant in forming the sewer, without placing any light to show that the gratings were there, not guilty does not put in issue the averment that the gratings were in the custody and care of the defendant, for it is an immaterial averment: *Grew* v. *Hill*, 6 D. & L. 664; see also *Atkinson* v. *Raleigh et al*, 3 Q. B. 79; *Greenell et al* v. *Edgcome et al*, 7 Q. B. 661; *Benett* v. *The Peninsular and Oriental Steamboat Co.* 6 D. & L. 387. Every material allegation in the inducement must be specially traversed, even though improperly incorporated with

in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratiâ. In an action for nuisance to the occupation of a house, by carrying on an offensive trade, the plea of "not guilty" will operate only as a denial that the defendant carried on the alleged trade

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the breach: see *Frankum* v. *Earl of Falmouth et al*, 2 A. & E. 452; *Dukes* v. *Gosting*, 1 Bing. N. C. 588; *Drummond* v. *Pigou*, 2 Bing. N. C. 114; *Dunford et al* v. *Trattles et al*, 1 D. & L. 554; *Haddrick* v. *Heslop et al*, 12 Q. B. 267; *Brink et al* v. *Wingward*, 2 C. & K. 656. In an action for negligently driving a horse and cart against the plaintiff's horse, defendant cannot under not guilty show that he was not the person driving when the injury happened, and that the cart did not belong to him: *Taverner* v. *Little*, 5 Bing. N. C. 678. Where the plaintiff's possession of the cart is alleged by way of inducement it is admitted by the plea of not guilty: *Emery* v. *Clark*, 2 Moo. & R. 260; see also *Hart* v. *Crowley*, 12 A. & E. 378. Leave and license may be given in evidence to an action for an assault: see *Christopherson* v. *Bare*, 11 Q. B. 473; *Bingham* v. *Clements*, 12 Q. B. 260; see further *Bennion* v. *Davison et al*, 3 M. & W. 179; *Bingham* v. *Stanley*, 2 Q. B. 117; *Coward* v. *Baddeley*, 4 H. & N. 478; or that the act complained of was the result of accident: *Gibbons* v. *Pepper*, 1 Ld. Rayd. 38; *Wakeman* v. *Robinson*, 1 Bing. 213; *Hall* v. *Fearnley*, 3 Q. B. 919; but in an action for keeping a mixen near the plaintiff's house, whereby the air was corrupted, defendant was not allowed under not guilty to give in evidence an uninterrupted user for twenty years: *Flight et al* v. *Thomas*, 2 P. & D. 531. In trover not guilty puts in issue the wrongful conversion: *Young et al* v. *Cooper*, 6 Ex. 259; overruling *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1; and the defendant might under that plea prove a tenancy in common with the plaintiff unless he destroyed the article: *Ib.*; *Farrar* v. *Beswick*, 1 M. & W. 682. Under not guilty the defendant cannot set up an absolute property in himself by purchase from the plaintiff: *Barton* v. *Brown*, 5 M. & W. 298; nor a right to detain the goods on a delivery of them to him by the plaintiff as a security for rent: *White* v. *Teale*, 4 P. & D. 43. The plea of not possessed puts in issue the right of the plaintiff to the possession of the goods at the time of the conversion: *Isaac* v. *Belcher et al*, 7 Dowl. P. C. 516. A lien may be given in evidence under a plea that "the plaintiff was not lawfully possessed:" *Brandão* v. *Barnett et al*, 1 M. & G. 908. In general, under this plea defendant may show that plaintiff has no right to immediate possession: *Owen* v. *Knight*, 6 Dowl. P. C. 244. Thus he may show that the goods were with the consent of the plaintiff handed over to a third party: *Vernon* v. *Shipton*, 2 M. & W. 9; or pledged by the plaintiff to a third party because the plea raises in question the right of possession as well as the right of property: *Samuel* v. *Morris et al*, 6 C. & P. 620. But under such plea the defendant cannot show an execution as his justification for making a seizure of the goods: *Samuel* v. *Duke et al*, 3 M. & W. 622; nor a claim to seize the goods for toll dues for landing them at a particular wharf: *Webb* v. *Tripp*, 1 Dowl. N.S. 589; which defences must be specially pleaded: *Knapp* v. *Salsbury*, 2 Camp. 500; *Hall* v. *Fearnly*, 3 Q.B. 919; *Kenrick* v. *Horder*, 29 L. T. Rep. 92. He may, however, show that the sale of the goods to the plaintiff was fraudulent: *Ashby* v. *Minnett*, 3 N. & P. 231; *Nicolls* v. *Bastard*, 2 C. M. & R. 659. The plea of not guilty and not possessed together make up the old plea of not guilty, and whatever might be given in evidence under not guilty before the New Rules of Pleading were first framed may be proved under one or other of these pleas: *Whitmore et al* v. *Greene et al*, 13 M. & W. 107, *per*

in such a way as to be a nuisance to the occupation of the house, (*n*) and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, (*o*) such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession, or trade, the plea of "not guilty" will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, (*p*) and with reference to the plaintiff's office, profession, or

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Alderson, B.; see also *Kynaston* v. *Crouch*, 14 M. & W. 266; *Unwin et al* v. *St Quintin*, 11 M. & W. 277.

(*n*) In an action for erecting a cesspool near a well and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool and that the water was thereby contaminated: *Norton* v. *Scholefield*, 9 M. & W. 665. But under this plea defendant cannot set up a right by prescription to continue the nuisance: *Flight et al* v. *Thomas*, 10 A. & E. 590. It was at one time held that under the general issue defendant might show that his trade was carried on in a proper and convenient place: *Hole* v. *Barlow*, 4 C. B. N.S. 334. But the contrary is now held to be the law: *Bamford* v. *Turnley*, 3 B. & S. 62.

(*o*) An individual cannot sue for the obstruction of a public way unless he has suffered a particular and special damage from the obstruction: *Wilkes* v. *The Hungerford Market Co.* 2 Bing. N. C. 281; *Rose* v. *Groves et al*, 5 M. & G. 613; *Simmons* v. *Lillystone*, 8 Ex. 431. A reversioner may maintain the action where the obstruction is of a permanent character and injurious to his reversion: *Baxter* v. *Taylor*, 4 B. & Ad. 72; *Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *The Midland Railway Co.* 10 C. B. N.S. 287.

(*p*) In an action for libel or slander the plea of not guilty puts the malice in issue: *Hoare* v. *Silverlock*, 9 C. B. 20. But the malice, except in the case of a privileged communication, is to be presumed if the matter published be defamatory and false: *Bromage et al* v. *Prosser*, 4 B. & C. 247; *Haire* v. *Wilson*, 9 B. & C. 643; *Fisher* v. *Clement*, 10 B. & C. 472. The inference of malice may be disproved: *McNab* v. *Magrath*, T. T. 7 Wm. IV. *MS.* R. & H. Dig. "Libel and Slander," i. 8. Under the general issue in libel the defendant may disprove the fact of publication, or show that it is not of an injurious character: *Parmiter* v. *Coupland et al*, 6 M. & W. 105; *Baylis* v. *Lawrence*, 11 A. & E. 920; *O'Brien* v. *Clemets*, 3 D. & L. 676; but the truth of the defendant's remarks on the report of a trial and the evidence given thereat cannot be given in evidence under not guilty: *Small* v. *McKenzie*, Dra. Rep. 183; *Rumsey* v. *Webb et ux.* Car. & M. 104; *Underwood* v. *Parks*, 2 Str. 1200; *Smith* v. *Richardson*, Willes, 20; and if comment be made the defendant may plead that the supposed libel was a fair and *bona fide* comment without malice, on the conduct of the plaintiff in a public capacity: *Earl of Lucan* v. *Smith*, 2 Jur. N.S. 1170. If the action be for slander all the circumstances immediately attending and preceding the speaking of the words may be given in evidence under the general issue: *Keegan* v. *Robson*, 3 U. C. Q. B. 375. So the defendant may give facts and circumstances in evidence in mitigation of damages; *Johnson* v. *Eastman*, Tay. Rep. 248. If the words be

trade, (*q*) but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. (*r*)

In actions for an escape, it will operate as a denial of the neglect

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not actionable *per se* the plea of not guilty puts in issue the special damage alleged as well as the uttering the words: *Wilby* v. *Elston*, 8 C. B. 142. In such an action the plaintiff cannot prove general damage beyond the special damage laid: *Dixon* v. *Smith*, 5 H. & N. 450. In an action for words alleged to have been spoken in a particular defamatory sense, the plea of not guilty not only denies the speaking of the words but the speaking of them in the sense alleged: *Watkin* v. *Hall*, L. R. 3 Q. B. 396. When the declaration contains prefatory allegations the defendant will not be allowed under not guilty to go into evidence as to the prefatory allegations: *Gwynne* v. *Sharpe*, Car. & M. 532, *per* Patteson, J.; *Heming et ux.* v. *Power*, 10 M. & W. 564. The defendant may, however, show that the words spoken were used in a privileged communication: *Richards* v. *Boulton*, 4 O.S. 95; *Lillie* v. *Price*, 5 A. & E. 645; *Hoare* v. *Silverlock*, 9 C. B. 20; *Earl Lucan* v. *Smith*, 1 H. & N. 481. Privileged communications comprehend all statements made *bona fide* in the performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them: *Somerville* v. *Hawkins*, 10 C. B. 583; see also *Tyson* v. *Evans*, 12 A. & E. 733; *Coxhead* v. *Richards*, 2 C. B. 569; *Blackham* v. *Pugh*, *Ib.* 611; *Bennett* v. *Deacon*, *Ib.* 628; *Wilson* v. *Robinson*, 7 Q. B. 68; *Griffiths* v. *Lewis*, *Ib.* 61; *Hopwood* v. *Thorn*, 8 C. B. 293; *Taylor* v. *Hawkins*, 16 Q. B, 308. But the plaintiff may in answer show actual malice: *Fountain* v. *Boodle et ux.* 3 Q. B. 5; *Taylor* v. *Hawkins*, 16 Q. B. 308.

(*q*) In a count for slander the plaintiff alleged that he was a commission merchant buying wheat, and that defendant spoke of him in relation to his trade the words "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales he finger-rigged some screw about the scales and threw on some weight at the same time, and I will not patronize him any more:" *Held* clearly a slander of the plaintiff in his business: *Marsden* v. *Henderson*, 22 U. C. Q. B. 585. Where in an action by a person describing himself in the declaration as a druggist, vendor of medicines and apothecary, the witnesses proved that several persons practising physic had purchased medicines from him, this evidence upon a motion for a nonsuit was considered sufficient to support the verdict: *Terry* v. *Starkweather*, Tay. Rep. 57. But where the plaintiff described himself as "a physician and surgeon licensed to practice according to the laws of the province," it was held that proof that he acted as such was insufficient without showing a license: *Burwell* v. *Hamilton*, H. T. 2 Wm. IV. *MS.* R. & H. Dig. "Libel and Slander," ii. 8.

(*r*) In an action for a libel the defendant at first pleaded not guilty, but afterwards pleaded to the further maintenance of the action that the plaintiff had recovered damages against another person for the same grievance. New assignment that the pending action was brought for other and different grievances. Plea to the new assignment not guilty. *Held* that this did not admit the inuendoes, and that by pleading not guilty to the new assignment the defendant had raised precisely the same issue, as if the libel had been set out in the declaration and the defendant had pleaded not guilty to it: *Duke of Brunswick* v. *Pepper*, 2 C. & K. 683, *per* Erle, J. To an action for words imputing to the plaintiff in the way of his trade that he was dishonest and a cheat, the defendant pleaded a judgment recovered in a former action. Upon the trial of the issue upon *nul tiel record*, the record when produced showed that the former action had been brought for calling the plaintiff a thief simply and not in the way of his trade: *Held*, no bar: *Wadsworth* v. *Bentley*, 23 L. J. Q. B. 3.

or default of the sheriff or his officers; (*s*) but not of the debt, (*t*) judgment, or preliminary proceedings. (*u*)

In actions against a carrier, the plea of "not guilty" will operate as a denial of the loss or damage; (*v*) but not of the receipt of the goods as a carrier for hire, or of the purpose for which they were received. (*w*)

(*s*) An action for an escape should be brought against the sheriff, and not against the bailiff who arrested, unless the defendant has been guilty of a rescue: *Wilson* v. *McCullough*, 5 O. S. 680. But defendant may show under not guilty that the bailiff guilty of the default was specially appointed by the plaintiff: *Ford* v. *Leche*, 6 A. & E. 699; but cannot show under it an authority from plaintiff not to execute the writ: *Howden* v. *Standish*, 6 C. B. 504. He may show the discharge of the defendant under the Insolvent Act: *Wallinger* v. *Gurney*, 11 C. B. N.S. 182. The plea denies actual damage as well as the default alleged as the cause of damage: *Williams* v. *Mostyn*, 4 M. & W. 145; *Wylie* v. *Birch*, 4 Q. B. 566; *Bales* v. *Wingfield*, *Ib.* 580 n.

(*t*) The plea admits all matters stated as inducement in the declaration: *Wright* v. *Lainson*, 2 M. & W. 739; *Lewis* v. *Alcock*, 3 M. & W. 188; *Rowe et al* v. *Ames*, 6 M. & W. 747. In an action against a sheriff for the escape of A. B., arrested on a *ca. re.* at the instance of the plaintiff, the declaration averred "that he (A. B.) was indebted to the plaintiff in a large sum of money, to wit, &c., upon and in respect of certain causes of action before then accrued to the plaintiff against the said A. B.," &c. Pleas, 1st, not guilty, 2d, denying that A. B. was indebted to the plaintiff *modo et forma*, &c. *Held* that under these pleadings plaintiff was entitled to recover if he showed that *any debt* accrued to him against A. B. before he sued out the writ: *O'Reilly* v. *Moodie*, 4 U. C. Q. B. 266. In debt for an escape the sheriff cannot plead in bar of the action satisfaction previous to the issuing of the writ: *Munson* v. *Hamilton*, 5 O. S. 118.

(*u*) It is not open to a sheriff sued for an escape to set up technical objections in regard to forms of action and points of practice having nothing to do with the fact of the existence of a debt: *O'Reilly* v. *Moodie*, 4 U. C. Q. B. 266. To an action against a sheriff for the escape of a party attached, the sheriff will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award—he cannot go further back than the order authorizing the attachment: *Huntley* v. *Smith*, 4 U. C. Q. B. 181.

(*v*) A person engaged to transport goods for hire is not by virtue of such engagement merely a common carrier and as such liable for all accidents, whether negligent or not: *Benedict* v. *Arthur*, 6 U. C. Q. B. 204; *Benett* v. *The Peninsular and Oriental Steamboat Co.* 6 D. & L. 387. Where several defendants are charged as common carriers and plead, traversing only the delivery to them of the parcel without saying "or any or either of them," the plea notwithstanding is good: *Parke et al* v. *Davis et al*, 6 U. C. Q. B. 411.

(*w*) The defendant under not guilty cannot set up that the goods were lost through the negligence of the plaintiff: *Webb* v. *Page*, 6 M. & G. 196; nor is it competent for defendant under such a plea to set up as a defence that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry: *Webb* v. *Page*, 6 Scott, N. R. 951. In an action (by the plaintiffs in ejectment) against defendants as common carriers for not delivering within a reasonable time the record of *Nisi Prius* at the assize town, it was held not open to the defendants to put in issue the plaintiff's title to the land, the subject of the action of ejectment: *Parke et al* v. *Davis et al*, 6 U. C. Q. B. 411.

17. (*x*) All matters in confession and avoidance shall be pleaded specially, as in actions on contract. (*y*)

18. (*z*) In actions of trespass to land, the close or place in which, &c., must be designated in the declaration by name, or abuttals, or other description, (*a*) in failure whereof the plaintiff may be ordered to

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(*x*) Taken from Eng. R. G. pl. No. 17 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 4 of H. T. 4 Wm. IV. Jervis N. R. 133, with which our old Rule Q. B. pr. No. 4 of E. T. 5 Vic. Cam. R. 60, corresponded.

(*y*) If the breach or wrongful act be admitted, and the defendant seek to protect himself from the consequences thereof by other circumstances, he must plead specially. Thus it has been held that a carrier to avail himself of a statute which requires notice, must plead it: *Syms* v. *Chaplin et al*, 5 A. & E. 634; *Webb* v. *Page*, 6 M. & G. 196. Formerly in trover a lien could not be given in evidence under not guilty: *White* v. *Teal*, 12 A. & E. 106; *Stancliffe* v. *Hardwicke*, 3 Dowl. P. C. 762; see also *Kynaston et al* v. *Croch*, 14 M. & W. 266; but now it seems it may, and is at all events clearly admissible under not possessed: *Richards* v. *Symons*, 8 Q. B. 90.

(*z*) Taken from Eng. R. G. pl. No. 18 of H. T. 1853, the origin of which was Eng. R. G. pl. 5 of H. T. 4 Wm. IV. Jervis N. R. 134, with which our old Rule Q. B. pl. No. 5 of E. T. 5 Vic. Cam. R. 60, corresponded.

(*a*) The plaintiff must prove the abuttals as alleged, and though he will not be defeated by a minute variance, yet he must show that the close in which the trespass was committed is faithfully described in substance, so as to give the defendant full information: *Webber* v. *Richards*, 1 Q. B. 439. A statement of two abuttals only may be sufficient: *North* v. *Ingamells*, 9 M. & W. 249. The description, as of a particular township, must be proved as laid: *Mattice* v. *Farr et al*, Tay. Rep. 218. A house, in one part of which the plaintiff's shop was kept, and in the rest of which the plaintiff's clerk and his family resided, although the plaintiff never resided there, was held to be properly described as plaintiff's dwelling-house: *Beatty* v. *McMasters et al*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. "Trespass," ii. 10. Where the declaration stated that the defendant broke and entered "certain lands of the plaintiff covered with water, being the bed and channel of the river T, and under the same in the several parishes of L. in L, in the county of G." it was held that the *locus in quo* was sufficiently described by name: *Duke of Beaufort* v. *Vivan*, 7 Ex. 580. The *locus in quo* should be designated by abuttals or other description as it was at the time of the trespass and not at the time of the declaration filed: *Humfrey* v. *The London and North West Railway Co. Ib.* 325; see also *Lempriere* v. *Humfrey*, 3 A. & E. 181. In trespass to a dwelling-house it has been held a bad plea to plead that the close in which, &c., is the close of the defendant: *Vail* v. *Noble et al*, 2 U. C. Q. B. 142. So in trespass for breaking and entering the *close* of the plaintiff, it was held a bad plea for the defendant to plead that the *closes* in which, &c., was not nor was either of them the close of the plaintiff: *Woodruff et al* v. *Davis*, *Ib* 404. To a declaration setting out the close by metes and bounds, the defendant pleaded that the part of the close on which, &c., was his close, and not the close of the defendant, as stated in the plea, the replication was held good: *Hiscott* v. *Coz*, 1 U. C. Q. B. 489. To support an action of trespass upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the *locus in quo*: *McNeil* v. *Train*, 5 U. C. Q. B. 91. And under that plea the question of possession is a fact for the jury: *Ib.*

amend with costs, or give such particulars as the Court or Judge may think reasonable. (*b*)

19. (*c*) In actions of trespass to land, the plea of "not guilty" shall operate as a denial that the defendant committed the trespass alleged in the place mentioned; (*cc*) but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially. (*d*)

20. (*e*) In actions for taking, damaging, or converting the plaintiff's goods, the plea of "not guilty" shall operate as a denial of the

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(*b*) *Court or Judge*—Relative powers, see note *w* to section 48 C. L. P. Act.

(*c*) Taken from the Eng. R. G. pl. No. 19 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 5 of H. T. 4 Wm. IV. Jervis N. R. 134, with which our old Rule Q. B. pr. No. 5 of E. T. 5 Vic.; Cam. R. 60, corresponded.

(*cc*) Where in trespass *quare clausum fregit* by one of two defendants in common it was proved that the defendant entered on the land under a writ of execution against the goods of the other tenant, it was held that such entry could not be given in evidence under not guilty: *Newkirk* v. *Payme*, 6 O. S. 458.

(*d*) The plea of not possessed denies the possession stated in the declaration, *i. e.* a sufficient possession to sustain the action: *Heath* v. *Milward*, 2 Bing. N.C. 98; *Harrison* v. *Dixon*, 12 M. & W. 142; that is to say, as against a mere wrong-doer the *actual* possession; as against a defendant alleging title *the legal right to possession: Graham* v. *Peat*, 1 East. 244; *Pugh* v. *Roberts*, 3 M. & W. 458; *Browne* v. *Dawson et al*, 12 A. & E. 624; *Asher et ux.* v. *Whitlock*, L. R. 1 Q. B. 1; *Purnell* v. *Young*, 3 M. & W. 288; *Harrison* v. *Dixon*, 12 M. & W. 142; *Jones* v. *Chapman et al*, 2 Ex. 803. The plaintiff complained of an injury to a messuage and premises in his possession, and the defendant pleaded not possessed; and it being found that the plaintiff had only part of the house, the defendant occupying the rest, it was held that the plaintiff was entitled to a verdict: *Fenn* v. *Grafton et al*, 2 Bing. N. C. 617. The plea of not possessed puts in issue the possession of the close described in the declaration: *Bond* v. *Downton*, 2 A. & E. 26; and if more than one close be described, the issue upon the plea is divisible, and the defendant will be entitled to a verdict as to so much as is not proved: *Phythian* v. *White et al*, 1 M. & W. 216; *Wilcox* v. *Montgomery*, 5 O. S. 312. The owner legally entitled cannot maintain trespass before entry: *Litchfield* v. *Ready*, 5 Ex. 939; *Turner* v. *The Cameron's Coalbrook Steam Coal Co.*, *Ib.* 932; *Ryan* v. *Clark*, 14 Q. B. 65; *Harrison* v. *Blackburn*, 17 C. B. N.S. 678. But an actual entry, when made, relates to the time of the legal right to enter: *Barnett* v. *Earl of Guildford*, 11 Ex. 19; *Anderson* v. *Radcliffe et al*, E. B. & E. 806. The plea of *liberum tenementum* admits the possession, and renders it incumbent on the defendant to prove title either by deed or by showing twenty years' actual possession: *Brest* v. *Lever*, 7 M. & W. 593. On this plea the plaintiff is entitled to a verdict if he establish a title to that part of the close on which the trespass was committed, and is not bound to prove title to the whole close: *Smith* v. *Royston*, 8 M. & W. 381. To a declaration in trespass *quare clausam fregit*, and for carrying away the plaintiff's hay and corn, the plea of *liberum tenementum* was held bad: *Wilcox* v. *Montgomery*, 5 O.S. 312.

(*e*) Taken from Eng. R. G. pl. No. 20 of T. T. 1853, the origin of which was Eng. R. G. pl. No. 5 of H. T. 4 Wm. IV., Jervis N. R. 134, with which our old Rule Q. B. pl. No. 5 of E. T. 5 Vic., Cam. R. 61, corresponded.

defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned; (*ee*) but not of the plaintiff's property therein. (*f*)

21 (*g*) In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "by statute," (*h*) together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, (*i*)

(*ee*) In trespass for taking goods the defendant cannot under the general issue even in mitigation of damages prove a repayment by him after action of the money produced by the sale of the goods: *Rundle* v. *Little et al*, 6 Q. B. 174; see further *Clarke* v. *Durham et al*, E. T. 3 Vic. *MS.* R. & H. Dig. "Trespass," ii. 16; *Carey* v. *Tate*, 6 O.S. 147; *Abrams* v. *Moon*, 1 U. C. Q. B. 552; *Lunn* v. *Turner et al*, 4 U. C. Q. B. 282.

(*f*) The plea of no property puts in issue the property as well as the possession: *Harrison* v. *Dixon*, 12 M. & W. 142; *Ashmore* v. *Hardy et al*, 7 C. & P. 501. Plaintiff to maintain the action should have had the possession of the goods: *Ward* v. *Macaulay et al*, 4 T. R. 489; *Young* v. *Hichens*, 6 Q. B. 606; either actual or constructive: *Smith* v. *Mills*, 1 T. R. 675; or a legal right to the immediate possession: *Balme et al* v. *Hutton et al*, 9 Bing. 471. But possession as a bailee is sufficient even against the absolute owner for a wrongful taking of the goods: *Colwill* v. *Reeves*, 2 Camp. 575; *Brierly* v. *Kendall et al*, 17 Q. B. 937; *Turner et al* v. *Hardcastle*, 11 C. B. N.S. 683. Possession is *prima facie* evidence of title against a wrong-doer: *Elliott et ux.* v. *Kemp*, 7 M. & W. 312, *per* Parke, J. If the defendant claim the goods he may under this plea show his title and that the plaintiff's title is fraudulent; for in such a case as against the defendant the plaintiff has no property: *Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Ashby* v. *Minnitt et al*, 8 A. & E. 121. It has been held that if the defendant justify taking the goods as assignee of a bankrupt, and the plaintiff reply that the goods are not the goods of the assignee but the goods of him, the plaintiff, he cannot under that replication dispute the bankruptcy: *Jones* v. *Brown et al*, 1 Bing. N. C. 484.

(*g*) Taken from Eng. R. G. pl. No. 21 of T. T. 1853, the origin of which was Eng. R. G. of T. T. 1 Vic. Jervis N. R. 156, with which our old Rule Q. B. pl. No. 16 of E. T. 5 Vic.; Cam. R. 24 corresponded.

(*h*) "According to the statute" instead of "by statute" written in the margin, may be sufficient: *Robertson* v. *Cooley et al*, 7 U. C. Q. B. 305. The court will not in general with this plea allow other pleas: *Neale* v. *McKenzie*, 2 Dowl. P. C. 702; *Fisher* v. *The Thames Junction Railway Co.* 5 Dowl. P. C. 773; *O'Brien* v. *Clement*, 15 M. & W. 435; *Legge* v. *Boyd*, 1 M. & G. 898; but see *Langford* v. *Woods*, 7 M. & G. 625; *Bartholomew* v. *Carter*, 9 Dowl. P. C. 896.

(*i*) Under our old rule the words "by statute" in the margin were sufficient. It was not necessary to give the year of the passing of the statute, much less the chapter and section. The old English rule was not more exacting. But where in an action of trespass for hunting over plaintiff's land, the defendant pleaded not guilty by statute, the court on an affidavit of the plaintiff that he could not discover the statute under which the defendant meant to justify, made absolute a rule upon the defendant to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out

and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; (*j*) and such memorandum shall be inserted in the margin of the issue and of the *nisi prius* record. (*k*)

22. (*l*) A plea containing a defence arising after the commencement of the action, may be pleaded, together with pleas of defences arising before the commencement of the action; (*m*) provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of pleading such first mentioned plea. (*n*)

23. (*o*) When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, (*p*) the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; (*q*) provided that this and

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of the margin of his plea: *Coy* v. *Lord Forester*, 8 M. & W. 312. The comprehensiveness of the general issue "by statute" is not affected by any of the new rules: *Ross* v. *Clifton et al*, 11 A. & E. 631.

(*j*) If the defendant omit to follow the requirements of this rule, he cannot give special matter in evidence to bring himself within the terms of an act of parliament which allows a plea of not guilty: *Coy* v. *Lord Forester*, 8 M. & W. 312. An amendment may be allowed even after verdict: *Edwards* v. *Hodges*, 15 C. B. 477, or appeal: *VanNatter* v. *The Buffalo and Lake Huron Railway Co.* 27 U. C. Q. B. 581. The parties may so act at the trial and subsequently as to be precluded from raising the objection of the omission of a particular statute in the margin of a plea: *Burridge* v. *Nicholetts*, 6 H. & N. 383.

(*k*) Where a defendant pleaded not guilty, intending to justify under a statute, but the *nisi prius* record had not the words "by statute" added to the margin, the judge at *nisi prius* refused to allow an amendment by the addition of these words, as it could not be shown that they were in the margin of the defendant's plea: *Forman* v. *Dawes et al*, 1 Car. & M. 127.

(*l*) Taken from Eng. R. G. pl. No. 22 of T. T. 1853.

(*m*) It is enacted by the C. L. P. Act that "any defence arising after the commencement of the action shall be pleaded according to the fact:" section 97. The notes to that section may be read with reference to the rule here annotated, and in addition to the cases there cited see *Jones* v. *Hill*, L. R. 5 Q. B. 230.

(*n*) Where the defendant after pleading by leave of a judge withdraws his plea and pleads matter of defence arising afterwards, and the plaintiff confesses such plea, the plaintiff is entitled to his costs up to the time of pleading such plea: *Howarth* v. *Brown*, 1 H. & C. 654.

(*o*) Taken from Eng. R. G. pl. No. 23 of T. T. 1853.

(*p*) Commonly known as a plea *puis darrein continuance:* see section 98 C. L. P. Act, and notes thereto.

(*q*) If the plea go to part only of the action, the plaintiff may enter a *nolle prosequi* or discontinuance; but if he reply or demur, and the defendant succeed, the defendant will be entitled to his costs up to the time of pleading: *Lyttleton* v. *Cross et al*, 4 B. & C. 117.

the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants. (*r*)

24. (*s*) If a plaintiff in ejectment be non-suited at the trial, the defendant shall be entitled to judgment for his costs of suit. (*t*)

25. (*u*) No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made on any record or roll whatever, or in the pleadings. (*v*)

(*r*) It has been held that if one of several defendants plead a plea of bankruptcy at nisi prius, the plaintiff cannot confess such plea and go to trial with the other defendants: *Pascall* v. *Horsley et al*, 3 C. & P. 372. But bankruptcy or composition in the case of a sole defendant may be pleaded since the last pleading: see *Barnett* v. *The London and North Western Railway Co.* 5 H. & N. 604; *The Staffordshire Banking Co.* (*Limited*) v. *Emmott*, L. R. 2 Ex. 208; *Morgan et al* v. *Harding et al*, 11 W. R. 65; *Brooks* v. *Jennings*, L. R. 1 C. P. 476; *Tetley et al* v. *Wanless*, L. R. 2 Ex. 21; s. c. in error, *Ib.* 275.

(*s*) Taken from Eng. R. G. pl. No. 29 of T. T. 1853.

(*t*) If the defendant appear, and the claimant do not appear at the trial, the claimant shall be non-suited: Con. Stat. U. C. cap. 27, s. 24.

(*u*) Taken from Eng. R. G. pl. No. 31 of T. T. 1853, the origin of which was Eng. R. G. No. 2 of H. T. 4 Wm. IV. Jervis N. R. 115, with which our old Rule Q. B. pl. No. 23 of E. T. 5 Vic. Cam. R. 29 corresponded.

(*v*) These forms, all of which have been long disused, may, as a matter of curiosity, be found upon reference to 2 Wms. Saund. 2 *a*, n.

FORMS TO THE COMMON LAW PROCEDURE ACT.

SCHEDULE A.

1.—*Form of an Issue in general.*

In the Q. B. (*or* C. P., *as the case may be.*)
The day of , in the year of our Lord 18 . (*date of Declaration.*) (*The Venue.*) A. B., by P. A., his Attorney (*or* in person, *as the case may be*), sues C. D., who has been summoned to answer the said A. B., by virtue of a writ issued on the day of , in the year of our Lord (*the date of the first writ*), out of Her Majesty's Court of Queen's Bench (*or* Common Pleas, *as the case may be*), for, &c. (*copy the Declaration from these words to the end, and all the Pleadings with their dates, writing each Plea or Pleading in a separate paragraph, and numbering the same as in the Pleading filed, and conclude thus*): Therefore let a Jury come, &c.

2.—*Special Case for the opinion of the Court, under Sec.* 85, (*a*) *where the allowance or disallowance of a particular item or items depends on a question of law.*

In the Q. B. (*or* C. P.)
Between A. B., Plaintiff,
and
C. D., Defendant.
The following case is stated for the opinion of the Court under a rule of Court (*or* order of the Hon. Mr. Justice), dated the day of 18 , made pursuant to the eighty-fifth section of the Common Law Procedure Act, 1856, (*here state the material facts of the case bearing upon the question of law to be decided.*)
The question (*or* questions) for the opinion of the Court is (*or* are)
First,—Whether, &c.
Second,—Whether, &c.

3.—*Issue to be tried by a Jury where the Court or a Judge has directed it under Sec.* 85, (*b*) *where the allowance or disallowance of a particular item or items depends on a question of fact.*

In the Q. B. (*or* C. P.)
The day of 18 , (*date of Issue when delivered by the plaintiff.*) (*Venue.*) A. B., by his Attorney, sues C. D., and the plaintiff (*or* defendant) affirms, and the defendant (*or* plaintiff) denies, that, &c., (*here state the question of fact to be tried, as directed by the Court or a Judge. In some cases it may be advisable to state an inducement before stating the question in dispute. If there be more than one question to be decided, state it thus*): and

(*a*) C. S. U. C. cap. 22, s. 159. (*b*) C. S. U. C. cap 22, s. 159.

the said plaintiff (*or* defendant) also affirms, and the defendant (*or* plaintiff) also denies, that, &c. And it has been ordered by the Court (*or* by the Hon. Mr. Justice) that the said question (*or* questions) shall be tried by a Jury. Therefore let the same be tried accordingly.

4.—*Special Case stated by an Arbitrator under Sec.* 86. (*c*)

(*In the Special Case the Arbitrator must state whether the Arbitration is under a compulsory reference under the Act, or whether it is upon a reference by consent of the parties where the submission has been or is to be made a Rule of one of the Courts. In the former case the Award must be entitled in the Court and Cause, and the Rule of Court must be set forth. In the latter case the terms of the reference relating to the submission, being a Rule of Court, must be set forth.*)

5.—*Form of a Nisi Prius Record in ordinary cases.*

(*The Nisi Prius Record will be a copy of the Issue, as delivered in the action.*)

6.—*Form of a Postea on a verdict for the plaintiff on all the issues, and where the defendant appears at the trial.*

Afterwards, on the day of A. D. , at , in the County (*or* United Counties) of , before , one of the Justices of our Lady the Queen, assigned to take the Assizes in and for the within County (*or* United Counties), come the parties within mentioned, by their respective Attornies within mentioned; and a Jury of the said County (*or* United Counties) being summoned also come, who, being sworn to try the matters in question between the said parties, upon their oaths say, that (*state the negative or affirmative of the issue as it is found for the plaintiff, and in the terms adopted by the pleading. If there be several issues joined and tried, then say*), as to the first issue joined, upon their oath say that, &c. (*state the affirmative or negative of the issue, as it is found for the plaintiff*); and as to the second issue within joined, the Jury aforesaid, upon their oath aforesaid, say, that, &c. (*so proceed to state the finding of the Jury upon all the issues. Conclude by stating an assessment of the damages thus*): and they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, at £ . Therefore, &c.

7.—*Postea on the Issue numbered* 3, *ante.*

(*The same as in ordinary cases, except that there is no assessment of damages.*)

8.—*Postea where a Judge, upon a trial before him, directs a reference on some of the issues, and of the accounts involved therein, and takes a verdict on others of the issues, referring the amount of damages under Sec.* 156. (*d*)

Afterwards, on the day of 18 , (*the Commission day of the Assizes,*) at , in the County (*or* United Counties) of , at the Assizes there holden before the Hon. , one of Her Majesty's Justices

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(*c*) C. S. U. C. cap. 22, s. 162. (*d*) C. S. U. C. cap. 22, s. 160.

of the Court of for Upper Canada, come the parties within mentioned, by their Attorneys within mentioned; and a Jury of the said County (*or* United Counties) being summoned, also come and are sworn to try the matters in question between the said parties: and as to the plaintiff's claim in the count of the Declaration within mentioned, it appears to the said Judge that the questions arising thereon involve the investigation of long accounts on the plaintiff's side; and that the questions arising on the defendant's plea that the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to (*or* greater than, *as the case may be*) the plaintiff's claim within mentioned, involve the investigation of long accounts on the defendant's side, which cannot be conveniently tried before him. And hereupon the said Judge orders and directs that a verdict be entered on each of the issues on the said count of the Declaration, in favor of the plaintiff, e upon the issue on the plea to the said count , that the a cause of action did not accrue within six years before this suit; and that such verdict shall be subject to, and that the matters in difference between the said parties on the said count (except as to the said last mentioned plea) be referred to the award of upon the terms that (*set forth the terms of the order*); and as to the said plea so excepted, the Jurors aforesaid upon their oath say, that the alleged cause of action in the said count did accrue within six years next before this suit. And as to the plaintiff's claim in the count (*or* counts) within mentioned, the Jurors aforesaid upon their oath say, that the defendant did not promise as alleged. Therefore, &c. (*This is only given as a general guide, and must be varied according to the pleadings, terms of reference, and circumstances of each case.*)

9.—*Form of Judgment for Plaintiff on a Verdict.*

(*Copy the Nisi Prius Record, and then proceed thus*): Afterwards, on the day of , in the year of our Lord , (*day of signing final Judgment,*) come the parties aforesaid, by their respective Attorneys aforesaid (*or as the case may be*), and the Hon. Mr. Justice , assigned to take the Assizes in and for the said County (*or* United Counties), before whom the said issue was (*or* issues were) tried, hath sent hither his record, had before him, in these words, &c. (*copy the postea*). Therefore it is considered, that the plaintiff do recover against the defendant the said moneys by the Jurors aforesaid in form aforesaid assessed (*or if the action be in debt, and the Jury do not assess the debt, but only the damages, then say,* do recover against the defendant the said debt of £ , and the moneys by the Jurors aforesaid in form aforesaid assessed); and also £ , for his costs of suit, by the Court here adjudged, of increase to the plaintiff; which said moneys and costs (*or* debt, damages and costs) in the whole amount to £ . (*In the margin of the roll, opposite the words* "therefore it is considered," *write* Judgment signed the day of , A. D. , *stating the day of signing the Judgment.*)

10.—*Form of Postea, on a verdict finding a balance in favor of a Defendant, on a plea of Set-off, and on other pleas.*

Afterwards, on the day of , A. D. (*the Commission day of the Assizes*), before the Hon. , one of the Justices assigned to take the Assizes in and for the within County (*or* United Counties), come the

parties within mentioned, by their respective Attorneys within mentioned; and a Jury of the said County (*or* United Counties) being summoned, also come, who, being sworn to try the matters in question between the said parties, upon their oath say (*if non-assumpsit was the first plea*), as to the first issue within joined, that the defendant did not promise as within alleged (*or if the first plea was, that he never was indebted, say* that the defendant never was indebted, as within alleged). And as to the second issue within joined, the Jurors aforesaid, upon their oath aforesaid, say that the plaintiff was and is indebted to the defendant, as within alleged, in an amount greater than the plaintiff's claim in the declaration within alleged; and they further say, that the balance due from the plaintiff to the defendant, upon the matters contained in the said declaration and the said second plea, amounts to £ . Therefore, &c.

11.—*Form of Judgment for Defendant thereon.*

(*Proceed in the usual form to the end of the Postea, and then thus*): Therefore it is considered that the plaintiff do take nothing by his said writ, but that the defendant do recover against the plaintiff the sum of £ , in form aforesaid, found to be due from the plaintiff to the defendant, together with £ for his costs of defence,—amounting in the whole to £ .

(*In the margin of the roll, opposite the words* "therefore it is considered," *write* Judgment signed the day of , A. D.).

12.—*Form of Judgment on a Special Case stated by an Arbitrator, (vide ante No. 4).*

(*Copy the special case, and then proceed thus*): Afterwards, on the day of , 18 , come here the parties aforesaid, and the Court is of opinion that (*state the opinion of the Court on the question or questions stated in the case, in the affirmative or negative as the case may be*). Therefore it is considered that the plaintiff do recover against the defendant the said £ , and £ for his costs of suit.

(*In the margin, opposite the words* "therefore it is considered," *&c., write* Judgment signed the day of 18 , *inserting the day of signing final Judgment.*)

13.—*Form of an Issue when it is directed to be tried by the Judge of the County Court.*

(*Commence the issue as in Form No.* 1, *above prescribed, then copy all the pleadings, and after the joinder of issue proceed as follows*): And forasmuch as the sum sought to be recovered, and endorsed on the copy of the original process served, does not exceed £ , (*or* and forasmuch as the debt or demand sought to be recovered is alleged to be ascertained by the signature of the defendant,) hereupon on the day of , in the year 18 , (*date of the Writ of Trial,*) pursuant to the statute, the Judge of the County Court for the County (*or* United Counties) of is commanded that he proceed to try such issue (*or* issues) at the first (*or* second) sittings to be next hereafter holden of the said County Court, by a Jury returned for the trial of Issues joined in the said Court; and when the same shall have been tried, that he make known to the Court here what shall have been

done by virtue of the writ of our Lady the Queen, to him in that behalf directed, with the finding of the Jury thereon endorsed, within ten days after the execution thereof.

14.—*Form of the Writ of Trial.*

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Judge of the County Court of :

Whereas A. B., plaintiff in our Court of Queen's Bench (*or* Common Pleas) in and for Upper Canada, at Toronto, on the day of , 18 , (*the date of the summons or other first process,*) impleaded C. D in an action for, &c. (*here recite the Declaration in the past tense.*) And whereas the defendant, on the day of last (*date of the plea*), by his Attorney (*or as the case may be*), came into our said Court and said (*here recite the pleas and pleadings to the joinder of issue*). And whereas the sum sought to be recovered in the said action, and endorsed on the writ of summons (*or as the case may be*) thereon, does not exceed £ . (*Or*) And whereas the debt or demand sought to be recovered in this action is alleged to be ascertained by the signature of the defendant, and it is fitting that the issue (*or* issues) should be tried before you the said Judge: *We*, therefore, pursuant to the statute in such cases made and provided, command you that you do proceed to try the said issue (*or* issues) at the first (*or* second) sittings of the said County Court, to be holden next after the date of this our writ, by a Jury returned for the trial at the said sittings of Issues joined in the said County Court: and when the same shall have been tried in manner aforesaid, We command you that you make known to our Justices of our said Court of Queen's Bench (*or* Common Pleas), at Toronto, what shall have been done by virtue of this writ with the finding of the Jury, hereon endorsed, within ten days after the execution hereof.

Witness, &c.

15.—*Form of Endorsement of the Verdict on the Writ of Trial.*

Afterwards, on the day of , 18 , (*the day of trial,*) before me, Esquire, Judge of the County Court within mentioned, came as well the within named plaintiff as the within named defendant, by their respective Attorneys within named (*or as the case may be*), and the jurors of the Jury whereof mention is within made being summoned also came, and being duly sworn to try the issue (*or* issues), on their oath said that, &c. (*state the finding of the Jury as on a postea on a trial at Nisi Prius.*)

16.—*The like in case a Nonsuit takes place.*

(*Proceed as in the above Form, but after the words* "duly sworn to try the issue within mentioned," *proceed as follows*): and were ready to give their verdict in that behalf; but the plaintiff being solemnly called, came not, nor did he further prosecute his suit against the defendant.

17.—*Form of Judgment for Plaintiff, after Verdict on Writ of Trial.*

(*Copy the Issue, and then proceed as follows*): Afterwards, on the day of , 18 , (*day of signing final Judgment*) come the parties aforesaid, by their respective Attorneys aforesaid (*or as the case may be*); and the

said Judge, before whom the said issue (*or* issues) came on to be tried, hath sent hither the said last mentioned writ, with an endorsement thereon, which said endorsement is in these words, to wit: (*copy the endorsement*) Therefore it is considered, &c. (*conclude as in other cases. See the Form Supra No.* 9.)

18.—*Form of Entry after Judgment by Default or on Demurrer, where the Damages are to be assessed before a Judge of a County Court.*

(*Copy the pleadings commencing the Issue, as in Form No.* 1, *and proceed*) and the defendant, in his proper person (*or* by , his Attorney), says nothing in bar or preclusion of the said action of the plaintiff, whereby the plaintiff remains therein undefended against the defendant (*or copy to the end of the Demurrer book, and then proceed*): and hereupon, on the day of , 18 , (*the day of giving judgment on the demurrer,*) came he. s as well the plaintiff as the defendant, by their respective Attorneys aforesaid; and it appears to the Court here that the declaration (*or* replication) is good in substance (*or* that the plea aforesaid is bad in substance). Wherefore the plaintiff ought to recover against the defendant his damages on occasion of the premises above complained of by him. But because it is unknown to the Court here what damages the plaintiff hath sustained on occasion of the premises, hereupon, on the day of , 18 , (*date of writ of inquiry,*) the Judge of the County Court of the County (*or* United Counties) of is commanded that he diligently enquire what damages the plaintiff hath sustained by reason of the premises, at the first (*or* second) sittings to be next hereafter holden of the said County Court by a Jury returned at such sittings; and that he make known to the Court here what shall have been done by virtue of the writ of our Lady the Queen to him in that behalf directed, within ten days after the execution thereof.

19.—*Form of Writ of Inquiry.*

Victoria, &c. (*as in Form No.* 14.)

To the Judge, &c. (*as before.*)

Whereas, &c. (*as in Form No.* 14, *setting out to the end of the Declaration, and proceeding as in Form No.* 16, *according as it is on judgment by default or judgment on demurrer, and proceed*). But because it is unknown to the said Court here what damages the plaintiff hath sustained by reason thereof, and it is fitting the same should be enquired of by you the said Judge, We, therefore, pursuant to the statute in such case made and provided, command you that you do diligently enquire what damages the said plaintiff hath sustained by reason of the premises, at the first (*or* second) sittings to be next hereafter holden of the said County Court, by a Jury returned at such sittings for the trial of issues joined in such Court. And we further command you that you make known to our Justices of our said Court of Queen's Bench (*or* Common Pleas), at Toronto, what shall have been done by virtue of this Writ with the finding of the Jury hereon endorsed, within ten days next after the execution hereof.

Witness, &c.

20.—*Form of Return to be endorsed.*

Afterwards, on the day of , 18 , (*day of Assessment*) before me, , Esquire, Judge of the County Court within mentioned, came

the within named plaintiff by his Attorney within named, and the jurors of the Jury whereof mention is within made, being summoned, also came and being duly sworn to assess the damages sustained by the plaintiff by reason of the premises within mentioned, say on their oath, that the plaintiff hath sustained damages on occasion thereof over and above his costs and charges by him about his suit in that behalf expended to £ .

21.—*Form of Judgment thereon.*

Afterwards, &c. (*as in Form No.* 15), came the plaintiff by his Attorney aforesaid, and the said Judge before whom the said damages were assessed, hath sent hither the said last mentioned writ, with an endorsement thereon, in these words, to wit (*copy the Endorsement*). Therefore it is considered, &c. (*conclude as in other cases*).

22.—*Form of Issue, where there are Issues in fact to be tried, as well as damages to be assessed on default, or on issues in law before the County Court.*

(*Commence as in No.* 1, *copying the pleadings, the Joinder of Issue, adding the similiter, and inserting the Joinder of Issue to be tried by the record or the judgment by default as to part of the pleadings, or the judgment by the plaintiff on demurrer, as the case may be, and if there be judgment by default, or judgment for plaintiff on a trial by the record or upon demurrer, proceed thus.*) Wherefore the plaintiff ought to recover against the defendant his damages on occasion of the premises, &c. And because it is at present unknown to the Court here whether the defendant will be convicted of the premises upon which issue is above joined between the parties or not, and because it is also unknown to the Court here what damages the plaintiff hath sustained on occasion of the premises, whereof it is considered that the plaintiff ought to recover his damages as aforesaid, and it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment in this behalf against the said defendant be stayed until the trial of the said Issue (*or* Issues) above joined between the said parties be tried by the Country (*or if judgment on demurrer, or on the trial by the record has not been given—then after the entry of the joinder of issue in fact and the demurrer or on the trial by the record—proceed.*) And because the Court here are not yet advised what judgment to give upon the premises whereof the parties have put themselves upon the judgment of the Court (*or as the case may be*). And because the Court here are not advised what judgment to give upon the premises whereon issue is joined between the said parties to be tried by the record. And because it is convenient and necessary that there be but one taxation of damages in this suit, and forasmuch as the sum sought to be recovered and endorsed on the copy of the original process served, does not exceed £ , (*or* forasmuch as the debt or demand sought to be recovered is alleged to be ascertained by the signature of the defendant,) hereupon on the day of 18 , (*date of the Writ of Trial and enquiry*) the Judge of the County Court of the County (*or* United Counties) of is commanded that he proceed, as well to try the issue (*or* issues) joined between the parties to be tried by the Country, as also, diligently to enquire what damages the said plaintiff hath sustained on occasion of the premises whereof it is considered that the plaintiff ought to recover against the defendant on occasion thereof as

aforesaid, (*or according to the facts* the premises whereof the parties have put themselves upon the judgment of the Court as aforesaid, *or* the premises wherein issue is joined between the parties to be tried by the Record, if judgment shall happen to be thereupon given for the plaintiff) at the first (*or* second sittings) to be next hereafter holden of the said County Court, by a Jury returned at such sittings for the trial of issues joined in the said Court, and that he make known to the Court here what shall have been done by virtue of the Writ of our Lady the Queen to him in that behalf directed, with the finding of the Jury thereon endorsed, within ten days next after the execution thereof.

23.—*Form of Writ of Enquiry to try the issues and assess damages contingently on demurrer or issue by the record or where there is judgment by default or on demurrer as to part.*

(*Commence the Writ as in number* 17, *setting out the pleadings, joinder in issue, &c., as the case may be, and according to the suitable form given in number* 20, *and then proceed.*) We, therefore, pursuant to the statute in such case made and provided, command you that you do proceed to try the issue (*or* issues) joined between the parties, to be tried by the Country, and also diligently enquire what damages the plaintiff hath sustained by occasion of the premises, whereof it is considered that the plaintiff ought to recover against the defendant his damages on occasion thereof as aforesaid (*or* the premises whereof the parties have put themselves upon the judgment of the Court as aforesaid *or* the premises whereon issue is joined between the parties to be tried by the record as aforesaid, *as the case may be*) if judgment shall happen to be thereupon given for the plaintiff, at the first (*or* second) sittings to be next hereafter holden of the said County Court by a jury returned at such sittings for the trial of issues joined in the said County Court — and that you make known to us in our said Court of Queen's Bench (*or* Common Pleas) at Toronto, what shall have been done by virtue of this Writ with the finding of the jury thereupon endorsed, within ten days after the execution hereof. Witness, &c.

24.—*Form of Endorsement of Verdict thereon.*

Afterwards, on the day of , 18 , (*day of the Trial, &c.*) before me, , Esquire, Judge of the County Court of the County (*or* United Counties) within mentioned, came as well the within named parties by their respective Attorneys within named (*or otherwise, as the case may be*), and the jurors of the Jury, whereof mention is within made, being summoned also come and being duly sworn to try the issue (*or* issues), and also to assess the damages sustained by the plaintiff on occasion of the premises within mentioned, on their oath, said (&c., *according to the finding of the Jury on the issues, and if for the plaintiff, proceed*), and the said jurors upon their oath aforesaid said that the plaintiff hath sustained damages on occasion thereof, and on occasion of the other premises within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to £ .

25.—*Form of Nonsuit thereon.*

(*Proceed as in form No.* 24, *to the statement that the Jury were sworn, &c.— after the end of which statement, proceed as follows*)—were ready to give their

verdict in that behalf, but the plaintiff, being solemnly called, came not, nor did he further prosecute his said suit against the defendant.

26.—*Form of Judgment thereon.*

(*This will be* mutatis mutandis, *according to the directions given in No.* 21.)

27.—*Form of Entry of Judgment, where the Court or a Judge decides in a summary manner, under section* 84, (*a*) *before declaration.*

In the Queen's Bench (*or* Common Pleas)
Upper Canada, } The day of , 18 , (*the day on which Judgment*
to wit, } *is signed*) A. B. in his own person (*or* by his Attorney,) on the day of , 18 , sued out a Writ of Summons against C. D., and the said C. D., on the day of , 18 , by his Attorney (*or* in person) caused an appearance to be entered for him to the said Writ (*or* and the said C. D. did not cause an appearance to be entered for him pursuant to the exigency of the said Writ) and afterwards by a rule of the said Court of Queen's Bench (*or* Common Pleas) (*or* by an order of the Honorable one of the Justices of the Court of), dated the day of , 18 , made in pursuance of the eighty-fourth section of the Common Law Procedure Act, 1856. It was ordered that the said C. D. should pay to the said A. B. the sum of £ (*setting out the terms or substance of the rule or order, and if costs were ordered, proceeding thus*) together with the costs of the said A. B., by him expended in and about the said Writ and the proceedings thereupon. And now on the day of , 18 , (*the day of signing Judgment*) it is manifestly shown that the said C. D. hath not paid the said sum of £ , and the said costs, therefore it is considered that the said A. B. do recover against the said C. D. the said sum of £ so ordered to be paid as aforesaid, and also £ for his costs of suit by the Court here adjudged to the said A. B., which said moneys and costs in the whole amount to £ , (*in the margin of the rule opposite the words* "therefore it is considered" *write* "judgment signed the day of , A. D. ," *stating the day of signing Judgment*).

28.—*The like, where the case is referred to an Arbitrator.*

(*Proceed as in foregoing form, No.* 27, *down to the words* "It was ordered," *and then proceed as follows*)—It was ordered that the claim of the plaintiff be referred to (*stating the name of the referee, and the substance of the rule or order of reference*)—And afterwards the said (*referee*) by his award (*or* certificate) did award (*or* certify) that there was due and payable from the said C. D. to the said A. B. the sum of £ and now on this day of , 18 , (*the day of signing Judgment*) it is manifestly shown that the said C. D. hath not paid the said sum of £ . Therefore it is considered that the said A. B. do recover against the said C. D. the said sum of £ , (*the amount awarded or certified; and if costs were given by the rule or order or were directed to abide the event of the reference,* and also £ for his costs. *Conclude as in the preceding form No.* 27).

(*These two Forms Nos.* 27 *and* 28 *may be so altered and modeled as to suit other cases arising under section* 84.) (*b*)

(*a*) C. S. U. C. cap. 22, s. 158. (*b*) C. S. U. C. cap. 22, s. 158.

WRITS OF EXECUTION.

29.—*Fieri Facias on a Judgment for Plaintiff in assumpsit.*

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of , Greeting.

We command you that of the goods and chattels in your Bailiwick of , you cause to be made £ , which lately in our Court of Queen's Bench (*or* Common Pleas) before the Justices of our said Court at Toronto, recovered against for damages which had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said to the said as for costs and charges by about suit in that behalf expended, whereof the said is convicted as appears of record, and have that money before our Justices aforesaid at Toronto immediately after the execution hereof to be rendered to the said , and in what manner you shall have executed this our Writ make appear to our Justices aforesaid at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness at Toronto, the day of , in the year of our Lord, 18 .

30.—*The like in Debt.*

(*Commence as in No.* 29, *and proceed down to* "cause to be made," *then proceed as follows,*) as well a certain debt of £ , which lately in our Court of Queen's Bench (*or* Common Pleas) before the Justices of our said Court at Toronto recovered against , as also (*if the judgment be in that form*) for damages which had sustained, as well by occasion of the detaining of that debt as for his costs and charges, &c. (*conclude as in the foregoing form, which may be varied to suit cases in trespass and other kinds of action, except ejectment.*)

31.—*The like against Lands.*

Victoria, &c.

To the Sheriff, &c.

We command you that of the lands and tenements of , in your Bailiwick, you cause to be made, &c., (*as before*) and have that money before our Justices aforesaid at Toronto immediately after the expiration of twelve months from the day of your receipt hereof, and in what manner, &c. (*as before to the end.*)

32.—*Fieri Facias on a rule for payment of money under a judgment in Form No.* 27.

Victoria, &c.

To the Sheriff, &c.

We command you that of the goods and chattels of C. D. in your Bailiwick, you cause to be made £ which lately in our Court of Queen's Bench (*or* Common Pleas) by a rule of our said Court (*or* by an order of the Honorable , one of the Justices of our Court of ,) dated the day of , 18 , were ordered to be paid by the said C. D. to A. B.,* as appears of record, and have that money before our Justices of our said Court of at Toronto immediately after the execution hereof,

and in what manner you shall have executed this our Writ, make appear to our Justices aforesaid at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness, &c.

33.—*Fieri Facias on a rule for payment of Money and Costs.*

Victoria, &c., (*as in form No.* 32 *down to the*)* together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £ , and have those moneys before, &c. (*concluding as in preceding form No.* 32.)

34.—*Fieri Facias on a rule for payment of costs only.*

Victoria, &c., (*same as in form No.* 32, *to* "made £ ,") for certain costs which by a rule of our Court of Queen's Bench (*or* Common Pleas) dated the day of , 18 , were ordered to be paid by the said C. D. to A. B., which said costs have been taxed and allowed by our said Court at the said sum as appears of record, and have that money before, &c. (*concluding as in preceding form No.* 32.)

35.—*Writ of capias ad satisfaciendum on a Judgment for Plaintiff.*

To the Sheriff of, &c.

We command you that you take C. D., if he shall be found in your Bailiwick, and him safely keep so that you may have his body before our Justices of our Court of Queen's Bench (*or* Common Pleas) at Toronto immediately after the execution hereof, to satisfy £ ,* (*the amount of all moneys recovered by the judgment*) which the said A. B. lately in our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D., for his damages (*or* debt and damages, *or otherwise according to the form of action*) whereof the said C. D. is convicted, as appears to us of record, and have you then there this Writ.

Witness, &c., (*as in preceding form No.* 32.)

36.—*Writ of capias ad satisfaciendum on a rule for payment of money.*

Victoria, &c., (*same as in form No.* 35, *to the* *) which lately in our Court of Queen's Bench (*or* Common Pleas) by a rule of our said Court (*or* by an order of the Honorable , one of the Justices of our Court of ,) dated the day of , 18 , were ordered to be paid by the said C. D. to A. B., as appears to us of record, and have you then there this Writ.

Witness, &c.

37.—*Writ of capias ad satisfaciendum on a rule for payment of money and costs.*

Victoria, &c., (*same as No* 36, *down to the words* "were ordered,") were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £ , (*the amount of the allocatur or allocaturs,*

if more than one,) as appears to us of record, and further to satisfy the said A. B. the said last mentioned sum, and have you then there this Writ.

Witness, &c.

38.—*Writ of capias ad satisfaciendum on a rule for the payment of costs only.*

Victoria, &c., (*same as in No.* 35, *down to the word* "immediately," immediately after the execution hereof, to satisfy A. B. £ for certain costs, which, by a rule of our Court of Queen's Bench (*or* Common Pleas *or* by an order of the Honorable , one of the Justices of our Court of), dated the day of , 18 , were ordered to be paid by the said C. D. to the said A. B., which said costs have been taxed and allowed by our said Court at the said sum, as appears to us of record, and have you there then this Writ.

Witness, &c.

39.—*Writs of execution, where the Court or a Judge decides on matters of account, under section* 84. (*a*)

(*All these may be framed upon the forms already given, vide forms No.* 32, *et seq. to No.* 38, *inclusive.*)

40.—*Writs of execution where matter of account is referred to and decided on by an Arbitrator, Officer of the Court, or Judge of the County Court.*

(*The same as directed in the next preceding form, but instead of stating the levy to be of money ordered by a rule or order to be paid, say*) £ , which by an award (*or* certificate) dated the day of , 18 , (*date of award or certificate*) made by E. F., an arbitrator appointed by the parties, or by E. F., Clerk of the Crown and Pleas (*or other officer, naming his office*), of our Court of *or* by E. F., Esquire, the Judge of the County Court of , (*or otherwise, as the case may be*) was awarded (*or* certified) to be due and payable from the said C. D. to A. B. as appears to us of record, and have you there then this Writ.

Witness, &c.

41.—*Writ of habere facias in ejectment, upon a Judgment by default.*

Victoria, &c.

To the Sheriff of, &c.

Whereas A. B., lately in our Court of Queen's Bench (*or* Common Pleas) by the judgment of the said Court recovered possession of , (*describe the property as in the Writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment*) with the appurtenances in your Bailiwick. Therefore we command you that without delay you cause the said A. B. to have possession of the said land and premises, with the appurtenances, and in what manner, &c. (*as in form No.* 29.)

42.—*Writ of habere facias and fieri facias for costs upon a judgment for Plaintiff in ejectment where defendant has appeared.*

Victoria, &c. Whereas A. B., lately in our Court of Queen's Bench (*or* Common Pleas) recovered possession of (*describe the property as in the Writ*

(*a*) C. S. U. C. cap. 22, s. 158.

of ejectment, or if part only of the land has been recovered, describe such part as in the judgment), with the appurtenances in your Bailiwick, in an action of ejectment at the suit of the said A. B. against C. D. Therefore we command you that without delay you cause the said A. B. to have possession of the said land and premises, with the appurtenances—and we also command you that of the goods and chattels of the said C. D. in your Bailiwick, you cause to be made £ , which the said A. B., lately in our said Court, recovered against the said C. D., for the said A. B.'s costs of the said suit, whereof the said C. D. is convicted, and have that money in our said Court immediately after the execution hereof, to be rendered to the said A. B., and in what manner, &c. (*as in form No.* 29.)

43.—*Writ of fieri facias for costs only on a judgment for Plaintiff in ejectment where defendant has appeared.*

Victoria, &c. (*as in form No.* 29, *down to the word* "recovered,") recovered against him for the said A. B.'s costs in an action of ejectment brought by the said A. B. against the said C. D. in that Court whereof the said C. D. is convicted, and have that money, &c. (*as in the next preceding form to the end.*)

44.—*Writ of habere facias possessionem on a rule to deliver possession of land pursuant to an award under section* 96. (*a*)

Victoria, &c.

To the Sheriff of, &c.

We command you that without delay you cause A. B. to have possession of (*here describe the lands and tenements as in the rule for the delivery of possession*), and of which lands and tenements by a rule of our Court of Queen's Bench (*or* Common Pleas) dated the day of , 18 , made pursuant to the 96th (*b*) section of the Common Law Procedure Act, 1856, E. F. (*the party named in the rule*) was ordered to deliver possession to the said A. B., and in what manner you have executed this our said Writ, make appear to our said Court at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness, &c.

45.—*Fi. Fa. against a garnishee under the* 196*th* (*c*) *section when the debt is not disputed or garnishee does not appear.*

Victoria, &c.

To the Sheriff, &c.

We command you that of the goods and chattels of E. F. in your Bailiwick you cause to be levied £ , being the amount of (*or* part of the amount of, *if the debt be more than the judgment debt*) a debt due from the said E. F. to C. D. heretofore attached in the hands of the said E. F. by an order of the Honorable , one of the Justices of our Court of Queen's Bench (*or* Common Pleas) dated the day of , 18 , pursuant to the statute made in such case, to satisfy (*or if the debt be less than the judgment debt*) towards satisfying £ , which A. B. lately in our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D.,

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(*a*) C. S. U. C. cap. 22, s. 174. (*b*) C. S. U. C. c. 22, s. 174.
(*c*) C. S. U. C. c. 22, s. 290.

whereof the said C. D. is convicted, as appears to us of record, and tha you have that sum of £ before our said Court immediately after the execution hereof to be rendered to the said A. B. and in what manner, &c. (*concluding as in form No.* 29.)

46.—*Ca Sa in the like case.*

Victoria, &c.

To the Sheriff, &c.

We command you that you take E. F. if he be found in your Bailiwick, and him safely keep so that you may have his body before our Justices of our Court of at Toronto, immediately after the execution hereof, to satisfy A. B., £ being the amount (*or* part of the amount *if the debt be more than the judgment debt*) of a debt due from the said E. F. to C. D. heretofore attached in the hands of the said E. F. by an order of the Honorable one of the Justices of our Court of , dated the day of , 18 , pursuant to the statute in such case made to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ which the said A. B. lately in our said Court of recovered against the said C. D. whereof the said C. D. is convicted as appears to us of record, and have you there then this Writ.

Witness, &c.

47.—*Writ against garnishee to shew cause why the judgment creditor should not have execution against him for the debt disputed by him, under section* 197. (*a*)

Victoria, &c.

To E. F. of in the County of

We command you, that within eight days after the service of this Writ upon you, inclusive of the day of such service, you appear in our Court of Queen's Bench (*or* Common Pleas) to show cause why A. B. should not have execution against you for £ , being the amount (*or* part of the amount *if the debt exceeds the judgment debt*) of a debt due from you to C. D. to satisfy (*or* towards satisfying *if the debt be less than the judgment debt*) £ , which on the day of , 18 , (*date of judgment*) the said A. B. by a judgment of our Court of recovered against the said C. D. and for costs of suit in this behalf, and take notice that in default of your not so doing the said A. B. may proceed to execution against you.

Witness, &c.

The following endorsement must be made on the Writ—This Writ was issued by R. A. (*Plaintiff's Attorney's name in full*) of (*place of abode in full, also if sued out as agent for another Attorney here say* "as agent for A. A. *of* ,") Attorney for the said A. B., *or if sued out by the Plaintiff in person,* "This Writ was issued in person by the Plaintiff within named who resides at ," (*mentioning the City, Town Incorporated or other Village, or the Township within which such Plaintiff resides.*) The Plaintiff claims £ (*the amount of the debt claimed from the garnishee*) and £ for costs, and if the amount thereof be paid to the Plaintiff or his Attorney within eight days from the service hereof, further proceedings will be stayed. (*Within three days after the service fill up the following endorsement,*) This Writ was served by me X. Y. on E. F. on the day of , 18 .

(*a*) C. S. U. C. cap. 22, s. 291.

48.—*Declaration thereon.*

In the Queen's Bench (*or* Common Pleas.)

The day of , A. D. 18 .

(*Venue*) A. B. by his Attorney (*or* in person) sues E. F. by a Writ issued out of this Court in these words—Victoria, &c. (*copy the Writ*) and the said E. F. has appeared to the said Writ, and the said A. B. by his Attorney aforesaid says that the said debt due from the said E. F. to the said C. D. is for, &c. (*here state the debt as in a declaration in ordinary cases*), and the said A. B. prays that execution may be adjudged to him accordingly for the said £ , and for costs in this behalf.

49.—*Plea thereto.*

In the Queen's Bench (*or* Common Pleas).

The day of , 18 .

E. F. ats. A. B. } The said E. F. by his Attorney, says that he never was indebted to the said C. D. as alleged (*or plead such other defence or several defences as in other cases.*)

50.—*Issue thereon.*

(*Copy the Declaration and Pleadings, and conclude thus*), Therefore let a Jury come, &c.

51.—*Postea thereon.*

The same as in ordinary cases, omitting the assessment of damages.

52.—*Judgment for Plaintiff therein.*

The same as in ordinary cases to the statement of the judgment, which may be thus, Therefore it is considered that the said A. B. have execution against the said E. F. for the said £ , the amount (*or* part of the amount) of the said debt due from him to the said C. D., to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt,*) the said £ , which the said A. B. on the said day of , 18 , (*date of judgment against judgment debtor*) by the judgment of this Court recovered against the said C. D., and it is further considered that the said A. B. do recover against the said E. F. £ , for his costs of suit in this behalf.

53.—*Fi. Fa. therein.*

Victoria, &c., (*as in No.* 29, *down to*) that of the goods and chattels of E. F. in your Bailiwick, you cause to be made £ , the amount (*or* part of the amount, *if the debt be more than the judgment debt,*) of a debt due from the said E. F. to C. D., to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ , which A. B. on the day of , 18 , (*date of judgment against judgment debtor,*) by the judgment of our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D., and whereupon it has been adjudged by our said Court that the said A. B. should have execution against the said E. F. for the said £ , and also £ , which in our same Court were adjudged to the said A. B. for his costs of suit which he hath been put to on occasion of our said Writ, sued

out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted, and have the said moneys before our said Court at Toronto immediately after the execution hereof, to be rendered to the said A. B., and in what manner, &c.

54.—*Ca. Sa. therein.*

Victoria, &c. (*beginning as in the preceding form*) that you take E. F., if he be found in your Bailiwick, and him safely keep, so that you may have his body before our Court of Queen's Bench (*or* Common Pleas) at Toronto, immediately after the execution hereof, to satisfy A. B., £ , the amount (*or* part of the amount, *if the debt be more than the judgment debt*) of a debt due from the said E. F. to C. D., and for the levying of which it has been adjudged by our Court of Queen's Bench (*or* Common Pleas) that the said A. B. should have his execution against the said E. F., to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ , which the said A. B. on , (*date of the judgment against the judgment debtor*) by the judgment of the said Court, recovered against the said C. D., and further to satisfy the said A. B., £ , which in our same Court were adjudged to the said A. B. for his costs of suit which he hath been put to on occasion of our Writ against the said E. F., at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted, and have you there then this Writ.

Witness, &c.

55.—*Judgment for Plaintiff after verdict that a Mandamus do issue under section* 277. (*a*)

(*The same as in the ordinary form of an entry of judgment to the end of the postea and then proceed,*) Therefore it is considered that a Writ of Mandamus do issue, commanding the defendant (*state the duty to be performed or the thing to be done as claimed by the declaration*), and it is also considered that the plaintiff do recover of the defendant the said moneys by the Court aforesaid, in form aforesaid, above assessed, and also £ , for his costs aforesaid in that behalf.

(*In the margin of the judgment opposite the words,* Therefore it is considered, &c., *write* judgment signed the day of , 18 , *inserting the day of signing final judgment.*)

56.—*Writ of Inquiry to ascertain the expense incurred by the doing of an act for the doing of which a Writ of Mandamus was issued under section* 280. (*b*)

Victoria, &c.

To the Sheriff of the County (*or* United Counties) of , greeting.

Whereas upon an application by A. B., the plaintiff, in an action against C. D., in our Court of Queen's Bench (*or* Common Pleas) at Toronto, our said Court did, on the day of , 18 , (*date of order*) direct that (*state the terms of the order directing the act to be done at the defendant's expense*), and the said A. B. (*or* and E. F. *if another person than the plaintiff has been appointed by the Court to do the act*), has done the said act so directed to be done, and in order to enable our said Court to ascertain the

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(*a*) C. S. U. C. cap. 23, s. 3. (*b*) C. S. U. C. cap. 23, s. 6.

amount of the expense of doing the same, we command you that by the oath of twelve good and lawful men of your Bailiwick, you do proceed diligently to enquire what is the amount of the expenses incurred by the said A. B. (*or by E. F., as the case may be*) in the doing of the said act, and that you send to our Justices of our said Court at Toronto, on the day of , now next ensuing, the inquisition, which you shall thereupon take under your seal, and the seals of those by whose oath you shall take the inquisition, together with this Writ.

Witness, &c.

57.—*Writ of Execution in detinue under section* 201, (*a*) *for the return of the chattel detained, and for a distringas until returned, separate from a Writ of execution for damages or costs.*

Victoria, &c.

To the Sheriff, &c.

We command you that without delay you cause the following chattels, that is to say (*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*) to be returned to A. B., which the said A. B., lately in our Court of at Toronto, recovered against C. D. in an action for the detention of the same, whereof the said C. D. is convicted.* And we further command you that if the said chattels cannot be found in your Bailiwick you distrain the said C. D. by all his lands and chattels in your Bailiwick, so that neither the said C. D. nor any one for him do lay hands on the same until the said C. D. render unto the said A. B. the said chattels and in what manner, &c. (*concluding as in Form No.* 29.)

58.—*The like, but instead of a distress until the chattel is returned, commanding the Sheriff to levy on defendant's goods the assessed value of it.*

(*Follow the preceding form until the* *, *and then proceed*) and we further command you that if the said chattels cannot be found in your Bailiwick—of the goods and chattels of the said C. D. in your Bailiwick, you cause to be made £ (*the assessed value of the chattels*) whereof the said C. D. is also convicted, and that you have that sum of £ , &c. (*concluding as in No.* 29.)

59—*Indorsement on Writ of Summons of claim of a Writ of Injunction under section* 283. (*b*)

The plaintiff intends to claim a writ of injunction to restrain the defendant from (*here state concisely for what the Writ of Injunction is required—as for example thus*) "felling or cutting down any timber or trees standing, growing, or being in or upon the land and premises at in the County of , and from committing any further or other waste or spoil in or upon the said land and premises." And take notice that in default of the defendant's entering an appearance as within commanded, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such Writ.

(*a*) C. S. U. C. cap. 22, s. 300. (*b*) C. S. U. C. cap. 23, s. 9.

60. *Form of Debt Attachment Book under Section* 199 (*a*) *of the Common Law Procedure Act*, 1856.

Name of Plaintiff.	Name of Judgment Debtor.	Amount of Judgment.	Date of Judgment.	Name of Garnishee.	Date of Order for Attachment.	Amount ordered to be paid by Garnishee.	Date of such order.	Date of Order for Execution against Garnishee.	Date of Order that Judgment Creditor may proceed against Garnishee.

(*a*) C. S. U. C. cap. 22, s. 203.

(a) C. S. U. C. cap. 22, s. .

SCHEDULE B.

TABLE OF COSTS.

General Allowance for Plaintiffs and Defendants, as well between Attorney and Client as between Party and Party.

TO THE ATTORNEY.

WRITS.

	£	s.	d.
Summons, including attendance	0	10	0
Concurrent Summons	0	7	6
Renewed Summons	0	7	6
Capias	0	10	0
Concurrent Capias	0	7	6
Renewed Capias	0	7	6
Capias ad satisfaciendum	0	10	0
Renewed Capias ad satisfaciendum	0	7	6
Capias ad satisfaciendum for the residue	0	10	0
Renewed do. do.	0	7	6
Fieri Facias	0	10	0
Renewed Fieri Facias	0	7	6
Concurrent Fieri Facias	0	7	6
Fieri Facias for the residue	0	10	0
Renewed do. do.	0	7	6
Habere Facias possessionem and Fieri Facias or Capias ad satisfaciendum for costs in one writ	0	15	0
Habere Facias possessionem alone	0	10	0
Special endorsement of demand on Writ of Summons	0	5	0
Writ of Revivor	0	10	0
Ejectment, (summons in)	0	10	0
Writ of Trial, drawing, if under seven folios	0	6	3
if above, 6d. per folio for all above.			
Writ of Enquiry the same.			
Subpœna ad testificandum	0	5	0
Subpœna duces tecum	0	6	3
and if above four folios, additional per folio, 6d.			
Attachment against Goods of absconding debtor	0	10	0
Attachment against Garnishee	0	10	0
Habeas Corpus obtained by Plaintiff, including allowance thereof	0	10	0
Procedendo	0	10	0
Venditioni exponas	0	10	0
Supersedeas	0	6	3
Mandamus	0	10	0
Injunction	0	10	0

NOTE.—The above allowances include all charges for attendance for the writ, and delivering it to the officer.

COPY AND SERVICE OF WRITS OF SUMMONS AND OTHER PROCESS.

	£	s.	d.
For each copy, including copies of all notices required to be endorsed.	0	5	0
Service of each copy of Writ, if not done by the Sheriff, or an officer employed by him, when taxable to the Attorney	0	2	6
Mileage per mile, for the distance actually and necessarily travelled, when taxable to the Attorney	0	0	6
Copy and service of Writ of Subpœna ad Testificandum, exclusive of mileage (*a*)	0	2	6

INSTRUCTIONS TO THE ATTORNEY.

Taking Instructions to sue or defend	0	10	0
Instructions for Pleading:			
For Special Affidavits, when allowed by the Master, and instructing Counsel on special matters	0	5	0
Instructions to Counsel in common matters	0	2	6

NOTE—No Fee allowed for instructions to Counsel, where such Counsel is attorney in the suit, or his partner.

Instructions for Brief	0	5	0
Do. if difficult and many witnesses or documents, the taxing officer, on sight of the Brief, may allow	0	10	0
Do. for every suggestion	0	5	0
Do. for issue of fact by consent	0	7	6
Do. for suggestion to revive, or for writ of revivor, when no rule necessary	0	5	0
Do. for rule for writ of revivor when necessary	0	5	0
Do. to defend for Executor, after suggestion of death of original defendant	0	5	0
Do. for agreement of damages	0	5	0
Do. for confession of action in ejectment, as to the whole or in part	0	5	0
Do. to strike or reduce a Special Jury	0	10	0

DRAWING PLEADINGS, &c.

Declaration, inclusive of instructions and Engrossing, and of attendance to file or serve, but not inclusive of copies to serve	0	12	6
If above ten folios, for every folio above ten, in addition	0	1	0
One or more Pleas, if three folios or under, exclusive of instructions, but inclusive of engrossing, and copies to serve	0	5	0
If above three folios, for every folio in addition, exclusive of copy to serve	0	1	0
Joinder of Issue, inclusive of copies and engrossing	0	2	6
Demurrer, inclusive of engrossing, and copy to serve	0	5	0
Joinder of Demurrer, inclusive of copies and engrossing	0	2	6
Marginal statement of matters of Law for argument, exclusive of copies for the Judges	0	5	0
Replications, new Assignments, and other Pleadings, the same as the foregoing charges for Pleas.			
Postea, including engrossing	0	5	0
Judgment, whether by default or final	0	2	6
Authority to Receive Moneys out of Court	0	2	6
Suggestions, Pleas to Suggestions, and subsequent Pleadings of three folios or under, inclusive of engrossment and copies	0	4	0

(*a*) See R. G. No. 1 of M. T. 29 Vic. page 765.

	£	s.	d.
If above three folios, for every folio, drawing and engrossing	0	1	0
Issue for the trial of facts by agreement, for every folio	0	1	0
Special Case, per folio	0	1	0
Drawing interrogatories or answers for any purpose required by Law, including engrossing, per folio	0	1	0
Agreement of Damages, and copy, if five folios or under	0	5	0
Above five folios, for every folio, drawing and engrossing	0	1	0
Copy, per folio	0	0	6
Special particulars of demand, or set-off, including copy, per folio	0	1	0
Short ditto and copy	0	3	6
Bill of Costs and copy for taxation	0	5	0
Copy for the opposite party	0	2	6
Taking Cognovit, and entering Judgment thereon, when there has been no previous proceeding, and the true debt does not exceed £50	2	0	0
For the same services, when the true debt exceeds £50	3	0	0
Drawing and Engrossing Cognovit, and attending execution, where there have been previous proceedings	0	5	0
Replication, accepting money out of Court, in full of demand, inclusive of instructions	0	3	6

In all the above items Engrossing included, unless separately allowed for.

COPIES.

Declarations, when not exceeding ten folios	0	6	3
Do. above ten folios, per folio	0	0	6
Other Pleadings before enumerated above three folios, per folio	0	0	6
Issue (Pleadings), if fifteen folios or under	0	7	6
If above fifteen folios, for every folio	0	0	6
All proceedings, Interrogatories, Answers, and other papers, of which copies are to be delivered, per folio	0	0	6
Judgment for non-appearance on specially Endorsed Writs, or Writs of Revivor, and in Ejectment, to be taken as nine folios, including the Writ.			

NOTICE.

To declare, reply, and subsequent pleadings, copy and service	0	2	6
By defendant to bring issue to trial, copy and service	0	3	6
To Executor or Administrator of sole Defendant deceased, to appear to writ and suggestion	0	3	6
Of appearance, when appearance duly entered and notice given on the day of appearance, but not otherwise	0	2	6
Of appearance to Writ of Revivor	0	2	6
To Plead	0	2	6
Of Declaration, when necessary, copy and service	0	2	6
Of objection for mis-joinder or non-joinder of plaintiff, copy and service	0	2	6
To Sheriff to discharge a prisoner out of custody, copy and service	0	3	0
Notice in ejectment to defend for part of the premises, and service	0	5	0
If above three folios, for every folio additional	0	1	6
Notice of claimant's or defendant's title, under sections 222 (*a*) and 224, (*b*) the same fees.			
Notice of admission of right, and denial of ouster by a Joint Tenant, &c., and service	0	3	6
If above three folios, for every folio	0	1	0
Of discontinuance by claimant in ejectment, and service	0	3	6
Of confession of action of ejectment, as to the whole or in part, and service	0	5	0

(*a*) C. S. U. C. cap. 27, s. 4. (*b*) C. S. U. C. cap. 27, s. 8.

	£	s.	d.
Of trial or assessment, copy and service	0	3	6
Demand of residence of plaintiff and all other common notices, copy and service	0	2	6
To admit or produce, if not exceeding two folios, copy and service	0	2	6
For each folio above two	0	1	0

NOTE.—Copy and service included in the above items, when not otherwise expressed.

COPY AND SERVICE.

Of special and common rules	0	3	9
Of special rule, above three folios, per folio additional	0	1	0
Of summons or order of a Judge	0	2	6
Of order to charge a prisoner in execution	0	3	6

Mileage on services, as on a writ of summons.

EJECTMENT.

Instructions to sue and examining deeds, as in other cases.

If title contested	1	0	0

ATTENDANCES.

Attendance at Judges' Chambers, at the Crown offices, and all other common attendances in the course of a cause	0	2	6
Fee on every record, writ of trial, or enquiry	0	5	0
Fee on every rule of Court, or Judge's order	0	5	0
Attending Assizes if cause entered, where no fee is charged by the attorney as counsel	0	5	0
Attendance on Master on special matters	0	5	0
For every hour after the first	0	5	0
Taxation of costs on postea	0	5	0
Of costs of cause, otherwise than on postea	0	2	6
Of interlocutory matters	0	2	6

BRIEFS.

For drawing per folio of original and necessary matter	0	1	0
Copies of the pleadings or documents when required	0	0	6
Copy for second counsel, where fee taxed to him, per folio	0	0	6

TERM FEES.

Term fee, after declaration filed	0	5	0
Every necessary letter on the business of the cause	0	2	6

AFFIDAVITS.

Drawing Special Affidavits, per folio, including engrossing	0	1	0
Copies of Affidavits, where necessary, per folio	0	0	6
Common Affidavit of five folios or under, including copy and oath	0	5	0

DEFENDANTS.

Entering appearance	0	3	6
For each additional defendant	0	1	3

A second summons, and order for time to plead, shall be allowed in special cases where necessary.

COUNSEL FEES. (*a*)

Fee on motion of course, or on Motion for rule *nisi*, or on motion to make rule absolute	0	10	0

(*a*) There fees are printed as amended by R. G. No. 1 of H. T. 22 Vic. p. 759.

	£	s.	d.
On special motion for rule *nisi*, only one counsel fee to be taxed	1	5	0
To attend reference to Master when counsel is necessary	1	5	0
For argument on supporting or opposing rules on return of rule *nisi*, on argument of demurrer, special case or appeal	2	10	0

To be increased in the discretion of the Master at Toronto, to a sum not to exceed £6 5s., subject to appeal to the Court or a Judge, to reduce the amount allowed.

Fee with brief on assessments	1	5	0
Fee with brief at trial, in cases of tort or in ejectment, or in matters of contract, when the sum to be recovered exceeds £100	2	10	0

To be increased by the taxing officer, in his discretion, to a sum not exceeding £5, to senior counsel, and £2 10s. to junior counsel, in actions of a special and important nature, subject to an appeal to the Master (at Toronto) of the Court where the action was brought, who shall have power to tax fees to the senior counsel, to any sum not exceeding £10, and to the junior counsel, not exceeding £5, provided that more than one counsel fee shall not be allowed in any case not of a special and important nature. (a)

Fee with brief in other cases	1	5	0
Fee to counsel on argument or examination in chambers, to be allowed by the Judge at the time, when he considers the attendance of counsel necessary, not less than 10s., no more than 25s.			

FEES

To be taken and received by the Clerks of the Crown and Pleas, or their Deputies, or by the Clerk of the Process.

In addition to all fees expressly imposed by statute—			
Every Writ	0	2	6
Every concurrent, alias, pluries, or renewed writ	0	2	6
Every appearance entered, and filing memorandum thereof	0	1	0
Every appearance, each defendant after the first	0	0	6
Filing every affidavit, writ, or other proceeding	0	0	4
Amending every writ or other proceeding	0	1	3
Every ordinary rule	0	1	3
Every special rule not exceeding six folios, per folio	0	1	0
Every judgment by default	0	2	6
Every final Judgment otherwise than judgment by default	0	2	6
Taxing every bill of costs, and giving allocatur	0	3	4
Every reference, inquiry, examination, or other special matter referred to the Master, for every meeting not exceeding one hour	0	5	0
Do. do. for every additional hour or less	0	5	0
Upon payment of money into Court, for every sum under £50	0	5	0
Do. £50 and under £100	0	10	0
Do. £100 and above that sum	1	0	0
Every certificate made evidence by law, or required by the practice, including any necessary search	0	2	6
Exemplification, or office copy of proceedings, per folio	0	0	6
Every search, if not more than two terms	0	0	6
Every search exceeding two, and not more than four terms	0	1	0
Every search exceeding four terms, or a general search	0	2	6
Every affidavit, affirmation, &c., taken before them	0	1	0
Every allowance and justification of bail	0	1	3
Taking recognizance of bail	0	1	3
Filing affidavit and enrolling articles previous to the admission of an attorney	0	2	6
Every admission of an attorney	0	10	0

(a) See *Ham et ux.* v. *Lasher et al*, 24 U. C. Q. B. 357.

	£	s.	d.
Entering satisfaction on record, and filing satisfaction piece, including any necessary search	0	2	6
Every commission for the examination of witnesses	0	5	0
Every commission for taking bail and affidavit (to be on parchment).	0	10	0
Entering exoneretur on bail piece	0	1	3
Making up records of conviction, or of acquittal, per folio	0	0	6
Entering and docketing judgment	0	2	6
For making the entry required in the debt attachment book	0	2	6

CLERK OF ASSIZE AND MARSHALL.

The Fees provided by 14 & 15 Vic. cap. 118, to be accounted for to the Fee Fund.

CLERK IN CHAMBERS.

Every Summons	0	1	3
Every Order	0	2	6
For receiving and taking charge of Nisi Prius records and exhibits in each cause	0	2	6
Filing each paper	0	0	4
Every Fiat for a Rule of Court	0	1	3
Taking every affidavit or affirmation	0	1	0
Office copies of papers, per folio	0	0	6

For searching, the same allowance as to the Clerk of the Crown and Pleas.

SHERIFF—(CIVIL SIDE). (*a*)

Every warrant to execute any process, mesne or final, when given to a bailiff	0	2	6
Arrest, when amount endorsed does not exceed £50	0	5	0
Do. do. do. over £50 and under £100	0	10	0
Do. do. do. £100 and over	1	0	0
Mileage, going to arrest, when arrest made, per mile	0	0	6
Do. conveying party arrested from place of arrest to the Gaol, per mile	0	0	6
Bail bond, or bond for the limits	0	5	0
Assignment of the same	0	5	0
For an undertaking to give a bail bond	0	5	0
Service of process, not bailable, scire facias, or writ of revivor (including affidavit of service), each defendant	0	5	0
For each summoner on writ of scire facias, to be paid by the sheriff.	0	2	6
Serving subpœna, declaration notices, or other papers (besides mileage for each party served)	0	2	6
Receiving, filing, entering and endorsing all writs, declarations, rules, notices, or other papers to be served, each	0	1	3
Return of all process and writs (except subpœnas)	0	2	6
Every search, not being by a party to a cause, or his attorney	0	1	0
Certificate of result of search, when required	0	2	6
Fee on striking special jury	1	0	0
Serving each special juror	0	1	3
Summoning special jury, each mile's travel from the Court House	0	0	6
Returning panel of special jurors	0	5	0
Every jury sworn	0	5	0

Poundage on executions, and on attachments in the nature of executions, where the sum made shall not exceed £100, five per cent.

Where it exceeds £100, and is less than £1,000, five per cent. for the first £100, and 2½ per cent for residue.

Over £1,000, 1½ per cent. on whatever exceeds £1,000, in addition to the poundage allowed up to £1,000, in lieu of all fees and charges

(*a*) See also R. G. Nos. 1 & 2 of H. T. 25 Vic. p. 761.

	£	s.	d.
for services and disbursements, except mileage, in going to seize, and disbursements for advertising, and except disbursements necessarily incurred in the care and removal of property, in cases exceeding £1,000, to be allowed by the Master in his discretion.			
Schedule of goods taken in execution, including copy to defendant, if not exceeding five folios	0	5	0

SCHEDULE (B).

Each folio above five	0	0	6
The sum actually disbursed for advertisements required by law to be inserted in the official *Gazette* or other newspaper.			
Drawing up advertisements, when required by law to be published in the official *Gazette* or other newspaper, and transmitting the same in each suit	0	5	0
Every notice of sale of goods in each suit	0	2	6
Every notice of postponement of sale on execution, in each suit	0	1	3
Service of writ of possession or restitution, besides mileage	1	0	0
Bringing up prisoner on attachment or habeas corpus, besides travel at 1s. per mile	0	5	0
Actual mileage from the Court House to the place where service of any process paper or proceeding is made, per mile	0	0	6
Seizing estate and effects, on attachment against an absconding debtor	0	10	0
Every inventory to be charged as on executions.			
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Master, or by order of the Court or a Judge.			
Presiding on execution of writ of enquiry, under sec. 280 (*a*) of the Common Law Procedure Act, 1856	1	0	0
Summoning jury	0	5	0
Bailiff's fee, summoning jury, mileage per mile	0	0	6
Hire of room, if actually paid, not to exceed	0	10	0
Mileage from Court House to place where writ executed, per mile	0	0	6
Bond to secure goods taken under an attachment, under sec. 50 (*b*) of the Common Law Procedure Act, 1856, if prepared by the sheriff	0	5	0

IN REPLEVIN.

Precept to the bailiff	0	2	6
Notice for service on defendant	0	2	6
Delivering goods to the party obtaining the writ	0	10	0
For writ, &c., de retorno habendo	0	5	0
Replevin bond	0	5	0

CRIER.

Calling and swearing jury	0	2	6
Calling plaintiff on non-suit	0	1	0
Proclamation and calling parties on recognizance, each person	0	1	0
Swearing each witness, or constable	0	0	6

JURORS.

Where not specially provided for by Statute.

Special jurors, each day's actual attendance, to be paid to those only who are sworn	0	5	0
Common jurors, when not paid by the county, every cause in the inferior jurisdiction, each juror	0	0	7½
In every other case, each juror	0	1	3

(*a*) C. S. U. C. cap. 23, s. 6. (*b*) C. S. U. C. cap. 25, s. 15.

ALLOWANCE TO WITNESSES.

	£	s.	d
To witnesses residing within three miles of the Court House, per diem	0	3	9
To witnesses residing over three miles from the Court House.....	0	5	0
Barristers and attorneys, physicians and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or to give professional opinions, per diem.....	1	0	0
Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem.....	1	0	0

If the witness attend in one cause only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over ten miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.

COMMISSION.

For taking every affidavit	0	1	0
Taking every recognizance of bail	0	2	6

REGULÆ GENERALES.

HILARY TERM, 22ND VICTORIA.

19th February, 1859.

It is ordered that so much of the rule of this Court and of the table of fees as relates to the taxing of fees to counsel be rescinded, upon, from, and after the first day of Easter Term next, and that the following be substituted:

COUNSEL FEES.

	£	s.	d.
Fee on motion of course, or on motion for rule *nisi*, or on motion to make rule absolute	0	10	0
On special motion for rule *nisi*, only one counsel fee to be taxed	1	5	0
To attend reference to Master when counsel is necessary	1	5	0
For argument on supporting or opposing rules on return of rule *nisi*, on argument of demurrer, special case or appeal	2	10	0

To be increased in the discretion of the Master at Toronto, to a sum not to exceed £6 5s., subject to appeal to the Court or a Judge, to reduce the amount allowed.

Fee with brief on assessments	1	5	0
Fee with brief at trial, in cases of tort or in ejectment, or in matters of contract, when the sum to be recovered exceeds £100	2	10	0

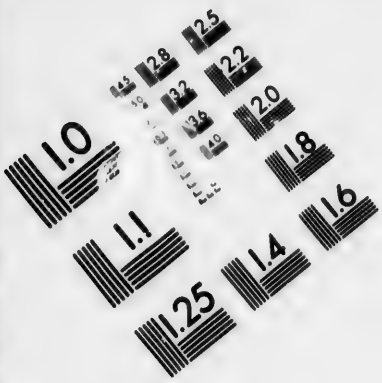
To be increased by the taxing officer, in his discretion, to a sum not exceeding £5, to senior counsel, and £2 10s. to junior counsel, in actions of a special and important nature, subject to an appeal to the Master (at Toronto) of the Court where the action was brought, who shall have power to tax fees to the senior counsel, to any sum not exceeding £10, and to the junior counsel, not exceeding £5, provided that more than one counsel fee shall not be allowed in any case not of a special and important nature. (*a*)

Fee with brief in other cases	1	5	0
Fee to counsel on argument or examination in chambers, to be allowed by the judge at the time, when he considers the attendance of counsel necessary, not less than 10s., nor more than 25s.			

It is ordered, that from and after the last day of this present Term the Clerk of the Process shall, on the opening of the respective Crown offices each morning, or as soon thereafter as may be, deliver to the Clerks of the Crown of the respective Courts in which the process has has been issued all processes on which summonses were issued, and all orders and affidavits on which writs of *capias* were issued by him on

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(*a*) See *Ham et ux.* v. *Lasher et al*, 24 U. C. Q. B. 357.


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the preceding day, that the same may be filed with the papers in the respective suits to which such processes, affidavits and orders belong.

It is ordered, that the Clerk of the Process shall deliver to each of the Clerks of the Crown of the respective Courts on the first day of January, the first day of April, the first day of July, and the first day of October, if not a Sunday or legal holiday, and if so then on the first day thereafter not being a Sunday or legal holiday, in each and every year, quarterly returns of all writs issued by him during the preceding quarter to the respective Crown offices, naming each description of writ, and the dates on which the same were issued, to each of the Clerks of the Crown requiring the same, the first return thereof to be made on the first day of April next ensuing.

TRINITY TERM, 24TH VICTORIA.

27th August, 1860.

1. It is ordered that from and after the first day of this present Trinity Term, 24th Victoria, Rule No. 155 of this Court, of Trinity Term, 1856, be rescinded, and that the following be substituted therefor:

No. 155.—In any action of the proper competence of the County or Division Courts, respectively, in which final Judgment shall have been obtained by a Plaintiff without Trial, or in which a Plaintiff shall obtain Execution on proceedings in the nature of a final Judgment, no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this Rule shall not extend to costs on interlocutory proceedings.

2. It is also ordered that Rule No. 146 of Trinity Term, 20th Victoria, be rescinded, and the following substituted therefor:

The Offices of the Clerk of the Crown and Pleas shall be kept open as follows, that is to say:—During Term, from ten in the morning to four in the afternoon, and (except between the first day of July and the twenty-first day of August) at other times, from ten in the morning until three in the afternoon,—Sundays, Christmas Day, Good Friday, Easter Monday, New Year Day, and the Birthday of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, excepted; and between the first day of July and the twenty-first day of August, both days inclusive, the said Offices shall be open from half-past nine in the forenoon, until twelve o'clock noon.

HILARY TERM, 25TH VICTORIA.

14th February, 1862.

It is ordered, that the several Sheriffs in Upper Canada shall be allowed, in addition to the Fees and Disbursements heretofore authorized, for services rendered by them, in the County Courts, to charge and receive the Fees and Disbursements following:

For return of Writ of Execution against Lands or Goods, where nothing has been made under the Writ ..... 2s. 6d.

For removing or retaining property taken under any Statute of this Province relating to Replevin, reasonable and necessary disbursements and allowances, to be approved by the Clerk, or by order of the Judge.

HILARY TERM, 25TH VICTORIA.

15th February, 1862.

It is ordered, that hereafter the several Sheriffs in Upper Canada shall be permitted to charge reasonable and necessary disbursements and allowances, to be approved by the Master, or by order of the Court or a Judge, for removing or retaining property taken under any Statute in this Province relating to Replevin.

It is ordered, that the Form of Writs of Assignment of Dower to be used under the Statute 24th Victoria, cap. 40, shall be as follows:

The Writ of Assignment of Dower required to be issued after a Judgment, in an Action of Dower, has been entered in favor of the Demandant, shall be in the form hitherto in use in Upper Canada.

And the Writ of Assignment of Dower, required to be issued under the second clause of the said Statute, when the right of Dower is acquiesced in by the owner of the Estate, may be as follows:

Upper Canada. } Victoria, by the Grace of God, &c.
County of }

To the Sheriff of the County of , Greeting:

Whereas, A. B., widow, who was the wife of C. D., deceased, demands against E. F., the third part of (here describe the Estate in which Dower is claimed, as in other Writs of Assignment of Dower), as the Dower of the said A. B. of the endowment of the said C. D., heretofore her husband; and whereas it has been made to appear to us in our Court of Queen's Bench, (or Common Pleas, as the case may be,) in Upper Canada, that the said E. F. is the owner of the said Real Estate out of which such Dower is claimed, and that he acquiesces in the said claim, and is willing to assign to the said A. B. her proper

Dower, but that the said A. B. and E. F. are not agreed as to the admeasurement thereof: We therefore command you, that without delay you do deliver to the said A. B. seizin of her third part of the said with the appurtenances, to hold to her in severalty by metes and bounds; and that you do proceed in the execution of this our Writ, according to the provisions of the statute in that behalf, passed by the Legislature of our Province of Canada, in the twenty-fourth year of our Reign.

Witness, &c.

(When the demandant has married again, since the death of her late husband, under whom she claims Dower, her name and description must be made such as to suit the circumstances.)

TRINITY TERM, 26TH VICTORIA.

It is ordered, that in appeals from the County Courts, in all cases when the Bond required by the sixty-seventh and sixty-eighth sections of the County Courts Act is executed, perfected and produced to the Judge of the County Court, whose decision is appealed from, as required by the said Statute, on or before the first day of the Term of the Court appealed to, next after the date of such Bond, the case appealed shall be set down to be heard on the first or second paper day of such Term; (*a*) and that if the case be not so set down, the appeal shall be considered and treated as abandoned, and the party in whose favor the decision of the Court below has been pronounced shall be at liberty to proceed in the cause as if no proceeding to appeal the same had been taken.

MICHAELMAS TERM, 27TH VICTORIA.

28th November, 1863.

PLEADING SEVERAL MATTERS, AND DEMURRING.

1. In all cases in which a Judge's order to plead and demur, or to plead several matters, is rendered necessary according to the Consolidated Statutes of Upper Canada, chapter 22, sections 109 and 110, the original order, or a copy thereof, shall either be attached to the *Nisi Prius* Record or Demurrer Book, or shall be copied on the margin thereof; and in case of non-compliance with this rule, the Clerks or Deputy Clerks of the Crown shall not pass the record, nor shall the demurrer be argued.

(*a*) See R. G. No. 2 of H. T. 30 Vic. p. 765.

TRINITY TERM, 29TH VICTORIA.

9th September, 1865.

The Rules of Court, under the head of "New Trial List," numbers one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, passed in Michaelmas Term, 27th Victoria, shall be, from and after the first day of Michaelmas Term next, annulled, and the following Rules shall come into force and take effect upon and after the first day of Michaelmas Term next:

NEW TRIAL LIST.

1. The party who obtains any Rule *Nisi* for a new trial, or for entering a nonsuit, or a verdict, or for increasing or reducing a verdict, on leave reserved, may, on or after the fourth day, inclusive, after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may, (if the same has not been already filed by the party who obtained the same,) on or after the fifth day after the granting of the rule, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk, after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy under the first or second rules, enter a memorandum thereof in a book to be kept for that purpose, in the order in which the same shall be delivered to him, such memorandum to be according to the form following:—

_____ TERM (YEAR).

Plaintiff's Name.	Defendant's Name.	Description of Rule.	When filed with the Clerk.	How disposed of.

5. On the *first Saturday*, the *second Tuesday*, and the *second Friday* of every Term, the Court of Queen's Bench, after going through the Bar to hear motions for rules *nisi*, or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business; and on the *first Friday*, *second Monday*, and *second Wedesday* of every Term, the Court of Common Pleas will, after going through the bar to hear motions for rules *nisi*, or motions of course, hear the rules so entered, according to the order in which they stand, in preference to any other business. The causes to be heard each day to be those on the list as it stands at the opening of the Court.

6. Each Court, in its discretion, will hear any rule so entered, when both parties are present, and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attends and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to show cause does not appear when the rule is called on in its proper order, the Court will hear the other side, *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business the Courts may, in their discretion, hear rules so entered on any other days during Term besides those mentioned in the fifth rule, the parties to the rule being present and desirous to proceed.

11. Each Court will, on sufficient ground shown, upon affidavit, enlarge a rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly and place the enlarged rule at the foot of the list.

12. All rules entered by the Clerk as aforesaid, which remain unheard at the end of any Term, shall be enlarged as of course, on filing a motion paper to that effect, to the following Term, and shall be forthwith re-entered in the Clerk's book, in the order in which they then stand, for hearing in the next ensuing term.

13. The Court may, nevertheless, in any case, if it shall see fit so to do, make any special rule or order, or give any special direction upon or with respect to any such rule, or the entering, taking out, or service

thereof, or with respect to any supposed lapse or abandonment thereof, or otherwise, as it might have done before the passing of these or the rescinded rules.

MICHAELMAS TERM, 29TH VICTORIA.

2nd December, 1865.

It is ordered, that the Table of Costs established by the Rule of this Court, of "Trinity" Term, 20th Victoria, be amended in that part of it relating to Attorneys, and headed "Copy and Service of Writs of Summons and other Process," by adding as follows:—

Copy and Service of Writ of Subpœna ad Testificandum, exclusive of mileage..... 50 cents.

It is ordered, that in all cases where leave is given to raise an Issue or Issues of Law, together with an Issue or Issues of Fact, to any Declaration or subsequent Pleading, the Issue or Issues of Law shall be determined before the Trial of the Issue or Issues of Fact, unless otherwise expressly ordered by the Court or Judge in the Rule or order permitting such Issue or Issues to be raised.

HILARY TERM, 30TH VICTORIA.

12th February, 1867.

It is ordered, that the following Rules shall come and be in force in the Courts of Queen's Bench and Common Pleas, from and after the last day of this present Hilary Term:

1. In "Easter" and "Michaelmas" Terms, the first Friday, the second Monday, the second Wednesday, and the third Monday, will be "Paper Days" in the Court of Queen's Bench; and the first Saturday, the second Tuesday, the second Thursday, and the third Tuesday, in the Court of Common Pleas.

2. County Court appeals (*a*) must be set down for argument for the first or second Paper Days of each Term, such day being the first Paper Day next after the date of the Appeal Bond, unless leave be granted by the Court, upon special affidavit, to set it down for a subsequent Paper Day: and the Court will hear County Court appeals on the first and second Paper Days of each Term in preference to the other cases set down upon the Paper.

(*a*) See R. G. of T. T. 26 Vic. p. 762.

3. On the last Tuesday and Friday in "Easter" and "Michaelmas" Terms, the Court of Queen's Bench; and on the last Monday and Wednesday, in the said Terms, the Court of Common Pleas, will take the New Trial Paper, and proceed therewith, in like manner as on the other days appointed by Rule of Court for that purpose. (*a*)

EASTER TERM, 31st VICTORIA.

6th June, 1868.

It is ordered that a certain Rule of the Court of Queen's Bench of Upper Canada, now Ontario, made in Michaelmas Term, 9 Victoria, on Saturday, the fifteenth day of November, A. D. 1845, be amended by striking out so much of the tariff of fees annexed thereto as applies to Sheriffs and by substituting therefor the tariff of fees hereto annexed. (*b*)

TARIFF OF FEES—CRIMINAL JUSTICE.

Notice of appointment to the associate Justices of Oyer and Terminer, each	$0 50
Attending the Assizes, per diem	5 00
" Quarter Sessions, per diem	4 00
Summoning each Grand Jury for the Assizes or Quarter Sessions	12 00
Summoning each Petit Jury for the Assizes or Quarter Sessions	24 00
For every Prisoner discharged from Gaol, having been committed by warrant for trial at the Assizes, Quarter Sessions, Mayor's or Recorder's Courts	1 00
Bringing up each Prisoner for arraignment, trial and sentence, in all for each Prisoner, whether convicted or acquitted	2 00
Drawing Calendar of Prisoners for trial at the Assizes, including copies	5 00
Advertising the holding the Assizes	4 00
" " Quarter Sessions	2 00
Every Annual or General Return required by law or by the Government respecting the Gaol or the Prisoners therein	5 00
Every other return made to the Government	4 00
Every return to the Sessions required by Statute or by Order of the Court	2 00
Drawing Calendar of Prisoners for trial at the Quarter Sessions or Recorder's Court, including copies	3 00
Returning Precepts to the Assizes or Sessions	4 00
Conveying Prisoners to the Penitentiary or Reformatory, or to another County (exclusive of disbursements), for each day necessarily employed	6 00
Arrest of each individual upon a warrant to be paid out of the public funds or by the party, (*as the case may be*)	2 00
Serving subpœna upon each person, to be paid out of the public funds or by the party, (*as the case may be*)	0 50

(*a*) The first Wednesday in Hilary Term in the Queen's Bench, and the first Thursday in Hilary Term in the Common Pleas, are New Trial Paper Days. See R. G. of M. T. 33 Vic. p. 677.

(*b*) This tariff has been confirmed by Stat. Ont. 32 Vic. cap. 11, s. 3.

Travelling in going to execute warrant or serve subpœna, 10 cents per mile, and the same charge per mile actually travelled in returning with a prisoner; where the service has not been effected, the Justices in Sessions to be satisfied that due diligence has been used; to be paid out of the public funds or by the party, (*as the case may be*).	
Conveying prisoners on attachment, Judge's order, or *Habeas Corpus*, to another County, exclusive of disbursements, when no charge allowed by law, for each day necessarily employed, to be paid out of the public funds or by the party, (*as the case may be*)	6 00
Making return upon attachment on writ of *Habeas Corpus*. To be paid out of the public funds or by the party, (*as the case may be*)	2 00
Levying fines or issues on recognizances estreated, or other process, £5 per £100 on the first £100 of the sum levied, exclusive of mileage at 10 cents per mile, to be levied under Consolidated Statutes Upper Canada, chapter 119, sec. 3; and on all sums above £100 the same allowance as on executions in civil proceedings.	
Carrying into execution the sentence of the Court in capital cases, all such sums as shall be unavoidably disbursed, to be taxed by the Court or Judge who passed the sentence.	
Attending and superintending the execution in such cases.....	20 00
Summoning each constable to attend the Assizes or Quarter Sessions, exclusive of mileage at 10 cents a mile	0 50
Keeping a record of Jurors who have served each Court.....	2 00
All disbursements actually and necessarily made in guarding prisoners, or in their conveyance to the Penitentiary, to any other district, or elsewhere, or for other purposes in the discharge of the duties of his office (when not provided for by law, nor hereinbefore specifically), to be rendered in account in detail, with proper vouchers, to the satisfaction of the Justices in Sessions, and to be by them allowed.	

MICHAELMAS TERM, 33RD VICTORIA.

2nd December, 1869.

It is ordered, that the first Wednesday in Hilary Term, in the Court of Queen's Bench, and the first Thursday in the said Term, in the Court of Common Pleas, shall be New Trial Paper Days. (*a*)

HILARY TERM, 33RD VICTORIA.

9th February, 1870.

Whereas by the Statute made and passed in the Session of the Legislature of Ontario, held in the thirty-third year of the reign of Her Majesty, intituled "An Act respecting proceedings in Judge's Chambers at Common Law."

It is enacted that it shall be lawful for a majority of all the Judges of the said Courts, which majority shall include the two Chief-Justices, or one of the Chief-Justices, and the senior of the Puisne Judges of the Superior Courts of Common Law, from time to time, to make and publish general rules for certain purposes therein mentioned.

(*a*) See R. G. No. 3 of H. T. 30 Vic. p. 676.

It is therefore ordered that the Clerk of the Crown and Pleas of the Court of Queen's Bench be and is hereby empowered and required to do all such things, and to transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any Statute or custom, or by the rules and practice of the said Courts or any of them respectively, were, at the time of the passing of the said Act, and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, except in respect of matters relating to the liberty of the subject and to Prohibitions and Injunctions, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say:—

All matters relating to Criminal proceedings.

The removal of causes from Inferior Courts other than the removal of Judgments for the purpose of having execution.

The referring of causes under the Common Law Procedure Act.

Reviewing taxation of costs.

Staying proceedings after verdict.

Appeals in Insolvency.

In all such excepted matters, not being matters relating to the liberty of the subject, the said Clerk may issue a Summons returnable before a Judge.

That in case any matter shall appear to the said Clerk of the Crown to be proper for the decision of a Judge, the Clerk may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Clerk with such directions as he may think fit.

That appeals from the Clerk's order or decision shall be made by Summons, such Summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a Judge or the said Clerk.

The appeal to be no stay unless so ordered by a Judge or the said Clerk.

The costs of such appeal shall be in the discretion of the Judge.

That the scale of costs for all matters done by and before the Clerk shall be the same as are fixed for business done by and before the Judges.

That the same fees shall be taken in respect of business transacted before the said Clerk at Chambers as are now taken when the same business is transacted before a Judge.

That these rules take effect on the 21st day of February, A.D. 1870.

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